Trying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy

Herbert Hovenkamp

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol33/iss2/1
Tying Arrangements in the Real Estate Market: Federal Antitrust Law and Local Land Development Policy

By HERBERT HOVENKAMP*

A tying arrangement is an offer or agreement to sell or lease a certain product only on the condition that the buyer agree to take a different product as well. Under certain conditions, such arrangements are condemned by both federal and state antitrust laws.1 In recent years, some sellers of housing have combined home sales with sales or leases of related items, such as financing, security, access to recreational facilities, maintenance, and other services. Sales of such items independent of the home sale create no antitrust problems, but when the seller requires the lease or purchase of the secondary product or service as part of the purchase of the housing unit, the sale may be subject to attack as an illegal tying arrangement.

The following real property transactions have been condemned by courts as illegal tying arrangements: (1) X sells a house trailer lot only on the condition that the buyer also buy the trailer itself from X;2 (2) X, a realtor, sells a home subject to a covenant that when the home is resold it must be listed for sale by X's real estate agency;3 (3) X sells a

---

* Associate Professor of Law, University of California, Hastings College of the Law. B.A., 1969, Calvin College; M.A., 1971; Ph.D., 1976; J.D., 1978, University of Texas.


residential lot on the condition that X build the structure to be erected on it or that X provide the building materials for the structure to be erected on it; (4) X sells a lot and requires the purchaser to obtain certain goods or services from X's business.

Recent cases have attempted further extensions of federal antitrust law into the real property market. In these cases, plaintiffs have challenged the right of a condominium developer to condition the sale of condominium units on the buyer's agreement to purchase or lease a share of common land. If the plaintiffs prevail, federal antitrust laws may be brought into conflict with local land use policy, as expressed in statutes requiring developers to provide a certain amount of open space with new condominiums.

This Article examines the applicability of section 1 of the Sherman Act and section 3 of the Clayton Act to the tying of condominium units with other products or services. It suggests that such laws should not be applied when they conflict with clearly articulated local land use policy. The Article first discusses the jurisdictional “commerce” requirements of the two acts and concludes that commerce jurisdiction over such tying arrangements will usually exist. It then inquires

\[\text{Notes and Citations}\]

\[\text{References}\]

\[326\] THE HASTINGS LAW JOURNAL [Vol. 33\]
whether such arrangements violate the substantive provisions of the antitrust laws, and, if so, whether such arrangements fall within the state action exemption. It concludes that, although the tying of condominiums to some facilities and services might violate the Sherman Act and might not be spared by the state action exemption, the antitrust laws were not intended to supersede most local land use policy and, in deciding whether there are two products or only one, federal courts should defer to local laws that require the tying of condominium sales to sales of facilities or services.

Basic Elements of Tying Arrangements

Despite disagreement among scholars on the use and benefits of tying arrangements,11 the courts have developed a fairly sophisticated theory of how tying arrangements work and why they are bad. The traditional judicial theory is that sellers use tying arrangements to create "leverage": to use monopoly power in the tying product to create a monopoly in the tied product, thereby making monopoly profits in two products instead of one.12 The antitrust laws may be found to prohibit tying arrangements when they inhibit competition in the market for the tied product.13

Tying arrangement cases may be brought under either section 1 of
the Sherman Act\textsuperscript{14} or section 3 of the Clayton Act.\textsuperscript{15} Section 3 of the Clayton Act was intended by its drafters to prohibit tying arrangements.\textsuperscript{16} Its terms are limited, however, to restraints on sales or leases of goods or commodities. Therefore, section 3 has been held not to apply to services\textsuperscript{17} or transactions in land.\textsuperscript{18} Because of these jurisdictional limitations, tying cases have also been brought under section 1 of the Sherman Act.\textsuperscript{19}

The precise test for labelling a particular transaction as an illegal tying arrangement under the Sherman Act or the Clayton Act is uncertain because the courts have not agreed on a unitary rule. Most courts have held that the Sherman Act prohibits tying arrangements on standards similar to those required under the Clayton Act, but some cases indicate that the tests differ.\textsuperscript{20}

The prevailing direction of judicial opinion, however, is towards a unitary test. For example, in 1980 the Second Circuit held in \emph{Yentsch v. Texaco, Inc.} \textsuperscript{21} that tying plaintiffs generally must show:

\begin{quote}
First, [separate] tying and tied product[s], . . . second, evidence of actual coercion by the seller that in fact forced the buyer to accept the tied product, . . . third, sufficient economic power held by the seller in the tying product market to coerce purchaser acceptance of the tied product, . . . fourth, anticompetitive effects in the tied market, . . . and fifth, involvement of a 'not insubstantial' amount of interstate commerce in tying the tied product market . . . .\textsuperscript{22}
\end{quote}

\textsuperscript{16} See Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 517 (1917).
\textsuperscript{17} See Capital Temporaries, Inc. v. Olster Corp., 506 F.2d 658, 661 n.1 (2d Cir. 1974). The government has taken the position that advertising is not a "commodity" within the meaning of the Clayton Act, although the Supreme Court has expressed no opinion on this point. See \textit{Times-Picayune Publishing Co. v. United States}, 345 U.S. 594, 609 n.27 (1953).
\textsuperscript{20} See notes 53-57 & accompanying text infra.
\textsuperscript{21} 630 F.2d 46 (2d Cir. 1980).
\textsuperscript{22} \textit{Id.} at 56-57; \textit{see also} Krehl v. Baskin-Robbins Ice Cream Co., 78 F.R.D. 108, 117-18 (C.D. Cal. 1978). Many courts employ a three-part test similar to that used in \textit{Siegel v. Chicken Delight, Inc.}, 448 F.2d 43, 47 (9th Cir. 1971), \textit{cert. denied}, 405 U.S. 955 (1972): "First, . . . the scheme in question involves two distinct items and provides that one (the tying product) may not be obtained unless the other (the tied product) is also purchased. Second, . . . the tying product possesses sufficient economic power appreciably to restrain competition in the tied product market. Third, . . . a 'not insubstantial' amount of commerce is affected by the arrangement." (emphasis in original). Recently, a growing number of courts have minimized the requirement of involvement of a "not insubstantial" amount of
Before the plaintiff may address these substantive issues, however, federal jurisdiction must be established.

**Federal Antitrust Jurisdiction Over Real Property Transactions**

The federal antitrust laws are authorized by the commerce clause of the United States Constitution, which permits Congress to regulate “Commerce with foreign Nations, and among the several States.”[23] The commerce power is broad and can be applied to many activities in or affecting interstate commerce.

In passing the Sherman Act, Congress “exercised all the power it possessed” to regulate interstate commerce.[24] The Supreme Court has held that the Sherman Act creates subject matter jurisdiction with respect to all restraints of trade “in or affecting” interstate commerce.[25] The jurisdictional reach of the Sherman Act is coextensive with the constitutional limits on federal power under the commerce clause.

The jurisdictional reach of the Clayton Act, on the other hand, is more limited. Section 3 of the Clayton Act applies only to restraints that are “in the flow” of interstate commerce.[26] As a result, Clayton Act claims are sometimes dismissed for insufficient effect on interstate commerce, while Sherman Act claims rarely are dismissed for this reason.[27]

The federal courts generally find jurisdiction under the commerce clause if they perceive that a given restraint has measurable interstate consequences. Although residential real property transactions might appear to involve only one state, a land sale often is “in” commerce or has a sufficient “effect” on commerce to bring it within the reach of federal antitrust jurisdiction.[28] A satisfactory test for federal antitrust
jurisdiction in the real estate industry has not yet been developed, however, and Supreme Court decisions have been only moderately helpful.

In 1975, the Supreme Court addressed the issue of the interstate nature of real property transactions in *Goldfarb v. Virginia State Bar*.\(^{29}\) The Court held that publication by a county bar association of a fee schedule for real estate title examinations violated section 1 of the Sherman Act. The circuit court had held that the Sherman Act did not reach title-examination price-fixing because the restraint was entirely local and any effect it might have had on interstate commerce was merely incidental or remote.\(^{30}\) In reversing the circuit court, the Supreme Court found that the real property transactions that created the need for title examinations were frequently interstate transactions. A significant portion of funds used for financing home purchases in the county\(^{31}\) came from outside the state, many home loans were guaranteed by either the United States Veterans Administration or the Department of Housing and Urban Development, and title insurance was provided by out-of-state companies.\(^{32}\) The court found that a fixed fee schedule for title searches affected these purchases because a title search was required as a practical matter for most home purchases financed by third-party mortgagees.\(^{33}\) According to the Court, therefore, the fixed fee schedule was sufficiently connected with the interstate aspects of real estate transactions to invoke the Sherman Act.\(^{34}\)

The *Goldfarb* approach to commerce clause jurisdiction left some questions unanswered. For example, *Goldfarb* could be interpreted to suggest that, if a certain service is provided in a real estate transaction, then any antitrust violation involving that service will be within the reach of the Sherman Act, provided that a significant number of homes in the area are financed from out-of-state sources or that title insurance is provided by out-of-state companies. Under this interpretation, there need be no showing that the allegedly illegal activities had any effect on interstate commerce.

On the other hand, *Goldfarb* could be interpreted to apply only to restraints on services that as a practical matter are necessary to the

\(^{29}\) 421 U.S. 773 (1975).


\(^{31}\) The county involved in *Goldfarb* was Fairfax County, Virginia.

\(^{32}\) 421 U.S. at 778, 783 n.8.

\(^{33}\) The Court observed that "[i]n financing realty purchases lenders require, 'as a condition of making the loan, that the title to property involved be examined . . . .'" *Id.* at 784 (quoting Goldfarb v. Virginia State Bar, 355 F. Supp. 491, 494 (E.D. Va. 1973)).

\(^{34}\) *Id.* at 785.
purchase of a home. Title insurance, the service at issue in *Goldfarb*, is essential for the relatively large class of purchasers who must obtain third-party financing.\(^\text{35}\) In contrast, commission-fixing agreements among realtors might not meet the *Goldfarb* test because a buyer is able to purchase or sell a home in most communities without employing a real estate agent.\(^\text{36}\)

In *McLain v. Real Estate Board*,\(^\text{37}\) the Supreme Court provided some additional guidance. The *McLain* Court held that agreements among realtors to fix commissions for listing and selling services were subject to Sherman Act attack. Although it did not discuss the necessity of the service to the transaction, the *McLain* court held that the service or product need not be essential to have a sufficient effect on interstate commerce to create antitrust jurisdiction.\(^\text{38}\)

In *McLain*, the plaintiffs alleged that the defendants had transacted business for “persons moving into and out of the Greater New Orleans area” and that the defendants had assisted some purchasers in obtaining financing and insurance that came from out-of-state sources.\(^\text{39}\) In dismissing the complaint in *McLain*, both the district and circuit courts divided each real estate transaction into various component activities, and held that the defendants’ price-fixing arrangement concerned only intrastate activities.\(^\text{40}\)

Reversing the lower courts, the Supreme Court observed that the Sherman Act applies to activities that either are “in” interstate commerce or “affect” it. The Court concluded that, under the Sherman Act, the plaintiffs could show “either that the defendants’ activity is itself in interstate commerce or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce.”\(^\text{41}\) Moreover, the plaintiffs “need not make the more par-

\(^{35}\) Id. at 784.

\(^{36}\) Some courts reached this conclusion, or a similar one, after the *Goldfarb* decision. See *McLain v. Real Estate Bd.*, 432 F. Supp. 982, 984-85 (E.D. La. 1977), *appeal dismissed*, 583 F.2d 1315, 1322 (5th Cir. 1978), *vacated*, 444 U.S. 232 (1980); see also *Income Realty & Mortgage, Inc. v. Denver Bd. of Realtors*, 578 F.2d 1319 (10th Cir.).


\(^{38}\) See *id.* at 244.

\(^{39}\) *Id.* at 235.

\(^{40}\) The district court suggested that, although financing and title insuring might be interstate activities, brokerage is a completely intrastate activity, and the plaintiffs had not alleged interstate commission fixing. Brokers did not become involved in title examinations or financing, but, as a general rule, only brought the buyer and a potential mortgagee together, who then worked out their own financing arrangements. See *McLain v. Real Estate Bd.*, 432 F. Supp. 982, 985 (E.D. La. 1977), *appeal dismissed*, 583 F.2d 1315 (5th Cir. 1978), *vacated*, 444 U.S. 232 (1980).

\(^{41}\) 444 U.S. at 242. The *McLain* Court explained that in *Goldfarb* it had applied the
ticularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates." If the general activity of real estate brokerage has some effect on interstate commerce, then Sherman Act jurisdiction will exist even if the plaintiff cannot show that the antitrust violation itself had any measurable impact on interstate commerce.

After McLain, it appears that Sherman Act jurisdiction will reach most restraints involving sales of housing. The plaintiff can probably demonstrate sufficient interstate commerce for jurisdiction merely by showing that many out-of-state buyers obtain financing or title insurance from out-of-state sources. Transactions in real estate involving significant interstate movement of purchasers or sellers also would seem to be subject to Sherman Act jurisdiction. In a case involving the allegation of tying home purchases to the purchase of building materials or construction contracts, a showing that a significant amount of the building materials have moved in interstate commerce will probably establish jurisdiction. In addition, a showing that a tying arrangement has discouraged potential out-of-state competitors from entering the market is probably adequate.

The Substantive Law of Tying Arrangements

The Tied Product's Interstate Market

Under the "affecting commerce" test of McLain, a plaintiff need only demonstrate that the defendant's activities somehow affect interstate commerce for federal jurisdiction under the Sherman Act. The substantive tests for tying arrangements, however, generally require that the plaintiff show "involvement of a 'not insubstantial' amount of

"in commerce" test. Its holding there was based on the finding that title examinations were "an integral part" of the interstate transaction of obtaining financing for the purchase of residential property." Id. at 244. McLain, on the other hand, was decided under the "affecting commerce" test, which requires only that the plaintiff "demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity." Id. at 242.

42. Id. at 242.
43. See id. at 245.
44. See id.; see also Chatham Condominium Ass'ns v. Century Village, Inc., 597 F.2d 1002, 1010-11 (5th Cir. 1979).
45. See Chatham Condominium Ass'ns v. Century Village, Inc., 597 F.2d 1002, 1006 (5th Cir. 1979).
46. Id. at 1010. The court cited the fact that "out-of-state companies were discouraged from entering the West Palm Beach area because the market for recreational facilities was effectively tied up" by the tying arrangements.
47. See text accompanying notes 24-25 supra.
interstate commerce in the tied product market,” suggesting a plaintiff may prevail only if it shows that a sufficient volume of the tied product was sold in markets involving interstate commerce.49

Thus, when a plaintiff can show that a particular tying arrangement restrains “a ‘not insubstantial’ amount of interstate commerce in the tied product market,” it would also thereby show a sufficient effect on commerce to create Sherman Act jurisdiction. Courts determining commerce clause jurisdiction under the Sherman Act should look directly at the tied product market to determine if the proper effect on interstate commerce exists, although this process intertwines the issue of jurisdictional reach under the Constitution with the substantive offense of tying. The Fifth Circuit has taken this approach.50

As to tying claims brought under the Clayton Act, however, allegations of an effect on interstate commerce in the market of the tied product are not sufficient for a finding of jurisdiction; a plaintiff also must show that the defendant’s activities were in the flow of commerce.51 For this showing, a court looks generally to the defendant’s activities rather than specifically to the tied product.52

Thus, when a court is considering a tying action brought under the Sherman Act, it may determine the effect on commerce in the tied product market and, in the process, determine both the commerce clause jurisdictional issue and one part of the substantive test for tying.

48. Yentsch v. Texaco, Inc., 630 F.2d 46, 57 (2d Cir. 1980); accord Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002, 1008, n.8 (5th Cir. 1979).

49. In Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002, 1008 n.8 (5th Cir. 1979), which involved tying in a condominium market, the court stated that the tying test required, inter alia, a showing of both a “not insubstantial” amount of interstate commerce in the tied market and “anticompetitive effects in the tied market.”

For example, when a trailer park developer leases lots only to those who buy trailers, the transactions probably have had a sufficient effect on interstate commerce to give rise to a cause of action under the Sherman Act, because the manufacture or financing of the trailers, the tied product, probably involves out-of-state activities. In the reverse situation, however, when the developer sells trailers only to people who also lease its lots, the developer’s acts might not create jurisdiction because the leasing of a trailer lot, the tied product, may be a purely local activity. See Marston v. Ann Arbor Property Managers Ass'n, 422 F.2d 836 (6th Cir. 1970) (per curiam) (bare allegation that plaintiff-lessees were apartment residents and defendant-lessors were property owners in college town of Ann Arbor, Michigan, was insufficient to demonstrate a substantial effect on interstate commerce).

50. See, e.g., Chatham Condominium Ass'n v. Century Village, Inc., 597 F.2d 1002 (5th Cir. 1979). The defendant had sold condominiums only to people who also agreed to share in a lease of recreational land and facilities. The court held that, in the process of making out the substantive claim that the defendant’s activity restrained a substantial amount of interstate commerce in the tied product, the plaintiff also showed sufficient effect on commerce to create jurisdiction under the Sherman Act. Id. at 1009-10.

51. See id. at 1010.

52. See id. at 1010-11.
When the court is considering a Clayton Act tying claim, however, it must consider first whether the defendant's activities generally are in the flow of commerce. If a Clayton Act tying plaintiff satisfies the flow of commerce requirement, the court must then determine whether there is a sufficient effect on interstate commerce in the market of the tied product.

Tying Tests Under the Sherman and Clayton Acts

In 1953, in *Times-Picayune Publishing Co. v. United States*, Justice Clark detailed the differences between the Sherman Act and Clayton Act tying tests. The defendants required that businesses place their advertisements in both its morning and evening newspapers. The government sued under the Sherman Act because it regarded advertising as a "service" and not as a "commodity" under section 3 of the Clayton Act.54

Justice Clark began with the premise that the Clayton Act was passed to condemn activity that the Sherman Act had been held not to condemn. Therefore, reasoned Justice Clark, one would expect the Sherman Act to apply to a narrower range of activities than the Clayton Act.55

Justice Clark concluded that, when a tying action is brought under section 1 of the Sherman Act, the plaintiff must show both that the seller has sufficient monopoly power in the tying product to restrain competition in the tied product and that a substantial volume of commerce in the tied product is restrained.56 Under section 3 of the Clayton Act, however, the plaintiff need show only one of these conditions.57

Since *Times-Picayune* was decided, Justice Clark's distinction between the Acts has increasingly been disregarded. Several jurisdictions have adopted a single test for violations of either Act, which resembles the traditional, two-prong Sherman Act test: a plaintiff must show both monopoly power in the tying product and restraint of competition in

53. 345 U.S. 594 (1953).
54. *Id.* at 609 n.27.
55. *Id.* at 606-10. One could argue, however, that by enacting section 3 of the Clayton Act Congress intended to declare a policy with respect to tying arrangements that had not been recognized in the Sherman Act. Before the Clayton Act was passed, the Supreme Court held that the Sherman Act did not reach tying arrangements. *See* Henry v. A.B. Dick Co., 224 U.S. 1, 29-30 (1912).
56. *Id.* at 608-09.
57. *Id.*
the tied product.58

Real Property and Market Power

Federal antitrust law can reach many restraints in the residential real estate industry. Other principles of federalism, however, are relevant to the question of how deeply the antitrust laws should go into the local housing market. There is no evidence that the framers of the federal antitrust laws intended the laws to preempt local land use controls. As a result, it would be appropriate for federal judges to defer to local policy when considering federal antitrust attacks in the housing market. Moreover, the substantive law of tying arrangements allows judicial deference to state decisionmaking in the real property area.

One requirement of the law of tying is that a defendant have sufficient market power in the tying product to restrain competition in the tied product. Over the years, the federal courts have developed a list of "suspect" tying products that are presumed to give their owners a sufficient amount of market power. In general, any tying product that is "unique," because it is patented,59 copyrighted,60 trademarked,61 or

58. In 1977, the Ninth Circuit noted that "[t]he practical difference between the two standards has eroded steadily since Justice Clark's attempt to draw a fine line . . . ." Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977).

Many courts disregard the distinction set out in Times-Picayune and apply a unitary test. See Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980) (Sherman Act); Electrogas, Inc. v. Dynatex Corp., 497 F. Supp. 97, 101 (N.D. Cal. 1980) (Sherman and Clayton Acts). Other courts note the distinction, but decide the cases as if the distinction did not exist. See Rental Car of New Hampshire, Inc. v. Westinghouse Elec. Corp., 496 F. Supp. 373, 379 (D. Mass. 1980). Still other courts hold that the distinction is no longer valid. See In re Data General Corp. Litigation, 490 F. Supp. 1089, 1100 (N.D. Cal. 1980). Today it appears to be the law of both the Fifth Circuit and the Ninth Circuit that there is no operative, substantive distinction between the two tests. See Spartan Grain & Mill Co. v. Ayers, 581 F.2d 419, 428 (5th Cir. 1978); Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1214 (9th Cir. 1977). See generally 16A J. Von Kalinowski, BUSINESS ORGANIZATIONS: ANTITRUST AND TRADE REGULATION § 6G.05 (1981). There may still be a "rule of reason" tying test governing cases in which the plaintiff is unable to prove both economic power in the tying product and a restraint of competition in the tied product. See Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (Fortner I). Recent federal case law has generally played down the notion of distinct "per se" and "rule of reason" tying tests. In Ware v. Trailer Mart, Inc., 623 F.2d 1150 (6th Cir. 1980), however, the Sixth Circuit permitted a plaintiff to proceed to trial on a rule of reason theory, alleging that the defendant had tied mobile home purchases to leases of lots in its trailer park. The Sixth Circuit found that economic power in the tying product is "relevant only if [the plaintiff] intends to prove a per se violation of Section 1." Id. at 1153. However, when making out a rule of reason claim, a plaintiff need not show appreciable market power in the tying product or a substantial effect on interstate commerce in the tied product.


highly desirable and distinguishable, will be presumed to confer upon its owner sufficient market power to restrain competition in the tied product.

Among the tying products that generally fall into this "unique" category is real property. In *Northern Pacific Railway v. United States*, the defendant railroad had conveyed real property subject to "preferential routing" clauses that required the grantees to use the defendant's railroad lines for shipping their products. In condemning these conditional grants as illegal tying arrangements, the Supreme Court concluded that "the defendant possessed substantial economic power by virtue of its extensive landholdings." Although no court has held that the mere ownership of land creates substantial economic power, *Northern Pacific* suggests that land, because of its uniqueness and scarcity, frequently confers such power. Lower courts have tended towards this conclusion. Because of the market power frequently conferred by the uniqueness of land, and because of the ease with which Sherman Act jurisdiction can be proven, the tying of condominium sales to other facilities and services could often be held to be illegal.

Although land is both unique and scarce, and every tract is a kind of mini-monopoly, the irony of *Northern Pacific* should not be lost: the uniqueness of land has always been an important justification for substantial federal deference to local decisionmaking. Contracts and torts have a certain mobility and universality that makes substantial federal regulation appropriate. However, the fact that each community's land is unique often has inclined federal courts to give great weight to local decisionmaking about land development and use. One of the great anomalies of the era of substantive due process was that the doctrine of liberty of contract was held not to apply to local land use regulations, even though land use statutes could interfere with freedom of contract just as much as wage and hours.

---

64. *Id.* at 7.
66. See notes 43-46 & accompanying text *supra*.
67. One of the great anomalies of the era of substantive due process was that the doctrine of liberty of contract was held not to apply to local land use regulations, even though land use statutes could interfere with freedom of contract just as much as wage and hours
Federal courts interpreting the antitrust laws have devised some mechanisms for deferring to state or local regulation in areas in which such deference seems to be appropriate. One such area is the state action exemption from the federal antitrust laws.

The State Action Exemption

In 1943, the Supreme Court held in *Parker v. Brown* that certain activities that would otherwise violate the federal antitrust laws may be exempt if they are compelled by a state-created regulatory program. The state action exemption from the federal antitrust laws is not constitutionally mandated. It is predicated on the belief that Congress did not intend to supplant certain state regulatory programs. The past five years have seen a great deal of litigation with respect to the “state action” exemption. Only recently has the Supreme Court attempted

---

68. 317 U.S. 341 (1943). The *Parker* Court held that a state program for allocating the supply of raisins in California and reducing surpluses was exempt from the federal antitrust laws even though the same activity performed by raisin producers acting on their own would almost certainly have been illegal per se. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940): “Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.”

69. See *Parker v. Brown*, 317 U.S. 341, 350-51 (1943): “We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.” In *Parker*, the Supreme Court made it clear that Congress could have enacted an antitrust statute that would have prohibited the California raisin allocation program. *Id.* at 350. In reviewing the legislative history of the antitrust laws, however, the Court found that Congress did not intend to interfere so much with a state’s regulatory policies.

In his dissent in *Community Communications v. City of Boulder*, 50 U.S.L.W. 4144 (U.S. Jan. 13, 1982), Justice Rehnquist stated that the so-called state action exemption is not an “exemption” from the antitrust laws. The question, according to Justice Rehnquist, should not be exemption but preemption—to what extent do federal antitrust laws preempt state and local regulation in our federal system? The distinction is important because within the “exemption” paradigm the question courts ask is whether a state or city violates the antitrust laws by enacting a certain statute. “[T]he gist of the Court’s opinion is that a municipality may actually violate the antitrust laws when it merely enacts an ordinance invalid under the Sherman Act . . . .” *Id.* at 4150 n.2. Rather, Justice Rehnquist stated that the question should simply be whether a particular state or municipal regulation has been preempted by the federal antitrust laws. In the case of preemption, the appropriate remedy would be an injunction against enforcement of the regulation.

70. *E.g.*, *Community Communications Co. v. City of Boulder*, 50 U.S.L.W. 4144 (Jan. 13, 1982).
to articulate a simple state action test, and many issues remain unresolved.

There are some constitutional limits on the application of federal antitrust laws to the states. The eleventh amendment dictates that a state cannot be a defendant in certain private actions. Under the tenth amendment, certain traditional governmental functions of states and political subdivisons are exempt from federal legislation enacted under the commerce clause. The tenth amendment has been held to give an exemption from the antitrust laws to certain institutions operated by a governmental subdivision in those cases in which the institution was carrying on a traditional governmental function, such as the operation of a prison store by the state prison authority. The state action exemption goes beyond the tenth amendment exemption, however, to insulate private conduct that is subject to state regulation from the antitrust laws. Land use regulations that require private builders to build in a certain way are probably not covered by the tenth amendment exemption, but they may be included in the “state action” anti-


72. U.S. CONST. amend XI.


74. U.S. CONST. amend X.


77. Land use planning is a traditional governmental function, and an argument could be made, based on National League of Cities v. Usery, 426 U.S. 833 (1976), that land use ordinances have an “exemption” from the federal antitrust laws under the tenth amendment and the doctrine of intergovernmental immunity. In National League of Cities, the court held that a city did not have to pay its own employees the minimum wage as dictated by the federal Fair Labor Standards Act. The precise holding was that federal legislation passed under the commerce clause could not “operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions.” Id. at 852. The meaning of “integral operations” is unclear, but presumably there is a difference between a city’s paying its own employees a wage below the federal minimum and its contracting with a for-profit company to have work done under contracts providing that the private company’s employees would earn less than the minimum wage. In the condominium tying cases, the defendant generally is a private, profit-making developers who may be
Whether state and local land development statutes qualify for the state action exemption has not been established. Whether state and local land use and development ordinances raise at least two important questions: whether such regulations fall within the scope of the "state action" exemption, and whether the "state action" exemption applies to regulations created by counties, cities, or other governmental subdivisions of the state.

The Scope of the State Action Exemption

In 1980, the United States Supreme Court articulated a simple "state action" test in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc. At issue in Midcal was a state statute that required retailers to sell wine at prices filed with the state by wholesalers. The statute thus permitted wine wholesalers to engage in resale price maintenance, a per se violation of section 1 of the Sherman Act. There was virtually no state supervision of the price-setting activities of the wholesalers.

The Supreme Court held that the California statute did not create an effective "state action" exemption from the antitrust laws. In analyzing the proper scope of the state action exemption, the Court developed a two-part standard. First, the "challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy.'" Second, the policy must be actively supervised by the state itself. The court held that California's statutory price maintenance requirement passed the first part of the test but not the second. Although California's policy was clearly articulated, it was not actively supervised by the state and amounted to nothing more than "a gauzy cloak of state involvement over what is essentially a private price-fixing

80. See id. at 103.
81. 445 U.S. at 105.
arrangement."  

Midcal leaves unclear whether this standard should be applied to state legislation that by its nature does not require administrative supervision by the state. Many land development regulations create standards for uses and density, but leave most of the decisionmaking and enforcement to the judiciary.

One example of such legislation is state regulation of condominiums, such as Florida's leasehold condominium statute, which specifically authorizes developers to offer to purchasers the sale of a condominium housing unit tied to a leasehold estate in certain common recreational areas. The language of the Florida statute constitutes substantial state supervision of leasehold condominiums and corrects many abuses that had occurred before the statute was passed; however, the statute does not seem to provide a mechanism for the kind of "active" administrative supervision contemplated in Midcal. The state itself neither creates the condominium package nor requires prior administrative review of any particular proposal. The state intervenes, largely through the judiciary, only after a controversy arises. Furthermore, the Florida statute should not be regarded as a complete policy regarding leasehold condominiums. The antitrust laws can and should protect against some arrangements that comply with local statutes.

State land development statutes, such as Florida's leasehold con-

82. Id. at 106.
84. See text accompanying notes 128-32 infra.
86. For example, a developer could erect a grocery store on the common area and require all condominium purchasers to shop there without violating the Florida statute. In City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), the Supreme Court faced an analogous situation with respect to a city-operated public utility. In holding that the city was not exempt from the antitrust laws, the Court noted that the city had been granted a monopoly from the state for producing and delivering electricity in its area. The Court said, however, that the monopoly grant was not a complete antitrust exemption: "[E]ven a lawful monopolist may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." Id. at 417; see also Community Communications Co. v. City of Boulder, 50 U.S.L.W. 4144 (U.S. Jan. 13, 1982).
dominium statute, are not likely to satisfy the *Midcal* "active supervision" standard, and thus probably will not qualify for the state action exemption. This would almost certainly be the result if a court perceived a private developer as simply using the statute to cloak an antitrust violation. Florida’s leasehold condominium act was not designed to exempt the entire Florida leasehold condominium industry from antitrust scrutiny; too many activities that are not within the prohibitions of the statute may nevertheless impose substantial restraints upon consumers.87

A federal court, on the other hand, could reasonably defer to the Florida leasehold condominium statute or a similar state law when analyzing the substantive elements of a particular antitrust claim. For example, the leasehold condominium statute establishes government approval of a package consisting of the sale of a condominium unit plus the long-term lease of the common elements. This recognition manifests a state interest in the integration of individual condominium units with common elements, even in those situations in which the integration is created by the sale of one part of the package and the long-term lease of another part. If the only substance of an antitrust complaint is a developer’s offer of a condominium for sale on the condition that the purchaser lease the common areas, then deference to state policy is appropriate when the federal court decides whether the package constitutes a single "product" under the federal law of tying.88

**Municipal Regulation and the State Action Exemption**

Even if statutes like the Florida Condominium Act qualify for the state action antitrust exemption, the problem of federal interference in local land development policy remains unsolved. Much regulation of condominium development is carried out by municipal, not by state governments. The second major issue raised by local land use planning legislation is whether the state action exemption applies to governmental subdivisions of the state.89

---


88. *See* notes 104-05 & accompanying text infra.

89. The state action exemption from the antitrust laws must be distinguished from the broad definition of "state action" used in civil rights litigation. The fourteenth amendment concept of state action is expansive and applies to public officials at every governmental level, and sometimes even to private persons acting under color of state law. *See generally* L. Tribe, *American Constitutional Law* §§ 18-1 to -7 (1978 & Supp. 1979). On the other hand, the antitrust "state action" exemption is strictly construed and generally applies
In its recent decision in Community Communications Co., Inc. v. City of Boulder,90 the Supreme Court substantially restricted the power of municipalities to regulate business without violating the federal antitrust laws. The issue in Community Communications was whether a state could transfer a part of its state action exemption to a city by means of a home rule provision permitting the city to pass regulatory legislation that would "supersede within the territorial limits . . . of said city . . . any law of the state in conflict therewith."91

Until 1979 the plaintiff was the only provider of restricted access cable television services in the city of Boulder, Colorado. In the late 1970s, however, new satellite technology permitted such services to be delivered by competing companies. Boulder's city council attempted to assist a potential competitor's entry into the market by passing an ordinance that prevented the plaintiff from expanding its services for three months. The city council also announced that during the three-month period it would draft an ordinance regulating entry and delivery of services in Boulder's restricted-access television market. The plaintiff sued, claiming that the moratorium violated section 1 of the Sherman Act.

The Supreme Court held that under these facts the City of Boulder did not have the benefit of the state action antitrust exemption. The Boulder ordinance would qualify for the exemption only if it were "the action of the State of Colorado itself in its sovereign capacity," or if it constituted "municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy."92 In this case the only state policy to which Boulder could look was the Colorado home-rule provision, which did not pass the test:

[T]he requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A state that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought.93

It seems clear that anticompetitive municipal zoning legislation will fare no better against an antitrust challenge than did Boulder, Col-

---

90. 50 U.S.L.W. 4144 (U.S. Jan. 13, 1982), reversing, 630 F.2d 704 (10th Cir. 1980).
92. 50 U.S.L.W. at 4146-47.
93. Id. at 4147 (emphasis in original).
orado's cable television ordinance. The municipal power to zone generally is created by state home rule provisions or zoning enabling acts that are "neutral" with respect to the question whether competition is to be eliminated or retained in a particular market.\textsuperscript{94}

The "Separate Product" Rule

To prove an illegal tying arrangement, a plaintiff must show that the tying product and the tied product are separate products.\textsuperscript{95} For example, it is not illegal for a haberdasher to refuse to sell a hat without its hatband, or for a shoe store to refuse to sell a left shoe without the right. In both these cases, a court is likely to rule that the "tying" and "tied" products are in fact a single product. A more difficult question is whether a condominium coupled with a swimming pool, a garden, or garbage collection facilities constitutes a single product.

\textsuperscript{94} See 1 R. Anderson, American Law of Zoning §§ 2.15-.20 (2d ed. 1976); S P. Rohan, Zoning and Land Use Controls §§ 35.02-.05 (1978); cf. Mason City Center Ass'ns v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979), in which the judge in a zoning case engaged in analysis similar to that prescribed by the Community Communications decision. In Mason City, the court held that a municipal zoning statute might qualify for the state action exemption if its restrictions were carried out "pursuant" to a state policy of eliminating competition in a particular area. The Court concluded, however, that the Iowa zoning enabling act "does not compel or contemplate anticompetitive agreements on the part of Iowa municipalities." 468 F. Supp. at 743 (footnote omitted). One commentator on the pre-Midcal case law suggested that to be exempt from the antitrust laws state legislation must manifest a clear intention to displace the antitrust laws as a regulatory program. See The Supreme Court, 1977 Term, 92 Harv. L. Rev. 57, 282-83 (1978); see also George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc, 424 F.2d 25 (1st Cir. 1970). "[V]alid government action confers antitrust immunity only when government determines that competition is not the \textit{summut bonum} in a particular field and deliberately attempts to provide an alternate form of public regulation." Id. at 30. The two-part test articulated in Midcal, however, does not include this specific requirement of a stated intention to displace the market. On the other hand, the statute at issue in Midcal clearly did eliminate competition. Furthermore, the issue in Midcal was not raised in the same terms. The requirement of a state intent to create an antitrust exemption arguably is consistent with the Midcal test. It is doubtful, however, that local land use planning statutes display such an intent to eliminate the free market and create an exemption from the antitrust laws. Although zoning restrictions can have a penetrating effect on competition, see Mason City Center Ass'ns v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979), they are intended not to regulate competition, but rather to control the uses of land. Cf. Grendel's Den, Inc., v. Goodwin, 662 F.2d 88 (1st Cir. 1981), \textit{prob. juris. noted}, Larkin v. Grendel's Den, Inc., 50 U.S.L.W. 3528 (U.S. Jan. 11, 1982) (No. 81-878), in which a restaurant challenged a Massachusetts statute prohibiting the sale of alcoholic beverages within 500 feet of a church or school if the church or school objected to the sale. The court concluded that the state action exemption did not apply because there was no clearly articulated and affirmatively expressed policy of the state to create the "anticompetitive effects" that the statute in fact created. Id. at 99-100.

\textsuperscript{95} See Yentsch v. Texaco, Inc., 630 F.2d 46, 56-57 (2d Cir. 1980); Siegel v. Chicken Delight, Inc., 448 F.2d 43, 47 (9th Cir. 1971), cert. denied, 405 U.S. 955 (1972).
In *Chatham Condominium Associations v. Century Village, Inc.*, the plaintiffs alleged that the defendants had illegally tied a ninety-nine-year lease of commonly-held recreational property to the sale of individual condominium units. The defendants argued that the individual units and the common recreational areas composed a single product, a "leisure living" package that the defendant was marketing.

The circuit court suggested that tying arrangements in the condominium market should be tested on a sliding scale:

> At one end of the spectrum, . . . the requirement that purchasers of condominiums also buy an undivided interest in certain common areas does not involve two separate products. At the other end of the spectrum, however, it would clearly be improper to require condominium purchasers to patronize, for example, a local shopping center owned by the condominium developers; in this hypothetical situation, two separate products are clearly involved.

The court, however, remanded the case for further argument on the two-product issue.

Almost every product on the American market can be divided into constituent parts and sold separately. The courts, however, are unlikely to accede to a customer's demand that a defendant selling a three-piece suit be forced to sell the pants alone, even if the pants alone are a "separate" product. Generally, courts deciding whether two items constitute two distinct "products" have relied more on common sense than on economic analysis. Each of these decisions makes

---

96. 597 F.2d 1002 (5th Cir. 1979).
97. *Id.* at 1012.
98. *Id.* at 1013.
100. For example, the installation of electric connections has been held to be the same "product" as the electricity itself because provision of electric lines is merely an ancillary service to providing electricity. *See* Washington Gas Light Co. v. Virginia Elec. & Power Co., 438 F.2d 248, 253 (4th Cir. 1971). The tying of a mandatory service and repair contract to sales of a community antenna for remote communities has been held to be a single product, because of the seller's interest in developing a reputation for quality and service in a new market. *See* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd* *per curiam*, 365 U.S. 567 (1961). Advertising in morning newspapers and advertising in evening newspapers have been held to constitute a single product because the "product" sold was not two advertisements but the single product of access to readership. *See* Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613-14 (1953). On the other hand, a general news service, a business news service, and a regional news service transmitted over the same facilities by a news gathering agency are three different products, largely because the three services could probably be delivered separately and a substantial number of customers would have preferred separate delivery. *See* Associated Press v. Taft-Ingalls Corp., 340 F.2d 753, 764 (6th Cir.), *cert. denied*, 383 U.S. 820 (1965).
sense on its facts. Neither the Supreme Court nor the lower courts, however, has articulated a generalized "single product" theory.

Courts have noted occasionally that efficiency should play an important role in questions of tying product determination, but have not explained what "efficiency" means. If a high percentage of customers prefer to buy two items together and it is cheaper for the defendant to market the two together, and if the cost savings would be substantially lost were the defendant additionally required to offer each item separately, then the two items should be considered a single product for purposes of the law of tying. For example, most shoe customers buy a left shoe and a right shoe simultaneously. A relatively small number of prospective purchasers enter the market for a left shoe alone. If a shoe store were required to sell a left shoe to the occasional customer who wanted one, the store would have increased costs for administration, stocking, returns, and accounting. These extra costs would be passed on to all consumers. If the store refused to sell shoes except by the pair, the benefit to the class of consumers who prefer their shoes by the pair might be greater than the loss to the class of consumers who want left shoes alone. In that case, society would benefit if the store were not required to offer to sell a single left shoe.

Similarly, the tying of condominium sales to sales or leases of common services and facilities may be more efficient than independent sales. A purchaser of a condominium in a large development purchases more than the space contained within the walls of his or her unit. A condominium unit must include an interest in certain common space, such as halls, exterior walls, and a common basement. In addition, a condominium is likely to be tied to an interest in certain common areas or facilities that are not absolutely necessary to the physical

101. See Anderson Foreign Motors v. New England Toyota Distributors, 475 F. Supp. 973, 982 (D. Mass. 1979) (integration in the manufacturing process could yield a conclusion that two functionally distinct items were in fact a single product); ILC Peripherals Leasing Corp. v. IBM, 448 F. Supp. 228 (N.D. Cal. 1978) (same).

102. The single-product test suggested here is derived from a variation of Pareto Optimality known as Kaldor-Hicks Efficiency. A particular rule is Kaldor-Hicks efficient if it yields a distribution of resources such that if the resources were distributed any other way the winners would not gain enough so that they could fully compensate the losers, whether or not they actually compensate them. Under the concept of Kaldor-Hicks efficiency, a marketer of shoes should be able to tie left shoes to right shoes if customers for the combination, a pair of shoes, would gain more from the requirement than the potential customers of a left or right shoe alone, who would be forced to buy a pair in order to acquire a single shoe, would lose. See Coleman, Efficiency, Exchange, and Auction: Philosophic Aspects of the Economic Approach to Law, 68 CALIF. L. REV. 221 (1980). The test assumes that the goal of the antitrust laws is to maximize consumer welfare. See generally R. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).
integrity of an individual home, but that nevertheless add to the quality of life. The typical common space in a condominium development might include a parking lot, a swimming pool, tennis courts or other recreational facilities, a garden, a club house, a sauna, laundry facilities, trash collection facilities, lawns and shrubbery, outdoor furniture, and an external security service.\textsuperscript{103} It could impose a difficult, and perhaps insurmountable, burden on developers to price various elements of this common space individually and give purchasers a chance to "opt out" of one item or another. The additional administrative costs would be passed on to the purchasers. Furthermore, preventing those who opt out from later using the facilities would create additional costs and inefficiency. For example, although the technology might be available to ensure that only authorized participants use the common swimming pool, the enforcement costs would be high and the security devices could be offensive to the kind of atmosphere that condominium dwellers would like to maintain. Those common items that could be provided just as efficiently by independent sources, however, such as trash collection service, may be "separate products" under an efficiency analysis.

Although courts have often considered non-economic criteria in deciding whether a tying item and a tied item constitute a single product,\textsuperscript{104} one factor not generally considered is local law. Deference to state and municipal land development policy could be a valuable mechanism for harmonizing the federal antitrust laws with local regulation. For example, if a federal court faced an allegation that a bicycle salesperson was violating section 3 of the Clayton Act by refusing to sell bicycles without headlights, the federal court ought to consider a city ordinance that requires all bicycles sold within the city to be equipped with headlights. It is unlikely that the framers of the antitrust laws intended the Clayton Act to interfere in local policy to the extent of striking down such relatively unoffensive and valuable safety ordinances.\textsuperscript{105}


\textsuperscript{105} If the regulation of safety equipment for bicycles is a traditional governmental activity, the tenth amendment might create a special exemption from the antitrust laws. See Jordan v. Mills, 473 F. Supp. 13 (E.D. Mich. 1979); see generally National League of Cities v. Usery, 426 U.S. 833 (1976).
Local Land Use Policy as an Element of the "Separate Product" Determination

Many applications of federal antitrust laws to tying arrangements in real estate would not conflict with local policy. In such situations, there is no reason for federal deference.\(^\text{106}\) When federal law and local land use policy conflict, however, because of a local determination of what constitutes a single product, federal courts should defer to local judgment. For example, local ordinances commonly require that a condominium or apartment developer provide at least one off-street parking space for each residential unit it sells.\(^\text{107}\) In such a situation, a federal court could quite appropriately consider local land use policy in determining whether the living unit and the parking spaces are distinct "products" for the purposes of the federal antitrust laws.

In general, the condominium market is regulated intensely by state and local statutes. For example, the balance between condominium living units and open recreational space is often dictated by municipal ordinances, as part of a planned unit development or planned unit residential development.\(^\text{108}\) Such ordinances evidence a municipality's overall policy regarding housing density and the availability of open recreational space.\(^\text{109}\)

---

\(^{106}\) For example, the tying of mobile home lots to mobile homes constitutes an illegal tying arrangement under federal and many state antitrust laws. See note 2 & accompanying text \textit{supra}. Restrictive covenants that require purchasers to buy their building materials from the seller, see note 4 & accompanying text \textit{supra}, or to list their homes at the time of resale with a particular selling agency, are also prohibited by antitrust laws. See note 3 & accompanying text \textit{supra}. In most cases, local government policy does not address such restrictions.


\(^{108}\) The dramatic rise of the planned unit development in the late 1960s and the 1970s was largely a product of the dramatic increase in the volume and cost of housing construction, and the continuing insistence of municipalities that open recreational space be provided in residential areas. See 5 P. Rohan, \textit{Zoning and Land Use Controls} §§ 32.01-.02 (1978) [hereinafter cited as \textit{Zoning}]. See generally \textit{Symposium: Planned Unit Development}, 114 U. Pa. L. Rev. 3 (1965). Cluster housing in planned unit developments can save money both in planning and construction and in ongoing maintenance. Furthermore, cluster housing may enable groups of residents to purchase facilities, such as swimming pools, that would be too expensive for the individual residents. Cluster development can provide additional security for the elderly, as well as a certain amount of relief from the maintenance and yard expense that ordinarily accompanies ownership of a single-family home. See W.H. Whyte, \textit{The Last Landscape} 225-52 (1970). See generally \textit{U.S. Dept. of Interior, Bureau of Land Management, Technical Bulletin 1, Where Not to Build: A Guide for Open Space Planning} (1968); Lloyd, \textit{A Developer Looks at Planned Unit Development}, 114 U. Pa. L. Rev. 3 (1965).

\(^{109}\) See generally 5 \textit{Zoning}, \textit{supra} note 108, §§ 32.01-.02.
Open Space and the Planned Unit Development

Many cities today have density restrictions that limit the amount of housing that can be placed on a particular tract of land and ensure the availability of open land. In traditional subdivisions of single-family homes, most of this open land consists of individually-owned lots and yards, and the municipal restrictions take the form of minimum lot-size requirements. Planned unit developments, on the other hand, operate as exceptions to these traditional allocations of building space. In a planned unit development, the prevailing density requirements apply to the entire development as a unit, rather than to the individual lots. In this way, the developer is permitted to group or "cluster" the housing into integrated units to save on construction costs. In exchange for individual lots or yards of a certain size, the planned unit development contains a common open space, which may be occupied by recreational facilities such as tennis courts or swimming pools, and which offsets the increased density of the housing itself.

A typical planned unit development is described in Orinda Homeowners Committee v. Board of Supervisors. In Orinda Homeowners Committee, the Board of Supervisors, on the recommendation of the county planning commission, rezoned a 187 acre parcel for the development of residential clusters mixed with single family homes. The plan required that no more than eight units could be clustered on a single acre and that the overall density of the project was to be about two units per acre. Approximately 345 dwelling units were to be constructed. This overall density requirement reflected the density requirements of the county's master plan. The proposal for the planned unit development also required that each cluster within the parcel be approved by the County Director of Planning. The developer thus was required by a local land use statute to offer both the individual housing units and the common open land together; the housing could not be built and sold unless the common open space was provided.

112. See 5 Zoning, supra note 108, §§ 32.01-.02; Hanke, Planned Unit Development and Land Use Intensity, 114 U. Pa. L. Rev. 15 (1965). Hanke defines a planned unit development as "a residential land subdivision of individually owned homes with neighborhood owned open areas and recreation facilities." Id. at 18.
114. Id. at 772, 90 Cal. Rptr. at 90. The case, not an antitrust case, held that the rezoning was valid.
The planned unit development is generally more intensely regulated than ordinary single-family development because control of common buildings and land areas can generate a host of problems. 115 Despite their economic advantages, planned unit developments have some inherent liabilities. The common, open property is necessarily shared space, and some owners receive more value from it than others. Certain decisions that the single-family homeowner makes alone must, in a planned unit development, be made by a group.

In most municipalities, proposed condominium developments are subject to subdivision and zoning restrictions, just as any other residential project would be. Some states have enacted condominium statutes, however, that effectively deprive municipalities of a great deal of this power. In any case, land use in the condominium development is intensely regulated by either municipal or state authority. 116

The application of the federal antitrust law of tying to planned unit developments presents an interesting analytical problem. A developer who sells a house only on the condition that the purchaser also buy the front yard does not violate the federal antitrust laws, particularly when the existence and minimum size of the front yard are dictated by state or municipal density restrictions. A house and its yard

115. See generally 5 ZONING, supra note 108, §§ 32.01-.02.

116. Most state statutes regulating condominiums provide that condominium developments must comply with local subdivision and zoning ordinances, including local provisions with respect to planned unit developments. A few states, however, create special exemptions for condominium projects. See 4B R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 633.32 (1979) (survey of state provisions). The 1977 Florida Condominium Act provides that condominiums shall conform to local zoning ordinances, with the qualification that "such requirement[s] shall be equally applicable to all buildings and improvements of the same kind not then, or thereafter to be, subjected to the condominium form of ownership." FLA. STAT. ANN. § 718.507 (West Supp. 1981). Thus, under the Florida statute a condominium development would be subject to local zoning regulation. See David v. B. & J. Holding Corp., 349 So. 2d 676 (Fla. Dist. Ct. App. 1977). In general, local zoning ordinances apply to condominiums in California. See CAL. CIV. CODE § 1370 (West Supp. 1981): "Unless a contrary intent is clearly expressed, local zoning ordinances shall be construed to treat like structures, lots, or parcels in like manner regardless of whether the ownership thereof is divided by sale of condominiums or into community apartments . . . ." See also Norsco Enterprises v. City of Fremont, 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976). For a discussion of the application of planned unit development ordinances to condominiums in California, see 13 W. BIEL & C. SENEKER, CALIFORNIA REAL ESTATE: LAW & PRACTICE § 471.05 (1981). Some municipalities have passed zoning ordinances that virtually prohibit condominium construction. See Transland Properties, Inc. v. Board of Adjustment, 18 N.C. App. 712, 198 S.E.2d 1 (1973). Other municipalities have been required by state law to permit condominium development. See Berenson v. Town of New Castle, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975). See generally Welfeld, The Condominium and Median-Income Housing, 31 FORDHAM L. REV. 457 (1963); Note, Condominiums and Zoning, 48 ST. JOHN'S L. REV. 957 (1974); Annot., 71 A.L.R.3d 866 (1976).
are a single "product" for the purpose of the tying laws. In a planned
unit development, twenty housing units might be clustered into a single
building on one end of a parcel, while an open recreational area the
size of twenty typical yards is located at the other end. Consistency
with a community's general master plan might dictate such a require-
ment, and the general theory of land-use planning suggests that high-
density housing should be offset by a certain amount of open land.117
On the other hand, when housing and open land are segregated, the
two begin to look more like distinct "products" and the development
begins to resemble a tying arrangement.

The "separate product" rule provides an excellent basis for federal
antitrust deference to state or local policy. In a planned unit develop-
ment, the relationship between individually owned housing units and
common recreational land areas is a product of a local statute that rep-
resents a substantial effort by local government to "integrate" the living
situation of the homeowner. Planned unit development rests on a local
determination that a certain amount of integration between living ac-
commodations and the availability of open space is good for the com-
munity. As the Supreme Court of Florida noted, under Florida law,
"tying recreational facilities to housing is at the heart of the condomin-
um concept, a concept which has been repeatedly sanctioned both by
the legislature and by the courts . . . ."118 If a state has developed
such a relevant land use policy, then federal courts applying the federal
antitrust laws ought to credit that judgment and regard the condomin-
um unit and the recreational land as a single "product."

117. See, e.g., 2 ZONING, supra note 108, § 12.01[1], at 12-2 & nn.1-2 (1978); U.S. DEP'T
OF INTERIOR, BUREAU OF LAND MANGEMENT, TECHNICAL BULLETIN 1, WHERE NOT TO
See also Daytona Dev. Corp. v. Bergquist, 308 So. 2d 548 (Fla. Dist. Ct. App. 1975), in
which the plaintiff, a condominium purchaser, sought to quiet his title with respect to an
interest in the common recreational areas. In Daytona, the Declaration of Condominium
required by state law described the common recreational area, but the purchaser's grant
failed to convey to him a pro rata share in it. The court considered the Florida Condomin-
ANN. § 718.103(9) (West Supp. 1981)), which defined a condominium parcel as "a unit to-
gether with the undivided share in the common elements which is appurtenant to the unit."
The court concluded that under Florida law "all condominium units have an undivided
share of the common elements and neither can exist separately from the other." Id. at 550.
The appellate court affirmed the trial court judgment quieting the plaintiff's title and effec-
tively reforming the plaintiff's deed to include an interest in the common areas.
Areas for Stricter Antitrust Scrutiny

Not every aspect of condominium projects should be outside the reach of the federal antitrust laws, even if local statutes require the buyer to take an interest in the common elements. The tied products and services provided by some sellers exceed the policy governing local land use statutes and impose restraints that local regulations either do not contemplate or do not deal with effectively.

The contrast between two types of alleged tying arrangements that have been the subject of federal litigation illustrates the differences between areas appropriate and inappropriate to federal antitrust law. The first involves the tying of a sale of a condominium unit and the lease, rather than the sale, of common land. The second involves a developer's requirement that the condominium buyer employ the developer or an agent to service and maintain the common areas. Characteristic of both of these arrangements is that the seller or developer maintains a profitable interest in the property for a long time after the purchaser has acquired his or her interest.

Leasehold Condominiums

Several recent antitrust cases have involved allegations that the defendant-developer was illegally tying the sale of the individual condominium unit to the long-term lease of the common recreational land and facilities. Such condominium packages, commonly called "leasehold condominiums," create great potential for abuse not ex-

119. See cases cited in note 6 supra.
120. See, e.g., Miller v. Granados, 529 F.2d 393 (5th Cir. 1976).
122. Some commentators, such as Professors Powell and Rohan, would use the term "leasehold condominium" to apply only to those developments in which the structural units, to be purchased in fee, sit on land all of which is conveyed under a long-term lease. See 4B R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 633.34[2], at 900.135 n.39 (1979). Professors Powell and Rohan would distinguish this situation from the one in which the structures and the land beneath them are acquired by the purchasers in fee but the recreational facilities are leased. Id. § 633.35 [3], at 912.1-912.2. However, the statutes generally do not make such a distinction. See UNIFORM PLANNED COMMUNITY ACT § 1-103. The Florida Condominium Act of 1977 contains a provision on leasehold condominiums that states the following: "A condominium may be created on lands held under lease or may include recreational facilities or other common elements or commonly used facilities on a leasehold . . . ." FLA. STAT. ANN. § 718.401 (West Supp. 1981). The Uniform Condominium Act generally bars the "leasehold condominium" that consists of a fee estate in the condominium unit and ground beneath but a separate leasehold estate in certain recreational property. See UNIFORM CONDOMINIUM ACT § 3-105. However, the Uniform Act
isting in the simple sale of a condominium with an undivided interest in the common property. Unless restrained by statute or contract, the lessor is free to raise rents without limit on the common land. The lessee may avoid rent increases by selling the condominium unit and moving out, but is unlikely to do so after establishing a home there. Therefore, the lessee may have little bargaining power with the lessor.123

Nevertheless, the leasehold condominium concept can provide a valuable service by enabling a prospective purchaser to qualify for home financing. In a traditional condominium package, the buyer must qualify for a mortgage loan sufficient to purchase both the unit and an interest in the common elements. In a leasehold condominium, however, the buyer purchases only the individual unit and leases the rest. The purchase price, and therefore the loan for which he or she must qualify, is proportionately smaller.124

would permit a temporary leasehold estate in recreational areas, which would eventually revert to the developer. See id. § 2-107. Both the Uniform Act and the recently drafted Model Condominium Code are discussed in Rohan, The "Model Condominium Code"—A Blueprint For Modernizing Condominium Legislation, 78 COLUM. L. REV. 587 (1978). In general, Professor Rohan is opposed on policy grounds to the concept of the leasehold condominium. Id. at 598. For a recent definition of the leasehold condominium in California, see Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981).

123. In some states, statutes regulating leasehold condominiums may protect lessees. E.g., FLA. STAT. ANN. § 718.401 (West Supp. 1981); see UNIFORM PLANNED COMMUNITY ACT § 2-106. See generally 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW & PRACTICE (pt. 3) § 15B.09 (1981); 1A id. § 18A.04.

124. Although the legal differences between a purchase subject to a mortgage and a conveyance by lease are substantial, the economic differences are not. A lease-purchase plan under which the homebuyer purchases the condominium unit but leases the interest in the common recreational area is a mechanism for sharing the risk of the mortgagee somewhat analogous to the provision of first and second mortgages by two different mortgagees. In the lease-purchase plan, a financial institution provides the capital for the purchase of the condominium unit, while the developer, as the lessor, invests the capital for long-term ownership of the common elements. Each holds its own separate reversionary interest or right of re-entry if the buyer defaults. In this way, the mortgagee effectively finances a substantially smaller percentage of the entire package; its risk is reduced, and the amount of money it is loaning is smaller. A bank might be willing to loan a particular buyer enough money to finance the purchase element of a lease-purchase plan, while it would be unwilling to finance a purchase of the entire package. In short, by buying the condominium and leasing the common recreational areas, a purchaser might be able to qualify for a bank loan, while he or she would not be able to qualify to purchase the entire package. For arguments that some purchasers might be able to qualify for a leasehold condominium, but not for a complete purchase, see D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 146-56 (1970). The authors estimated that, during the 1950s, units in Florida leasehold cooperatives sold on the average for prices one third less than comparable units in fee cooperatives. Id. at 148; see also Levinson v. Maison Grande, Inc., 517 F. Supp. 963, 968 (S.D. Fla. 1981) (lease-purchase arrangement can lower purchase price); 4B R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY § 633.34[2] (1979) (financial advantages of marketing condominiums bot-
For this reason, some states explicitly recognize and authorize leasehold condominiums. The recently drafted Uniform Planned Community Act, a model for state regulation, provides that the declaration establishing a leasehold planned community "shall allocate a fraction or percentage of the common expenses of the association . . . to each unit in the planned community, and state the formulas used to establish those allocations." Under the Uniform Act, the leasehold interest in the common area must be allocated to all the owners of the individual units, on a per-unit basis. Purchasers of a single condominium unit would not be permitted to opt out of their leasehold interest in the common elements. The Uniform Planned Community Act thus creates precisely the situation that several purchasers have complained of as illegal tying arrangements.

By proper regulation, however, local legislators can turn a potentially harmful arrangement into one beneficial to home buyers. Florida's Condominium Act, for example, provides several safeguards against abuse. It gives the association of condominium owners a qualified right of first refusal if the lessor ever decides to sell its interest in the common elements. It declares void on public policy grounds any provision in a lease that permits the lessor to escalate the annual rental fee beyond a fixed percentage. Finally, it requires that in all leasehold condominiums the lease term be at least fifty years, and that rent not be collected for promised facilities until they are completed.

toned on a leasehold in the land). One advantage of the lease-purchase arrangement is a possible reduction in the down payment. One commentator estimates that a unit requiring a downpayment of $8000 if purchased entirely in fee would require only $6800 down if part of a leasehold purchase. See generally 4A P. Rohan, REAL ESTATE FINANCING, ch. 4 (1976).
126. UNIFORM PLANNED COMMUNITY ACT § 2-107(a).
127. Id. § 2-107(b): "If units may be added to or withdrawn from the planned community, the declaration must state the formulas to be used to reallocate the allocated interests among all units included in the planned community after the addition or withdrawal." (emphasis added).
129. Id. § 718.401(6)(b).
130. Id. § 718.401(8)(a).
131. Id. § 718.401(5), which provides in part that "[a] condominium may be created on lands held under lease or may include recreational facilities or other common elements or commonly used facilities on a leasehold, if, on the date the first unit is conveyed by the developer to a bona fide purchaser, the lease has an unexpired term of at least 50 years." See also CAL. CIV. CODE § 783 (West Supp. 1981) (condominium defined as an estate in real property which may be "either (1) an estate of inheritance or perpetual estate, (2) an estate for life or (3) an estate for years, such as a leasehold or a subleasehold."); Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 174 Cal. Rptr. 136 (1981).
The Florida Condominium Act may create a state action exemption from the antitrust laws and thus place leasehold condominiums that comply with the Florida statute beyond the reach of the Sherman and Clayton Acts. At the same time, the Act effectively authorizes the leasehold condominium in Florida, and could thus provide the rationale for a federal court to decide that the purchase of a condominium unit and the lease of the recreational facilities are one "product" for the substantive requirements of the tying laws.

By enacting a comprehensive statute rather than simply banning leasehold condominiums, state legislators are declaring a policy that leasehold condominiums are a valuable mechanism for providing owner-occupied housing. Application of federal antitrust laws here would not only frustrate the land-use goals of state legislators, but would regulate in an area that needs no additional regulation.

Tied Maintenance Contracts

Other condominium tying arrangements, not involving land use policy, may allow more room for federal intrusion. In Miller v. Granados, a class action tying suit brought by condominium owners under the Sherman Act, the owners charged that the developer tied the sale of individual condominium units to an "operational management agreement" under which the developer provided various goods and maintenance services to the condominium development. The agreement, which was forced upon the unit purchasers, provided for a quarterly fee to be paid to the management for these services and provided that this fee could be increased periodically in accordance with the Cost of Living Index. The district court dismissed the action, but the Fifth Circuit remanded, noting that the claim might state a cause of

133. But see notes 79-88 & accompanying text supra.
136. 529 F.2d 393 (5th Cir. 1976).
137. Id. at 395.
action under federal antitrust laws.\textsuperscript{138}

Tying arrangements under which developers force maintenance contracts onto unit purchasers are generally subject to minimal state regulation. If such state regulation is absent, use of the federal antitrust laws on behalf of purchasers is appropriate. State governments, however, might perceive a value in developer maintenance contracts and permit them, subject to active regulation by the state.

A developer's maintenance contract with each condominium owner can benefit both the developer and the public during the period in which the developer is selling condominium units, but still owns a significant number of them. When a developer is trying to market the development, it has an interest in the maintenance and general appearance of the development. For this reason, Florida's Condominium Act requires that any reservation made by the developer "prior to assumption of control of the association by unit owners" permitting the developer to provide management and maintenance services "shall be fair and reasonable."\textsuperscript{139} The Florida Act also provides a mechanism by which the association, once it has obtained control, may be released from this initial obligation. When seventy-five percent of the ownership in the individual units has passed to the purchasers, the purchasers can cancel the initial management contract by a vote of seventy-five percent or more of the individual owners.\textsuperscript{140} Finally, the Florida Act declares "void for public policy" any clause in the management's maintenance contract reservation that permits it to escalate the management fees.\textsuperscript{141}

These provisions of the Florida Condominium Act are generally a more efficient mechanism for protecting the condominium developers and purchasers than are the federal antitrust laws. The Act recognizes and administers at the state level the developer's interest in the maintenance of a condominium development's common areas during the transitional period of construction and marketing. The federal antitrust laws also have recognized a value in a seller's control over maintenance

\textsuperscript{138} Id. at 396-97.


\textsuperscript{141} Id. § 718.302(4). The provisions of the statute, however, may not apply with respect to agreements entered into before the statute was passed. See \textit{Fleeman v. Case}, 342 So. 2d 815 (Fla. 1977); see also \textit{Kaufman v. Shere}, 347 So. 2d 627 (Fla. Dist. Ct. App. 1977). Whether the federal antitrust laws should apply in a case in which enforcement of the state statute would constitute impairment of a previously existing contract is a different question. In such a case, the absence of state regulation should invite federal scrutiny.
of a product during an initial period of marketing and development. Moreover, the Florida statute provides a mechanism by which the individual owners can relieve themselves of the burden of this “tying arrangement” when the developer’s legitimate interest has expired. In such a situation, it would be appropriate for the federal courts to defer to state policy and hold that the sale of a condominium unit and the developer’s provision of maintenance for the common elements are “one product” during this initial developmental phase.

Conclusion

Several recent tying arrangement cases have involved alleged restraints in the residential housing market. Often the substance of these tying arrangement claims lies in an area that is regulated by state or local government.

Federal antitrust intervention into state and local land development policy presents a novel use of the Sherman and Clayton Acts that was not contemplated by their framers. As a matter of policy, federal law should not intrude too deeply into such state and local regulation. This is particularly true when the federal interest to be protected pertains to regulation of the marketplace and not to some important federally-protected individual right, such as the right to be free from race or sex discrimination. The antitrust laws generally fall into the first of these categories.

Under current law, the commerce clause of the United States Constitution is not an effective limit on the intrusion of federal antitrust law into the locally regulated housing market. Two limitations within the antitrust laws, however, can restrain excessive federal intervention. First, the “state action” exemption can place qualifying state regulatory programs out of reach of the federal antitrust laws. Although the state action exemption has been well-developed in some areas, its precise boundaries with respect to local land use regulation are uncertain. Second, a tying arrangement must involve separate tying and tied products. When determining whether two products are separate, a federal court ought to defer to a local determination that the two belong together.