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So, What is a Tying Claim And What Does that Mean for NAR Affiliated MLS Who Require REALTOR® Membership? (It's Not Nearly the Knot you Think)

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I. THE ELEMENTS

A tying arrangement requires: (1) two distinct products or services; (2) a conditional sale—you can't have one, you can't have one, you can't have one without the other (like love and marriage); (3) market power in the tying product (monopolization in the relevant market or at least sufficient power in the tying market to restrain free competition in the market for the tied product); and (4) a substantial impact in terms of sales in the market for the tied product. *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1088-89 (9th Cir. 2009). The claim can be brought under Sections 1 or 2 of the Sherman Act in support of a monopolization claim. 15 U.S.C. §§ 1 and 2. The Plaintiff may also use Section 3 of the Clayton Act which specifically makes illegal a tying arrangement that substantially lessens competition. 15 U.S.C. § 14. Finally, Section 5 of the Federal Trade Commission Act which makes illegal an unfair or deceptive practice that Causes or is likely to cause substantial injury to consumers, cannot be reasonably avoided by consumers, and is not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45.

Plaintiffs almost always opt to rely on the Sherman Act monopolization claim. Prior to 2006, these claims were subject to the rule of reason, palcing the burden on a defendant to explain why a certain act, while anti-competitive, was still reasonable. Plaintiffs' liked the burden shifting analysis, although it was not as favorable as the Per Se rule that existed before 1986. While this advantage all but disappeared with *Illinois Toolworks*, the Sherman Act claims are thus viewed as overall easier to understand and prove.

The development of Sherman Act tying claims ping ponged between rule of reason and a requirement of *per* se illegality after proof of market power. Tying arrangements carried the *per se* label for many years until *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 35 (1984). As Justice O'Connor stated in concurrence:

> The "per se" doctrine in tying cases has thus always required an elaborate inquiry into the economic effects of the tying

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> arrangement…. The time has therefore come to abandon the "per se" label and refocus the inquiry on the adverse economic effects, and the potential economic benefits, that the tie may have. The law of tie-ins will thus be brought into accord with the law applicable to all other allegedly anticompetitive economic arrangements, except those few horizontal or quasi-horizontal restraints that can be said to have no economic justification whatsoever. This change will rationalize rather than abandon tie-in doctrine as it is already applied.

Id. Under the Jefferson Parish regime, plaintiffs made a showing that the tying arrangement negatively affected competition and the defendant now had to justify the practice.

In *ILLINOIS TOOL WORKS INC. ET AL. v. INDEPENDENT INK, INC.*, the Court adopted a test requiring the plaintiff in a tying claim to prove through evidence market power in the tying product exercised by the defendant. No more short cuts, presumptions of illegality or burden shifting, plaintiffs had to prove the market power in the tying product market. "The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. We conclude that the mere fact that a tying product is patented does not support such a presumption." *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 35 (2006). In today's world the plaintiff in a tying case faces a rigorous initial burden. "Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the tying product." *Id*. at 42.

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II. VARIATIONS IN THE CIRCUITS AND STATE LAW

Several circuits have added an additional factor to any tying claim under the Sherman Act.[1] In the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh circuits the plaintiff must also prove that the tying seller has some direct economic interest in the sales of the tied product. *Riefert v. South Central Wisconsin MLS Corp.*, 450 F.3d 312, 316-17 (7th Cir. 2006); *Carl Sandburt Vill. Condo. Ass'n No. 1 v. First Condo. Dev. Co.*, 758 F.2d 203, 208 (7th Cir. 1985). The First, Eighth, Tenth and Federal Circuits do not place this added burden on a tying claim.

The split in the Circuits on this issue has been around since about 1980 and the Supreme Court has not decided to resolve it. I expect this difference to continue.

Antitrust and unfair competition are not exclusive to the federal government. In general, the federal antitrust laws do not preempt state laws aimed a similar goals. Thus tying arrangements can be attacked in state courts as well.

Changes in federal law like the Class Action Fairness Act and Foreign Trade Antitrust Improvement Act are tightening access to the federal courts for some antitrust issues. Thus more plaintiffs are looking at state remedies for what they think might be a tying arrangement or other antitrust violation. See, E.g., *City of Los Angeles, et al. v. Infineon Tech., et al.*, Case No. 08-480561 (San Francisco County Super. Ct. filed Oct. 3, 2008), available at: www.sfsuperiorcourt.org/ (antitrust/unfair competition complaint filed on behalf of 99 governmental entities; jurisdictional provisions of Class Action Fairness Act not applicable where total number of class members is less than 100).

In addition to federal antitrust law, almost every state and territory has adopted laws to prevent similar conduct. Some states, like California, have

[1] While I have laid out a four element test for a tying claim, may courts combine elements one and two and call it a three element claim. Thus you will see courts calling this additional element the fourth element.

antitrust acts of their own. Others use unfair and deceptive trade practices acts to regulate similar conduct. In evaluating your MLS rules, be sure to take into account the applicable state laws.

The state laws vary greatly. A few do not allow private lawsuits, leaving all enforcement to the state's attorney general. Almost all that allow private suits allow multiplied damages and attorneys' fees to prevailing plaintiffs if they establish intentional or other aggravated conduct.

III. TYING IS DYING

In discussing the elements of tying, we saw the Supreme Court's gradual cutting away at the power of the claim. Tying began as one of the big, bad four per se claims—prove the arrangement is all you had to do. Then it had the rule of reason applied. Now the Plaintiff must prove market power.

Academics and legal commentators are calling for more refinement of tying claims. The literature supports a restriction to claims where the plaintiff can prove market power in the TIED PRODUCT, not just the tying product. The courts have not yet said the tying is not per se illegal, but they have put so many caveats on the claim that it is hard to view it as per se anymore.

As a claim evolves and becomes removed from per se illegal, history tells us the courts will begin to treat it as per se legal. It will take strong evidence of some unique anti-competitive effects in the relevant market for the claim to work. This same progression happened with maximum retail price maintenance—what once led to per se liability now is per se legal absent some really special circumstance.

This tend can be seen in government enforcement. The government brings very few tying arrangement claims, and recently none successfully. A great example is the Microsoft case. *United States v. Microsoft*, 253 F.3d 34 (2001). While the District Court dutifully followed precedent that tying arrangemnts are per se illegal, the D.C. Circuit declined to apply per se rule based on "the characteristics of the products at issue." The government subsequently dropped its tying claim rather than pursue it under a rule of reason standard.

Anticompetitive Effects of Tying:

- Raise prices to consumers or limit their choices (collusive effects).
- Exclude or impair rival by raising costs, leading to higher consumer prices (exclusionary effects).
- Evade rate regulation.
- Facilitate price discrimination (as through metering).

Pro-competitive Effects of Tying:

- Assure product quality.
- Achieve economies through joint production, distribution or marketing.
- Undermine seller cartel by facilitating secret price-cutting.
- Prevent excessive mark-ups by the seller of complementary goods or services.
- Avoid double marginalization.
- Facilitate price discrimination (as through metering).

When the pro-competitive effects outnumber the anti-competitive, it is hard to support a per se model. The likelihood is tying will soon be viewed as an acceptable practice and, for those with lawful monopolies in the tying product (like patent or copyright) merely a way to allocate legal monopoly profits. See, Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy, Gavill, Kovacic, and Baker, eds., (2d ed. 2008).

It appears safe to expect that the law of tying will continue to evolve and that tying claims will become much less of a possible concern for MLS.

IV. THE TOUGH CASES

A non-National Association of Realtors® affiliated association of real estate agents challenged the MLS rules of an Atlanta area NAR affiliated MLS and Board in *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991). The trial court granted summary judgment on anti-trust claims related to illegal tying of Realtor® membership to MLS membership, conspiracy to monopolize the market for multi-list services or the market for agent membership, and an illegal group boycott of non-Realtor® agents. The Court of Appeals reversed, finding issues of fact on the conspiracy and group boycott claims. It also held there was an illegal tying arrangement, but only if the plaintiffs could prove sufficient market power.

The Court of Appeals first looked at antitrust standing. The general doctrine of standing requires that a person bringing a lawsuit suffer an actual injury that the courts can redress. This avoids advisory opinion. In the antitrust arena, the courts take standing a bit further. The plaintiff must have suffered an antitrust injury—the conduct might cause economic loss but unless the economic loss arises from market manipulation it does not count. Further, the plaintiff must be "an efficient enforcer" of the antitrust laws. *Thompson*, 934 F.2d at 1571; *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438 (11th Cir. 1991). The court found standing for the non-realtor® association on all three claims and an individual agent on the tying and boycott claims. Since the agent was not a member of the MLS (consumer) nor a competitor, he did not have standing to sue over higher MLS fees allegedly brought about by the monopoly on MLS services.

The antitrust standing requirement evolved into another split in the circuits. Some circuits take the doctrine to its logical conclusion that only a consumer or a competitor in the relevant market can truly have antitrust standing. *Ethypharm S.A. France v. Abbott Laboratories*, No. 11-3602 (3d Cir. January 23, 2013).

The MLS argued that the markets for MLS services and agent affiliation really represented one market, one product and thus there could be no tying claim. The court r ejected this argument finding two independent markets and thus tying could exist. The court relied heavily on the fact that at least 55 non-NAR MLS

operated in the United States at the time. FTC Staff Report, *The Residential Real Estate Brokerage Industry* at 116 (1983).

The court stopped short of finding an illegal tying arrangement. The court required analysis under the "rule of reason" not "per se." *Thompson*, 934 F.2d at 1574; *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980). This analysis required the plaintiffs to prove that Metro Multi-List had market power in the relevant region—in other words it could coerce agents/brokers to join the Realtors® in order to receive MLS services. The court found an issue of fact to be decided at trial whether the competing association could form its own MLS and whether there were market alternatives to MLS services must be determined.

The research does not find a disposition of this case after remand. This indicates it probably settled. Interestingly, very few cases give an affirmative citation for *Thompson*. Despite its stark holding that the NAR affiliated MLS did tie membership and MLS services, other courts have not been willing to follow.

The California courts created rules that make NAR affiliated MLS open their services to non-NAR/Board members. The Supreme Court of California found that excluding non-Realtor® agents/brokers form an NAR affiliated MLS constituted an illegal group boycott under California's state antitrust laws (the Cartwright Act) in *Marin County Board of Realtors v. Palsson*, 130 Cal.Rptr.1, 16 Cal.3d 920, 549 P.2d 833 (1976). The case did not address tying arrangements but its findings led to later tying cases.

Later California cases continued to find that denial of access to a residential MLS unless one joined the local Realtors® constituted a group boycott, but reviewed an independent investment property MLS operated by the same Board under a tying arrangement review. *People v. Nat'l Ass'n of Realtors*, 120 Cal. App.3d 459, 174 Cal.Rptr. 728 (1981). The California antitrust laws find a tying arrangement where either the seller has market power (monopoly) in the market for the tying product OR the sales in the tied product result in substantial restraint in that market. *Id*. at 471-72. Under federal law BOTH elements must be present. The court remanded to the trial court for a determination if there were sufficient

market power to support an illegal tying arrangement in the investment property MLS.

After remand, the trial court found illegal tying arrangements with regard to both the residential and investment property MLS and entered an injunction requiring that any licensed agent could become a member of the MLS without membership in the San Diego Association of Realtors®. The appellate court affirmed in *People v. National Association of Realtors*, 155 Cal.App.3d 578, 582 (1984).

V. WHAT DOES THE FUTURE HOLD FOR MEMBERSHIP RESTRICTION?

Despite the more liberal standard of the California Act, NAR affiliated MLS continue to operate and not every tying arrangement claim is successful. A broker sued the San Diego Association of Realtors® claiming an illegal tie-in between the association and Sandicor's MLS in *Freeman v. San Diego Association of Realtors*, 77 Cal.App.4th 171, 91 Cal.Rptr.2d 534 (2000). The trial court dismissed the lawsuit on demurrer.[2] The Court of Appeals affirmed.

Several local Realtor® associations became service centers for the Sandicor MLS allowing them to offer "enhanced services" to their members on behalf of Sandicor. The plaintiff complained that he enhanced services raised the price of his MLS membership and were tied to his basic membership. *Id*. at 181-182. The court affirmed dismissal finding that the complaint failed to allege two separate products and that the tie restrained a substantial volume of commerce in the tied product. *Id*. at 184-85.

The requirement that a member of a NAR affiliated MLS must belong to a NAR affiliated local association fares much better under federal antitrust laws than in California. A broker claimed an illegal tying arrangement between MLS services and Realtor® membership in *Reifert v. South Central Wisconsin MLS Corp.*, 450 F.2d 312 (7th Cir. 2006). The district court granted summary judgment to the MLS

[2] A demurrer is similar to a motion to dismiss in states with civil procedure modeled on the federal rules. A demurrer challenges the complaint as insufficient as a matter of law.

finding the alleged tie had no effect on interstate commerce. *Id*. at 317. The court affirmed.

The court of appeals found that the first two elements of a tying arrangement existed. The MLS services constituted a separate product (tying product) from the association membership (tied product). Further, the MLS operated with market power—it constituted the only source of listing data in the area. *Id*. However, the court found no evidence of a competitor in the market for real estate association membership. No other group offered or tried to offer such a service. Without competition being foreclosed in the tied market, there can be no tying arrangement. *Id*. at 318; see 9 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1723a (2d ed. 2004) ("When there are no rival sellers of the tied product to be foreclosed, then the alleged tie-in might affect a substantial volume of commerce in the tied product and yet not foreclose anyone,").

The court reached a similar conclusion in *Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803 (1st Cir. 1988). After trial, the trial court granted directed verdict or entered judgment on the jury's verdict on all counts for the local Board, including a claim for tying MLS services to Board membership. The court found the tying claim fatally defective because plaintiff presented no evidence that any broker might have purchased membership in some other association but for the tied MLS services. Without the impact on commerce in the tied market, there could be no tying arrangement claim under the Supreme Court's decision in *Hyde*. *Id*. at 814-15, citing, *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984).

The court went on in *dicta* to criticize the use of tying arrangement claims to challenge trade association membership requirements:

> We are also doubtful whether this situation constitutes a "tie" of separate "products" in the first place. We are unaware of any federal case that has characterized a multiple listing service as a tying arrangement. FN12 But see *People v. National Ass'n of Realtors*, 120 Cal.App.3d 459, 174 Cal.Rptr. 728, 732–35 (1981) (applying state law tying doctrine to MLS); *People v. National Ass'n of Realtors*, 155

> Cal.App.3d 578, 202 Cal.Rptr. 243, 247 (1984) (affirming trial court finding of illegal tying arrangement); but compare *People v. Colorado Springs Bd. of Realtors Inc.*, 692 P.2d 1055, 1065–67 (Colo.1984) (en banc) (no tying arrangement in MLS under state law). The defendant boards are not "sellers" in the usual sense of the term, but rather a trade organization. The MLS is one of the advantages gained by joining that trade organization. Membership brings with it certain responsibilities as well. Whether or not it is subject to challenge on other antitrust grounds, such an arrangement is not a matter of invalid tying. Indeed, we have not been alerted to any federal case in which similar requirements and incentives of such an organization have been described as a tying arrangement. We need not definitively determine whether such a characterization would ever be apt, however, because we affirm the dismissal for the reasons stated above. (FN12. Whether it is an unlawful group boycott or an illegal example of price-fixing is a much more complex question. See United States v. Realty Multi–List, Inc., 629 F.2d 1351 (5th Cir.1980)).

Id. at 815.

The court reached a similar result in *Buyer's Consumer Realty, Inc. v. Northern Kentucky Ass'n of Realtors*, 410 F. Supp.2d 574 (E.D. Ky. 2006). On summary judgment, the court found that the buyers only brokerage did not have antitrust standing. As discussed above, antitrust injury must flow from the anti-competitive effect of the defendants actions-no must some injury proximately caused. *Id*. at 579, citing, *Brunswick Corp. v. Pueblo Bowl-O-Mat., Inc.*, 429 U.S. 477, 489 (1977) and *Worldwide Basketball and Sport Tours, Inc. v. National Collegiate Athletic Ass'n*, 388 F.3d 955, 965 (6th Cir. 2004). The court concluded that being forced to purchase "membership" in the local association was not antitrust injury—it didn't foreclose one form purchasing some other membership. *Id.* at 580-81. Likewise, since the plaintiffs showed no competing sellers in the tied market, i.e. real estate sales related organization memberships, no tying arrangement could exist as a matter of law. *Id*. at 581-82. The court also dismissed the group boycott claim. See also, *Prencipe v. Spokane Board of*

Realtors, Civ. Act. No. CIV-04-0319-LRS (E.D. Wash. May 12, 2006) (2006 WL 1310402) (Order granting summary judgment dismissing tying and group boycott claims for MLS services and Realtor® membership).

Finally, a recent real estate tying arrangement case not related to MLS services came out of the Ninth Circuit in *Blough v. Holland Realty, Inc.*, 574 F.3d 1084 (9th Cir. 2009). In that case, the purchasers of undeveloped lots in subdivisions, bought so developers could build custom homes for the purchasers, claimed a tying arrangement because the developers had agreed to pay real estate commissions to select brokers on any sale in the subdivision. The purchasers claimed the undeveloped lot market was illegally tied to the broker services for sale of existing homes market. The court affirmed summary judgment finding no impact on the alleged tied market.

VI. CONCLUSION

Outside of California it seems that tying arrangement claims based on a tie between MLS access and Realtor® membership are unlikely to succeed in the future unless there is a major shift in the market place. Only if competing trade organizations for real estate professionals enter the market would such claims have a chance of success. Even then, they would have to overcome other significant hurdles outlined above. Academics and commentators are forecasting a requirement of market power in both the tying and tied markets in the future amounting to a dual monopoly. This will make proving tying arrangements even more difficult.