

# the inman interview

BENJAMIN BROWN



## Meet the lawyer suing to change buyer's agent commissions forever

Benjamin Brown, a partner at Cohen Milstein and co-chair of the firm's antitrust practice group, is a lawyer whose name the real estate industry may come to know well

BY [ANDREA V. BRAMBILA](#)

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You may not know Benjamin Brown by name, yet — but he's recently become a significant figure in the U.S. residential real estate industry.

Brown is a partner at Cohen Milstein, one of six major law firms that last month joined together to file a sweeping [class-action lawsuit](#) against the [National Association of Realtors \(NAR\)](#), [Realty](#), [HomeServices of America](#), [RE/MAX](#), and [Keller Williams](#), alleging all of these major names in real estate have been committing antitrust violations by requiring homesellers to pay the commissions of buyer brokers as well.



Benjamin Brown

The plaintiff behind the case that Brown and his fellow lawyers are representing is a Minnesota homeseller named Christopher Moehrl. But the case seeks damages on behalf of all homesellers who paid a broker commission in the last four years in connection with the sale and listing of their home in one of 20 Realtor association-owned MLSs in 20 market areas nationwide, potentially including millions of aggrieved homesellers.

The other five firms include Hagens Berman Sobol Shapiro LLC, Handley Farah & Anderson PLLC, Justice Catalyst Law, Wright Marsh & Levy, and Teske Katz Ktizer & Rochel PLLP. And the six have a formidable track record, having won settlements worth billions (or hundreds of millions) of dollars against corporate giants including [Anthem](#), [Apple](#), [Volkswagon](#), [BP](#), [Samsung](#), [Philip Morris](#), [Toyota](#), Pfizer subsidiary [Wyeth](#), and [Visa](#).



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Brown himself has previously served as a trial attorney in the antitrust division of the U.S. Department of Justice and is an adjunct professor at Georgetown Law School, where he teaches complex litigation.

Since the lawsuit's filing, opinions in the industry have varied with some saying the lawsuit could [wreak havoc on homebuyers](#) and [Realtors](#) or turn out to be [a dud](#).

Inman interviewed Brown over the phone to discuss what he hopes the suit will accomplish, how much it will seek in damages, how long it could last, and what it will mean for the real estate industry going forward.

**These are some pretty prominent law firms involved in this case. You guys aren't playing, is that right?**

That's right. We have a couple of the leading and antitrust class action firms in the country and have associated with a collection of attorneys that we think are together capable of litigating this and meeting the resources that the defendants will throw at this lawsuit and giving our class a reasonable chance of success.

**The suit is coming at a time when there are lots of venture capital-funded real estate companies who would maybe like the results of a case like this. Who's funding the suit?**

We're funding the suit ourselves.

**Okay, so it's not like some big real estate company came to you and said, 'Hey, we don't like this rule. We'd like to get rid of it. We'll fund a lawsuit against it'?**

The goals of the lawsuit are to create a truly competitive market for buyer broker services and to compensate the members of our class for overcharges that they've suffered.

**Is there a particular number of plaintiffs that have signed on already other than Christopher Moehr?**

No. The way that class action lawsuits work is that there are one or more plaintiffs who are interested or willing to serve as representatives of the larger class and everybody who falls within that larger class definition has their interests pursued and protected by the counsel. At the end of the day, if the class is certified and there's a settlement or judgment reached, then any money that results would be distributed to folks through a claims process.

**How do you get paid at the end of the day?**

We would only get paid for our work if there is a settlement reached or a judgment rendered after trial and a court order to determine that the attorneys would be entitled to a percentage of that award. Any amount that we would get would be set at the discretion of the court. The court would make sure that any amount of attorneys' fees would not constitute a windfall.

**In what way would eliminating the buyer broker commission rule increase competition?**

If you have brokers competing with each other to represent specific buyers and competing on price to get specific business then history and all of our practical experience shows that you have more effective price competition.

**If that were to happen, if buyers paid their brokers directly, what effect do you think that would have on the demand for such brokers? Do you think that buyers would actually hire buyer's agents?**

I think that buyers would often hire buyer's agents. There may well be a market for buyers to hire somebody to assist them through the process of contracting for the purchase of their home. Some buyers might contract with their brokers for additional services, including helping them to understand pricing or the characteristics of a particular neighborhood or home.

I think that it's safe to say that the commission rates would be lower than you see now for buyer brokers.

**Do you think there would be as many buyer's agents hired as there are now?**

If you look at England, for example, brokers [and] real estate agents are doing fine financially there. But what you do see is that there are fewer people employed as agents.

I think that what you would see is a more efficient marketplace where buyers contract for the actual services they need according to competitive prices at whatever price results from a competitive marketplace. That might mean that some brokers, especially those who are less efficient or less productive, might find that they are better served in a different profession.

lawsuit. It says, 'If the court rules in favor of the plaintiffs here, Realtor associations evaporate, the MLS likely dies off and the entire infrastructure of residential real estate in the United States has to be remade.'

Well, I think that's an exaggeration. But I agree in principle that there will have to be significant changes. If you talk to real estate agents in countries that have competitive markets for both seller and buyer side commissions, those real estate agents are as satisfied with their jobs and don't work necessarily any longer hours or fewer hours than those in the United States. You do tend to see higher volumes for brokers in those countries.

I think there would probably be winners and losers if our suit was successful and you were to fast forward 15 or 20 years. I have no reason to believe that the winners would want to go back in time. And I'm sure the losers in that scenario would talk about the good old days.

**Is that part of the goal — to change how the real estate industry works now?**

Right now, when you go to hire a buyer broker, if you're in the market for a new house, and you ask them how much of a commission they want from you, they tell you they don't need a commission from you because their services are free. As we all know, they are receiving a commission and the commission is paid by the seller.

We're envisioning a world where buyers would go out to the market and their brokers would have to quote them ... a flat rate or a percentage and it would not be as high as it is now and there would be negotiations. Buyers would be paying their brokers. There are a lot of benefits when the person receiving the services is paying the service provider directly. Better service and lower prices are typically what you see.

**The complaint mentions foreign countries where there's no buyer broker commission rule. Those countries also don't have MLSs. The multiple listing service was basically created so that brokers can offer each other compensation. What do you think the effect your suit will have on MLSs if you guys win?**

Undoubtedly it would affect MLSs. Whether it would mean the demise of all MLSs or specifically how the market will evolve for the exchange of information about available properties in the absence of what we currently understand is what the MLS currently does is getting a bit far afield for this specific case that we filed.

Our interest is just in protecting our class's interest and you don't always know what's going to happen when true competition is introduced into any given market.

**Is one of the goals to get rid of MLSs?**

No. Our goals are only focused on achieving justice for homesellers.

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**something you think will happen here where instead of going to the MLS they'll go to Zillow?**

It's certainly a possibility.

**The reason the buyer broker commission rule is set up the way it is now is because buying a house is such a big purchase that if you were to add the cost of paying for a buyer's broker to the cost the buyer is already paying, that would actually limit the pool of buyers for a particular house. What do you think the elimination of the rule would have on the pool of buyers available?**

Ultimately, I think it would go up. If you talk to an economist they would say the idea that you would introduce true competition into the market for buyer broker services and that the net effect of that would be somehow an increase in the purchase price of the home including all transaction costs, they would tell you that you're looking at it backwards.

What you'll find instead if you talk to economists and pose to them the question of what would happen if there's true price competition for buyer brokers, is they would tell you that the total price of a home, including all transaction costs and including all commissions, the net total price will come down. And as a result, the pool of buyers will go up, which will be good for both buyers and sellers.

**The effect could be that home prices overall go down?**

Home prices overall, yes, assuming that you're including in that home price all transaction costs for the sale of the home. It certainly wouldn't go up.

**Your plaintiffs are sellers, so how would it be good for them?**

The amount of money in the seller's pocket at the end of the day if we're successful will be higher.

**How's that?**

Because right now they're responsible for paying an inflated buyer commission and they won't be if we're successful.

**How long do you expect the lawsuit to last?**

This is a big enough case that I suspect it will not be resolved for many years. If you look at large antitrust class actions that have this degree of importance and complexity where this amount of money is at stake and these important issues are at stake, I would be very surprised if it lasts less than four years. I would not be shocked if it lasted 10.

**And you guys are prepared to be in it for that long?**

Absolutely. If you look at the history of our firms, the cases we've been involved in, these are the types of fights that we take on and we've never run out of energy. We've never run out of money and we've never given up on a case.

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have been added as the case went along. I can't rule that out.

**How much are you asking for in damages?**

I suspect when we finally make the calculations and make a damages estimate it will be in the billions.

**When do you think you'll have made that calculation?**

I would say next year would be the earliest that we could possibly come up with that kind of number.

**When would you get certified as a class action? At what point in the process does that happen?**

The issue of class certification won't even be briefed until next year at the earliest and it wouldn't surprise me if briefing didn't start on that issue next year either.

**You mentioned that there could be fewer agents, just more efficient ones. The people you've decided to sue are these big franchisors. What impact do you think fewer agents would have on them?**

I'm not saying necessarily there will be fewer agents. That's just one possibility. What would the effect of fewer agents be on those defendants? I don't know. Some of it would depend on how they themselves react to this and how they change their ground rules, vis a vis their franchisees.

**One thing readers brought up is that this could increase dual agency if fewer buyers decide to hire buyer's agents. Do you think that this could increase dual agency and would that be good or bad?**

It's just very hard to know. I think if we are successful, there are some brokers out there who are going to be successful on a whole other level relative to where they are now because they're going to be the people who are willing to innovate. If we win this case and you fast forward 20 years, there are probably going to be some titans in the industry who never would have had their chance but for this lawsuit.

What mechanisms those successful brokers would use to gain their additional market share, whether it's offering creative methods of and attractive options for dual agency, whether it's low flat rates, whether it's a la carte pricing, I think you'll see a lot of innovation.

**Some of our readers took issue with the main thrust of the complaint about there being a requirement to offer a certain amount of commission to the buyer's agent. Readers argued that that there is no requirement, that listing agents negotiate with sellers how much to offer the buyer's agent and that amount could be zero. Or it could be \$500. Or it could be a percentage of the home price because you don't put the total commission in the MLS. So what's your response to that?**



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readers who believe that offers are being made at very low and truly competitive rates, and I'm sure that's an argument that the defendants in this case will make, then the facts will bear that out. That's not what our investigation uncovered. I'm sure that our allegations that your readers took issue with will be fully put to the test by the defendants in this case.

**What did your investigation uncover?**

Our investigation uncovered that the offers of compensation were not made at competitive rates.

**Could you define competitive rates?**

The rates that would result from a competitive market. There's not a number that's attached. If you don't have competition, then to figure out what the competitive rate is requires analysis of a lot of data and it requires true expert economists to come in and figure out where those rates would be in a competitive marketplace. There's not a competitive market structure and so the resulting offers aren't at competitive rates. It's just sort of tautology.

**Are you accusing these defendants of price fixing?**

The wording that I would use would probably not be price fixing, not because it isn't accurate, but because it leads to potentially mistaken impressions. So what I would say is that the defendants have put in place a series of competitive restraints that result in inflated prices for buyer brokerage services.

**The implication is that while not everyone in a market is paying the same thing in terms of commission that there is a typical commission in a market that most listing agents will offer buyer's agents, which also seems like general knowledge in the industry. Is that what you're arguing in terms of price restraints?**

The short answer is no. I don't disagree with the way that you characterized it. But the anti-competitive restraints I'm talking about [are], for example, the NAR rules which are then incorporated in the MLS rules. I'm talking about the market structure where sellers offer the unilateral offer of compensation through the MLS.

I think to the extent that your readers or anyone understands [price fixing] to be that the defendants have agreed on a specific percentage that will uniformly apply across all transactions, then that's not what was meant.

**Some readers are arguing that the seller doesn't pay the buyer's broker, that it's the listing agent who shares their commission as a marketing tactic to sell the house. So it's the listing agent taking from their own pocket to sell the house. What do you think about that? A lot of listing agents will say, 'I get paid the same whether or not there's a buyer's agent because it's in the contract at the beginning before there's any buyer's agent involved at all.'**

I understand that some of your readers who are Realtors may choose to think of it that way. In reality, that's not what's happening.



**and the buyer's agent negotiates with the buyer their commission because they put it in the contract saying, 'if the listing agent doesn't pay me this much, then you'll agree to pay me this much.' So they are saying that there's negotiation happening on all sides here. What's your response to that?**

Well, we'll have to see what discovery shows. If they believe that real negotiation is happening on the seller side, then we'll just have to see if the facts bear that out. That is not consistent with what most, if not all, folks who've studied these markets have concluded, so it's an interesting take, but I don't think it's one that reflects reality.

**Do you think you'll settle this case?**

It's way too early to know.

**Anything you'd like to add that you think our readers should know?**

If we're successful there could be change in the industry and change is scary. But I think that those brokerages that move quickly and provide great service and great pricing to their consumers will be far more successful in this world. And someday there are going to be a lot of brokers out there who are really grateful for any changes that are brought via this lawsuit.

*This interview has been edited for length and clarity. Brown declined to comment on what led to the lawsuit, how the six law firms decided to work together, how long the suit has been in the works, how the plaintiff and defendants were chosen, or how the suit's attorneys decided to focus on 20 specific market areas.*

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