

## Exclusive Dealing in Healthcare

### *Methodist Health Services Corp. v. OSF Healthcare System*

By: Emily Walden and Yun Ling

#### I. Introduction

Section 2 of the Sherman Act prohibits the use of unilateral anticompetitive conduct to acquire or maintain monopoly power.<sup>16</sup> A Section 2 violation requires both that the defendant possess monopoly power in the relevant market and that the monopoly power was obtained as the result of anticompetitive, or exclusionary, conduct. The definition of monopoly power, or the ability to profitably raise prices above those in a competitive market for a sustained period of time, is well-established. However, in practice it is difficult to distinguish procompetitive from potentially exclusionary unilateral conduct; indeed, the same conduct may both exclude competitors and generate efficiencies.<sup>17</sup>

Section 2 covers a wide range of conduct, from exclusive dealing to bundled discounts and predatory pricing. In this article, we focus on exclusive dealing in healthcare. Relative to health insurance plans with broad or open networks, which include all providers, plans with narrow networks offer

patients access to a limited set of healthcare providers in exchange for lower rates. While narrow networks have been touted as a solution to high healthcare costs,<sup>18</sup> they have also been the subject of numerous Section 2 challenges because they necessarily exclude a subset of providers, typically in exchange for lower rates. Recent cases include *United States v. United Regional (2011)*,<sup>19</sup> *Marion Healthcare v. Southern Illinois Healthcare (2018)*,<sup>20</sup> and *Methodist Health Services Corp. v. OSF Healthcare System (2017)*.<sup>21</sup> We focus on the third case in this article and discuss the framework used to evaluate exclusive dealing.

#### II. Methodist Health Services Corp. v. OSF Healthcare System

##### a. Background

In 2013, Methodist Health Services Corp. (“Methodist”), the second largest hospital in the Peoria, Illinois, area, sued OSF Healthcare System (“St. Francis”), the largest hospital in the area, for attempted monopolization in violation of Section 2 of the Sherman Act.<sup>22</sup> In addition to being the largest hospital in the relevant geographic market, which both parties agreed included the three counties surrounding Peoria, St. Francis also provided the widest range of services. St. Francis was the sole provider of

<sup>16</sup> 15 U.S.C. § 2.

<sup>17</sup> U.S. Dep’t of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008). <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-1>.

<sup>18</sup> Recent academic research provides evidence that narrow networks reduce healthcare costs. *See, for example*, Atwood, Alicia, and Anthony T. Lo Sasso, “The effect of narrow provider networks on health care use,” *Journal of health economics* 50 (2016): 86-98; and Dafny, Leemore S., et al, “Narrow networks on the health insurance marketplaces: prevalence,

pricing, and the cost of network breadth.” *Health Affairs* 36.9 (2017): 1606-1614.

<sup>19</sup> *U.S. & State of Texas v. United Regional Health Care System*, No. 7:11-CV-00030 (N.D. Tex. Feb. 25, 2011)

<sup>20</sup> *Marion HealthCare LLC v. Southern Illinois Healthcare*, No. 3:12-CV-00871 (S.D. Ill. Feb. 8, 2018)

<sup>21</sup> *Methodist Health Serv. Corp. v. OSF Healthcare Sys.*, 859 F.3d 408 (7th Cir. 2017)

<sup>22</sup> The case also alleged that St. Francis’ conduct was in violation of Section 1 of the Sherman Act.

organ transplants, high-level trauma care, and advanced pediatric care, which accounted for one-fifth of its inpatient days.

Methodist's suit focused on commercial plans, rather than public payers (e.g., Medicare and Medicaid), whose patients are typically not profitable for providers.<sup>23</sup> The commercial payer market in Peoria was primarily comprised of national health insurance companies and Caterpillar, a self-insurer employer, which accounted for the second largest share of commercial patients in the market. St. Francis had exclusive contracts with three large commercial insurers – Blue Cross Blue Shield (“BCBS”), Humana, and Health Alliance – that excluded Methodist in exchange for lower prices. St. Francis had an exclusive contract with Caterpillar until 2009, but at the time of the suit Caterpillar included both Methodist and St. Francis in its plan.

Methodist alleged that St. Francis's position as the sole provider of certain services made it a must-have hospital in the Peoria market and allowed it to wield market power in the relevant market. Methodist ultimately alleged that St. Francis used this market power to coerce payers into signing contracts that excluded Methodist, foreclosing Methodist from the market and raising health insurance prices. St. Francis conceded that it had market power but disagreed that it had used its market power to unfairly disadvantage Methodist or harm consumers.

---

<sup>23</sup> St. Francis argued that commercially and publicly insured patients were interchangeable from the perspective of providers and therefore should be considered part of the same market. The district court sided with Methodist on the grounds that payments

## b. Substantial Foreclosure Analysis

Possession of monopoly power alone does not constitute a Section 2 violation. A firm may possess monopoly power because it sells a superior product or utilizes a more efficient production process. St. Francis contended that it favored exclusive contracts because they ensured a stable commercial patient base, which helped finance several long-term investment projects that benefited patients. Rather, exclusive dealing violates Section 2 only if a firm uses its monopoly power to unreasonably restrain trade under a Rule of Reason evaluation.

Exclusive dealing is judged to unreasonably restrain trade if it results in the substantial foreclosure of competition, evaluated based on both quantitative and qualitative evidence. To proceed with an exclusive dealing claim, courts typically require a plaintiff to show that they have been foreclosed from competing for at least 30 percent of the market.<sup>24</sup> Beyond that, the courts consider qualitative factors such as contract duration and whether the plaintiff could reach customers through alternative channels.

The share of the market that was foreclosed to Methodist was the primary quantitative evidence evaluated by the district court in *Methodist Health Services Corp. v. OSF Healthcare System*. While Methodist's economic expert contended that 52 to 54 percent of patients were foreclosed from the market, St. Francis argued that the

from government payers were substantially lower than those from commercial insurers and often did not cover providers' costs.

<sup>24</sup> See, for example, *Stop & Shop v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (2004).

true share was 20 to 22 percent. The two numbers differed due to the set of customers included in each calculation. Methodist argued that it was foreclosed by the three commercial plans that had exclusive contracts with St. Francis – BCBS PPO, Caterpillar PPO, and Humana – which constituted 54 percent of the market in 2009.<sup>25</sup> While St. Francis argued that Methodist was free to compete for all patients, since most employers offered at least one health plan that included Methodist, it contended that Methodist's foreclosure calculation incorrectly included a number of patients, including those who were treated at Methodist out-of-network and St. Francis employees covered under the employee health plan. The district court accepted St. Francis' adjustments, which brought the total foreclosure share down to 20 to 22 percent, below the 30 percent threshold.

Moreover, the courts found that the qualitative evidence, including the short duration of contracts that expired every year or two and a lack of evidence presented that Methodist could not replicate all services provided by St. Francis, also favored the defendants. Based on its evaluation of the quantitative and qualitative facts, the district court found that St. Francis' conduct did not constitute an unlawful restraint of trade and granted summary judgement in favor of St. Francis.<sup>26</sup>

### III. Conclusion

The Sherman Act is ultimately concerned with the preservation of

competition, not the protection of individual competitors, which the courts have recognized are not the same.<sup>27</sup> In *Methodist Health Services Corp. v. OSF Healthcare System*, the district court found that the share of the market from which Methodist was allegedly foreclosed fell below the threshold necessary for further review based on precedent from past cases. However, if Methodist were foreclosed from competing for a share of the market above the threshold, further evaluation would be needed to determine whether the procompetitive benefits of St. Francis' exclusive contracts – the lower prices consumers and payers would enjoy from narrow networks – were outweighed by any harm from foreclosure.

---

<sup>25</sup> In 2012 there were four plans, which constituted 52 percent of the market.

<sup>26</sup> This ruling was upheld by the 7<sup>th</sup> Circuit Court on appeal.

<sup>27</sup> *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984).