

LAWSUITS AGAINST OUR INDUSTRY

Is it the end of the cooperation and compensation structure of brokerage?

By Steve Murray, president

ARE WE UNDER ATTACK?

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ver the past few months, numerous lawsuits have been filed against the National Association of Realtors® (NAR) and some of the large national franchisers alleging that they are engaged in a massive conspiracy against housing consumers to maintain a certain commission level and sharing arrangement. Some commentators have said that they believe this is the beginning of the end of the *cooperation and compensation* structure of the North American brokerage market.

WE DON'T SEE IT THAT WAY

First, in our consumer studies with Harris Insights from 2001 forward, (and particularly our studies of 2004 and 2005) consumers were well aware that they had choices ranging from selling or buying a home themselves, or using a flat-fee firm, or a discount brokerage firm or a full-service firm. They knew to ask for discounts from the average brokerage commission.

Second, consumers reported in these studies that not only were they aware of these options, but a significant share of them seriously considered using them.

MINIMUM SERVICE STANDARDS

Some years ago, REAL Trends was retained by the Canadian Competition Bureau (picture the U.S. Federal Trade Commission and the Department of Justice Anti-Trust Division combined) to study the effects of minimum service standards in various states in America on discount, flat fee, and limited service brokerage firms. We concluded, after interviewing more than 25 firms, that although these firms had to add somewhat to their service offerings, it did not affect their businesses.

No consumer is forced to use an agent by law or regulation. If that were the case, then we could blame the regulators or politicians who put them in their jobs for forcing consumers to do so.

Sellers who list their homes with an agent do so at arm's length. First, they don't have to list with an agent. If they do, they can negotiate the commission. When they do enter into a listing agreement, they know how much the commission is.

There is no evidence that we are aware of that sellers adjust their market price net of commission. Most data we've seen indicates that the market price is, in fact, the market price. Whether a commission is 1 percent or 8 percent does not seem to have a direct impact on what the seller gets for their home.

In REAL Trends consumer studies with Harris Insights & Analytics, the usage rate of agents has gone from approximately 81 percent in 2001-2002 to 90 percent in 2018. Even millennials are using agents more than predicted, at a 92 percent usage. In an age of more technology, limited inventory, and rising home prices, consumers think using an agent is more important and useful than ever before.

WHERE IS THE CONSPIRACY?

Where is the harm to consumers? What we suspect is that there are those who are hugely frustrated that the combination of tech and Wall Street hasn't been able to blow up the residential brokerage industry as they have done to so many others. Numerous articles are calling for the demise of the agent, or the broker, or the MLS, and that

something about it isn't fair. They all say the same thing. Consumers now find their own homes online, do all the homework, etc., so why haven't commissions come down?

Two things—first, commissions have come down, and they are going to drift even lower in the years ahead. It's incredible what competition (versus) litigation can accomplish. Second, the housing transaction is infrequent, complex, and consumers know at an instinctual level that if they were to make a mistake in buying or selling a home, it could hurt them badly.

So, the usage rate of real estate agents goes up even as the commission rate comes down. Some research we've done suggests that the scarcity of inventory, together with increasing numbers of agents explains much of the decline in commission rates.

WHAT'S THE ALTERNATIVE?

Let's break up cooperation and compensation. Sellers pay their agent; buyers pay their agent. Suddenly, first-time home buyers (34 to 36 percent of all buyers) have to negotiate to pay their agent and, then, pay their agent—on top of all their other closing costs. Anybody want to opine on the impact on first-time home buyers or the homeownership rate?

Would this drive more double-sided deals as some buyers go directly to the selling agent to avoid paying any buyer's agent?

Would this cause the MLS to go away and tilt the playing field to firms like Zillow or Realtor.com? Or Upstream? Would a national MLS in the hands of two or three providers be a better situation for consumers than what is available today? Or, would change anticipated from the litigation drive the market to fragment the other way with more off-market or coming-soon listings than are available in the large public exchanges?

Keep in mind that the claimants, in this case, are not non-profit public interest law firms. They are not in this to help improve the system, but to extract money from it