UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS
EAST SAINT LOUIS DIVISION

Marion Healthcare LLC, Plaintiff,	)	
v.	)	Civil Action No. 3:12-CV-00871
Southern Illinois Healthcare, Defendant.	)	

STATEMENT OF INTEREST ON BEHALF OF
THE UNITED STATES OF AMERICA

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INTEREST OF THE UNITED STATES

The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States is principally responsible for enforcing the federal antitrust laws, *United States v. Borden Co*., 347 U.S. 514, 518 (1954); *see* 15 U.S.C. §§ 4, 25, and has a strong interest in their correct application.

BACKGROUND

Marion HealthCare, LLC (Marion) is an ambulatory surgery center that provides outpatient surgical services in southern Illinois. Southern Illinois Healthcare (Southern Illinois) is a healthcare system operating various acute-care hospitals that provide inpatient and outpatient surgical services, and has partial ownership in two ambulatory surgery centers that provide outpatient surgical services, in the same area. In 2012, Marion sued Southern Illinois, alleging that Southern Illinois had entered into exclusive agreements with health insurers that prohibited those insurers from contracting with competing providers, including Marion. Marion claims, *inter alia*, that these exclusive agreements unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, because they substantially foreclose Marion and other competitors from commercial health insurance contracts for outpatient services.

On October 13, 2017, Southern Illinois moved for summary judgment, arguing that *Methodist Health Services Corp. v. OSF Healthcare System*, 859 F.3d

408 (7th Cir. 2017), "disposes of [Marion's] claims." Mot. Summ. J., Dkt. 313, at 1. According to Southern Illinois, *Methodist* establishes that complaints "brought against exclusive contracts that are not long-term and do not result in 'sky-high prices' or 'bankruptcy' for other competitors in the market do not survive summary judgment in the Seventh Circuit." *Id.* at 4. Marion argued that *Methodist* was distinguishable and should be limited to its facts. Opp'n. to Mot. Summ. J., Dkt. 337, at 3. On reply, Southern Illinois reiterated its position that *Methodist* established a rule of per se legality for short-term exclusive-dealing arrangements because, "[i]n this circuit, a smaller rival can compete for short-term exclusive contracts as a matter of law." Reply Br., Dkt. 352, at 3-5.

ARGUMENT

Southern Illinois is wrong to argue that the Seventh Circuit has held that short-term exclusive contracts are legal "as a matter of law." Mot. at 25. The Supreme Court has long held that exclusive contracts are evaluated under the rule of reason, and may be condemned if their "practical effect" is to foreclose a substantial portion of the market to competition. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-28 (1961). Where the uncontroverted evidence indicates that the challenged exclusive contracts are nominally of limited duration, a plaintiff bears the burden of proving that the contracts nevertheless are exclusionary.

Whether the plaintiff can compete in the face of the exclusive contracts remains a question of fact.[1]

1. Exclusive dealing is one of many practices that can be anticompetitive in particular circumstances, such as when a seller with a material advantage demands exclusive deals to weaken or eliminate its smaller rivals. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006). But exclusive contracts are not inherently suspect under the antitrust laws, and indeed, competition can thrive in a market with exclusive contracts. "Exclusive contracts are often ways of organizing the market to encourage more competitive pricing than might otherwise occur . . . [by] grouping purchases together into a single contract in order to reduce the costs of using the market." XI Herbert Hovenkamp, Antitrust Law ¶ 1811(c), at 156 (3d. ed. 2011). Intense "competition-for-the-contract" can benefit customers. *See Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996).

Thus, exclusive-dealing claims are analyzed under the rule of reason. Courts require a threshold showing of substantial market foreclosure. *See Tampa Elec.* 365 U.S. at 321. This analysis requires consideration of "the structure of the market for the products or services in question," *Jefferson Parish*, 466 U.S. at 45; *see also ZF*

[1] The United States addresses only the proper reading of *Methodist* and other cases involving exclusive-dealing claims. The United States takes no position on the correct application of law to fact in this case or on the merits of Marion's antitrust claim.

Meritor, LLC v. Eaton Corp., 696 F.3d 254, 284 (3d Cir. 2012), to determine the "practical effect" of the exclusive arrangement, *McWane, Inc. v. FTC*, 783 F.3d 814, 834 (11th Cir. 2015) (citing *Tampa Elec.*, 365 U.S. at 326-28).

The duration of an exclusive contract may be an important factor in determining an exclusive agreement's "practical effect." If each customer's business is frequently up for competition as a contract expires, foreclosing a substantial part of the market might be impossible. *Paddock Publ'ns*, 103 F.3d at 47. And yet, even at-will exclusive contracts can foreclose if there is no meaningful opportunity to compete for the business. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 194 & n.2 (3d Cir. 2005). Thus, the formal duration of a contract is not dispositive of its potential for market foreclosure. Exclusive dealing is anticompetitive when it deprives rivals of a genuine opportunity to compete, and plaintiffs must have an opportunity to show that even a short-term exclusive-dealing arrangement makes "it economically infeasible" for the buyer to switch suppliers. *McWane*, 783 F.3d at 834; *see also ZF Meritor*, 696 F.3d at 284.

In markets where healthcare providers compete to be included in insurers' networks, a contract's nominal duration may reveal very little about whether it is "economically infeasible" for an insurer to switch providers. Insurers contract with providers to build networks that appeal to employers. Consumers care which providers are in-network. *See FTC v. Advocate Health Care Network*, 841 F.3d 460, 470 (7th Cir. 2016) ("Getting an appendectomy is not like buying a beer; one Pabst Blue Ribbon or Hoegaarden may be as good as another, no matter where they are bought[, but f]or surgery patients, who their surgeon will be matters, the hospital's reputation matters, and the hospital's location matters."). An insurance product may be unmarketable if it "lacks services in a particular region," *Advocate Health*, 841 F.3d at 475, or a must-have hospital, *see id.* at 470-71. A must-have hospital, therefore, could be in a position to use exclusive contracts to deny critical patient volume to its rivals. And it is not true, as a general matter, that competing providers can easily overcome a hospital's must-have status by replicating its services. The required investment could be enormous and barred by state law or regulators. For a small provider, achieving a high quality of care on many procedures done much more frequently by large hospitals can be impossible. Accordingly, courts evaluating an exclusive-dealing claim must evaluate proffered evidence on competition for the exclusive contract or a lack thereof, on the willingness of the party granting exclusivity to deal exclusively with others, on opportunities for others to compete for exclusive deals, and on anything else pertinent to the contract's impact on competition.

2. Southern Illinois would have this Court look no further than the nominal duration of its exclusive contracts because it erroneously contends that the Seventh Circuit has held short-term exclusive contracts "legal as a matter of law." Mot. at 25 (citing *Methodist*, 859 F.3d at 410). But *Methodist* does not adopt a rule of *per se* legality for short-term exclusive contracts. Instead, it applies the rule of reason and holds only that the *Methodist* plaintiffs had failed to establish a triable issue as to the existence of the necessary harm to competition.

Methodist Health Services (Methodist) and OSF Healthcare System (Saint Francis) operate hospitals in the Peoria area. Methodist claimed that Saint Francis's exclusive contracts with insurance companies unreasonably restrained trade, monopolized trade, and attempted to monopolize trade in markets for the sale of hospital services to commercial insurance companies in violation of Sections 1 and 2 of the Sherman Act and the Illinois Antitrust Act. Compl., *Methodist Health Servs. Corp. v. OSF Healthcare Sys.*, No. 1:13-cv-01054 (C.D. Ill. Feb. 5, 2013). Methodist alleged that Saint Francis used its "must-have" status as the area's only provider of certain acute care services to induce commercial insurers to exclude Methodist and other area hospitals from their networks. *Id.* ¶¶ 3, 60-62.

The district court granted summary judgment to Saint Francis, concluding that the undisputed facts established that the maximum foreclosure rate from Saint Francis's contracts was 20-22 percent. *Methodist Health Services Corp. v. OSF Healthcare Sys.*, No. 1:13-cv-01054, 2016 WL 5817176, *13 (C.D. Ill. Sep. 30, 2016). This degree of foreclosure, it ruled, was insufficient to support Methodist's exclusive-dealing claim. *Id.* at *14. The district court noted that Saint Francis's exclusive deals may not be anticompetitive given their short duration, but did not grant summary judgment on that ground. *Id.* at *10.

The Seventh Circuit affirmed. *Methodist*, 859 F.3d at 409-11. The court found "no evidence" that the contracts had a significant exclusionary effect because they expired on a regular basis and Methodist successfully competed to secure "its own exclusive contracts with insurance companies." *Id.* at 410-11. Moreover, it found no reason in the record why Methodist was not able to "duplicate the special services" that made Saint Francis a "must have" hospital, and thus improve Methodist's ability to compete for exclusive deals. *Id.* at 410. And, the court found "no evidence" of harm to competition from Saint Francis's exclusive contracts in the form of elevated prices or the loss of an important competitor. *Id.*[2] In short, the plaintiff had failed to make the required showing that the defendant's contracts harmed competition. Thus, "[a]s the district judge concluded . . . Methodist failed to make a case." *Id.* at 411.

Southern Illinois' effort to transform *Methodist* into a rule of *per se* legality is unsound. To be sure, *Methodist* relies on the short duration of the exclusive contract in assessing the plaintiff's claim of exclusion. But the court did not limit its consideration to the contract duration, as would be expected if the court were invoking the rule Southern Illinois advocates. Instead, the court affirmed summary judgment because, in its view, the evidence demonstrated healthy competition-for-the-contract (Methodist had "made its own exclusive contracts with insurance companies") and Methodist had proffered "no evidence" that it could not have placed itself on equal footing to compete for the contracts that it claimed it could not win. *Methodist*, 859 F.3d at 410-11.

[2] The panel observed that exclusive contracts "might result in sky-high prices" or the "bankruptcy of the other hospitals," but it did not hold that exclusive dealing was unlawful only when it had such extreme consequences. *Methodist*, 859 F.3d at 410.

Other precedent in this circuit takes the same, fact-specific approach. For example, in *Paddock Publications*, the panel rejected the exclusive-dealing claims because the plaintiff presented no evidence that it could not successfully bid for the relevant exclusive deal. 103 F.3d at 44, 47 (relying upon the fact that the plaintiff never tried to outbid its larger competitors by "seeing whether money could persuade a supplemental news service to cut off one of the larger papers . . . either on a total compensation basis or a per-subscriber basis" and that the plaintiff "has never tried to make a better offer"). And in *Roland Machinery Co.*, the court recognized that even when the challenged contract was of limited duration—90-days in that case—exclusive-dealing agreements still must be analyzed to see whether the "anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it." *Roland Mach. Co. v. Dresser Indus. Inc.*, 749 F.2d 380, 394 (7th Cir. 1984).

CONCLUSION

The district court in *Methodist* assessed proffered evidence on market foreclosure and found Methodist's showing came up short under the traditional and well-established test. The Seventh Circuit's affirmance adopted this analysis; it did not overwrite it. The Court should reject Southern Illinois' invitation to adopt a rule of per se legality, and instead consider the evidence proffered to determine whether there is a genuine issue of disputed fact for trial.

Respectfully submitted.

s/ Jonathan H. Lasken

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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2018, I electronically filed the foregoing Statement of Interest on Behalf of the United States of America with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

Respectfully submitted.

s/ Jonathan Lasken__________