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Ninth Circuit Finds That New Home Buyer Plaintiffs Fail To Satisfy *Per Se* Tying Element That Amount Of Commerce Not Be "Insubstantial"

"Zero Foreclosure" Is Less Than "Di Minimus."

Buyers of newly constructed homes in the Boise, Idaho, area filed a federal antitrust class action, alleging that realtors representing owners of undeveloped property tied the sale of the undeveloped lots to realtors' services and commissions that included the new homes constructed on the lots by contractors, as well at the value of the lot. Plaintiffs claimed that the practice was a *per se* unlawful tying arrangement under Section 1 of The Sherman Act.

Plaintiffs' real gripe was that the price they had paid included real estate commissions to the developers' agents. They had purchased a lot and a finished home from the home-builder for a total price that included costs, commissions, and the like. What the plaintiffs called the tied product was really part of the additional cost of building on a lot in a subdivision that the buyers had chosen.

The District Court certified a class consisting of all buyers who (1) bought undeveloped lots in subdivisions where the realtors had exclusive marketing rights on behalf of the owner-developers; and (2) were required to build a house on the lot in order to purchase the lot; and (3) were required to pay the realtors a commission based on the cost of the house plus the cost of the lot.

The District Court identified the "tying product" as the sale of undeveloped lots. The "tied product" was the realtors' services, i.e. commissions based on the total value of the developed lots. The realtor defendants moved for summary judgment.

The District Court granted the motion, and held that the plaintiffs had failed to show that the alleged tie "affects a not insubstantial volume of commerce in the tied product market." In an opinion by Judge Pamela Ann Rymer, the Court of Appeals for the Ninth Circuit affirmed, holding that the District Court correctly applied the doctrine of "zero foreclosure" when it granted summary judgment to defendant realtors. *Blough v. Holland Realty, Inc.* (9th Cir. July 27, 2009), No. 08-35536.

The court noted that under the law of illegal tying arrangements, a tying arrangement may be

condemned as a *per se* violation, if three prongs are met: (1) the defendant tied together the sale of two distinct products or services; (2) the defendant possesses enough economic power in the tying product market to coerce its customer into the purchase of an unwanted tied product; and (3) the tying arrangement affects a "not insubstantial amount of commerce" in the market for the tied product.

The court noted that it was only the "third prong" that was at issue in the case. Where plaintiffs "came a cropper" was that there was no evidentiary showing that any of the plaintiffs would otherwise have bought the service allegedly tied to their purchases from any other seller. The court found that there was no market for listing and referral services for buyers of this type of newly constructed home in a development. Where there is no market for the tied product, there is no competition to be foreclosed. Thus, “zero foreclosure” meant that plaintiffs could not show that the third element of tying, which requires an effect on a “not insubstantial amount of commerce,” had been met. The court cited with approval the recent decision from the Seventh Circuit in *Reifert S. Cent. Wis. MLS Corp.*, 450 F. 3d 312, 317-18 (7th Cir. 2006).

Other realtors had not been foreclosed from any potential customers seeking their services. Quoting from *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984), Judge Rymer wrote:

> When a purchaser is "forced" to buy a product he would not have otherwise bought, even from another seller, in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

As the Court of Appeals affirmed the narrow ruling of the District Court that there was "zero foreclosure" under the third prong of the elements of an illegal tying arrangement, there was no discussion given to the presence or absence of the other elements of a tying arrangement. Rather, Judge Rymer noted that the court was "assuming (without deciding) that Buyers meet the first two prongs of the test for a *per se* unlawful tying arrangement." In *Souza v. Estate of Bishop*, 821 Fd. 1332 (9th Cir. 1987), the court held that the alleged tie of single family residences to leased property in Hawaii involved only a single product, namely a home on a lot. The *Souza* court held that as a matter of law, the sale of a home in conjunction with the lease of a lot cannot be a tying arrangement, and that an argument to the contrary "defies reason." 821 F.2d at 1335. Similarly, it could be well argued under *Jefferson Parish* that there may be a substantial number of undeveloped lots in the Boise area, upon which homes could be constructed, or even, in these economic times, recently built but unsold, or even foreclosed homes that would be found to be sufficiently close substitutes such that the defendant realtors could not be said to have "appreciable economic power" in a properly defined relevant market.

But in *Blough*, the "third prong" analysis sufficed -- after all, "zero foreclosure," by definition, is something less than *"di minimus,"* even if not "much ado about nothing."

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