

Judge lays out reasoning for NAR settlement approval

Judge Stephen R. Bough overruled all objections to the National Association of Realtors and HomeServices deals and awarded attorneys one-third of the settlement amounts as requested

by [Andrea V. Brambila](#), Inman News Today, December 03, 2024

No one gets exactly what they want from a settlement. But the deals reached with the National Association of Realtors and HomeServices to resolve antitrust claims related to commissions nationwide meet the legal requirements of being fair, adequate and reasonable.

That's according to Judge Stephen R. Bough of the U.S. District Court for the Western District of Missouri, who granted final approval to the deals last week.

In his written [Nov. 27 order](#), Bough overruled all of the objections to the deals submitted in advance of their Nov. 26 fairness hearing, kept the settlement agreements as-is, including nearly \$700 million toward a settlement fund, and awarded plaintiffs' attorneys one-third of the settlement fund (about \$233 million), plus \$16.5 million in expenses, as requested.

"The NAR and HomeServices Settlements, separately, together, and in light of the previously approved settlements, provide for a significant financial recovery to the Settlement Class in light of the strengths and weaknesses of the case and the risks and costs of continued litigation, including appeal, and the Settling Defendants' financial resources," Bough wrote in the 88-page order.

"The Settlements also include meaningful changes to the Settling Defendants' policies, including removal of offers of compensation on the MLS [multiple listing service]."

Bough's wording in the Nov. 27 order is frequently virtually identical or very similar to Bough's order a month ago [granting final approval](#) to settlements in another commission case known as Gibson. This is likely in part because the objections filed in Gibson largely mirror [those also filed against the NAR settlement](#).

Despite the [U.S. Department of Justice's statement of interest](#) filed in relation to the NAR settlement two days before the fairness hearing and the presence of a DOJ attorney at the hearing, Bough made no reference to the DOJ in his order granting final approval and did not acquiesce to the DOJ's requests that the settlement be modified in regard to buyer agreements or that Bough clarify that the NAR settlement does not create "any immunity or defense under the antitrust laws."

"The Court also finds that the appropriate state and federal officials were timely notified of the NAR and HomeServices Settlement Agreements under the Class Action Fairness Act of 2005 (CAFA) ... and that ninety (90) days have passed without objection as to entry of approval from any governmental entity," Bough wrote.

Instead, Bough emphasized the deals' reasonableness under the circumstances. For instance, Bough noted that more than 99 percent of identified settlement class members were notified of the deals and that as of Nov. 14, more than 491,000 claims had been made while there were only 36 total objectors and 39 opt-outs.

He also pushed back against arguments from some objectors that the deals' scope was too broad, covering commission-related antitrust claims across the country and both Realtor-affiliated MLSs and non-Realtor-affiliated MLSs.

"A nationwide settlement was a necessary condition of obtaining any settlement for the benefit of the class, a nationwide settlement will conserve judicial and private resources, and Class members were fully apprised of the settlement class definition through the notice process," Bough wrote.

"As the Court further explains below, the record reflects that it was both justified and necessary to achieve any settlement for the Settlement Class to include all MLSs for residential real estate nationwide, however the MLSs were named in Gibson (e.g., real estate listing service), and regardless of their formal affiliation with NAR.

"Moreover, the only way that the Settlements were possible was if they provided for a nationwide recovery and release."

Bough contended that the deals were the result of "tough negotiations" and that plaintiffs' attorneys got as much as they could for the settlement class as possible given the defendants' financial positions.

"Although some Class members have objected that they may not recover every dollar they paid to real estate agents, that is the nature of settlements, which necessarily reflect a compromise," Bough wrote.

"The record supports the finding that Plaintiffs sought to obtain the largest recovery they could in light of the risks of continued litigation, including each Settling Defendant's ability to pay limitations," Bough added.

Regarding the objections submitted, Bough waived those submitted by anyone who did not comply with his order that they appear in person at the fairness hearing. But he also overruled each objection on the merits, finding that none warrant denying the deals' final approval.

Advertisement

In particular, Bough pushed back against [objections](#) filed by University of Buffalo contracts law professor [Tanya Monestier](#), calling them "unfounded." In response to Monestier writing that the NAR settlement contains no enforcement mechanism, he noted that the court itself as well as the plaintiffs have the authority to enforce the deal.

"Every significant Realtor MLS in the country — in total, 547 Realtor MLSs — opted into the Settlement," Bough wrote.

"In addition, 15 non-Realtor MLSs opted in as well (including by agreeing to make additional payments to the Class). Further, under the Agreement, Plaintiffs and the Court have authority to enforce the Settlement Agreement directly against 13 large brokerage firms around the Country that have opted into the Settlement.

"And the Settlement Agreement creates substantial incentives for Realtor MLSs, member boards, brokerages and individual agents to abide by the Settlement terms. These entities and individuals only become 'Released Parties' if they 'compl[y] with the practice changes reflected' in the

Settlement Agreements and ‘agree[] to provide proof of such compliance if requested by Co-Lead Counsel.’”

Regarding Monestier’s complaints regarding enforcement of the settlement by plaintiffs’ attorneys, Bough wrote, “This speculation is not only premature given that the Settlement Agreement was not yet approved at the time of her objection; it is also inconsistent with Counsel’s vigorous prosecution of this litigation for half a decade.

“Professor Monestier supposes that Co-Lead Counsel will not enforce the Settlement because doing so might somehow cause the Settlement to be ‘rescinded,’ which would in turn put Co-Lead Counsel’s attorneys’ fees at risk. However, under the Agreement’s plain language, once the Settlement is finally approved, NAR will not have any rescission rights, and so there is no conflict of interest.”

Bough also defended the plaintiffs’ attorneys expertise regarding the practice changes in the NAR settlement.

“She claims that the practice changes were ‘concocted by lawyers without a full appreciation of how this would play out in the real world,’” Bough wrote.

“The record reflects, however, that the NAR Settlement’s practice changes were developed in consultation with economic and real estate industry experts. Co-Lead Counsel too have extensive antitrust expertise and have developed knowledge of the real estate industry based on a half-decade’s worth of detailed factual and expert discovery and research.”

In her objection, Monestier details workarounds that some agents are engaging in that violate either the spirit or the letter of the NAR settlement agreement’s practice changes. According to Bough, that means the deal should be approved, not rejected.

“[A]pproving the Settlement would facilitate the Settlement’s enforcement,” Bough wrote.

“Professor Monestier claims that these supposed ‘workarounds’ are ‘widespread,’ but she does not provide sufficient evidence to assess that claim and the examples she does provide are anecdotal and speculative.”

“The practice changes have only been in place since August 17, 2024,” Bough added. “By comparison, the challenged NAR rules were in place for decades. The record in this case reflects that it can take ‘several years . . . to see significant market adjustment.’”

Bough complained that Monestier’s objection “would risk reverting to rules that a jury determined violate federal antitrust law” and didn’t “offer a realistic alternative” to the NAR settlement.

“The NAR Settlement reflects a negotiated compromise of a case challenging a particular set of practices,” Bough wrote.

“There are also limits both to the scope of the federal antitrust laws and this Court’s injunctive relief authority. As a result, the NAR Settlement cannot be expected to address every act of misconduct that may arise in the real estate industry.”

Bough also rejected Monestier's protests that the amount the plaintiffs' attorneys were requesting for their fees was too high.

"Plaintiffs' Counsel developed this case without a government suit," Bough wrote. "Plaintiffs' Counsel then pursued this litigation on their own for more than five years, expending a tremendous amount of time and money in the process. Plaintiffs' Counsel took the risk of litigating the case through a jury verdict, and obtained one of the largest antitrust jury verdicts in United States history. [T]his is exactly the kind of case where an award at the highest percentage is appropriate."

Bough also pointed to the practice changes contained in the NAR settlement as partial justification for the the attorney's award.

"Prof. Monestier's opinions are inconsistent with analyses of the impact of the injunctive relief provisions of this Settlement, which suggest that consumers may save billions of dollars per year," Bough wrote.

"Counsel is not seeking any additional fee for this valuable relief on these Settlements, but the value of this relief is substantial and is appropriately considered in evaluating the fee that is sought," he added.

Bough concluded his order by affirming his jurisdiction over the settlement.

"The Court retains continuing and exclusive jurisdiction over all matters relating to the administration and consummation of the Settlements and to interpret, implement, administer and enforce the Settlements (including with respect to the scope of the Settlement Class, Released Claims, and Released Parties), in accordance with their terms, and to implement and complete the claims administration process, in accordance with the Settlements, for the benefit of the Settlement Class," he wrote.