OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-1031

TITLE JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., Petitioners v. EDWIN G. HYDE

PLACE Washington, D. C.

DATE November 2, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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JEFFERSON PARISH HOSPITAL DISTRICT :

NO. 2, ET AL., :

Petitioners :

v. : No. 82-1031

EDWIN G. HYDE :

- -x

Washington, D.C.

Wednesday, November 2, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

FRANK, H. EASTERBROOK, ESQ., Chicago, Ill.; on behalf of the Petitioners.

JERROLD J. GANZFRIED, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States as amicus curiae.

JOHN M. LANDIS, ESQ., New Orleans, Louisiana; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Jefferson Parish Hospital District v. Hyde.

Mr. Easterbrook, you may proceed whenever you are ready.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court:

The question in this case is whether an arrangement by which a hospital obtains full-time services of four anesthesiologists in exchange for a promise not to admit others to practice there is a tying unlawful per se under the Sherman Act.

The first contract was signed in 1971 when East Jefferson General Hospital opened. Dr. Roux pledged to work full time in the hospital for a year.

The hospital pledged to give him all of the hospital business. The contract also called for Dr. Roux to hire, fire, supervise and train the nurse anesthetists at the hospital and to run the hospital's department of anesthesia.

The contract was extended year by year until 1976 when a new five-year agreement was signed. By the time of trial Roux and Associations, four

anesthesiologists, were supervising 14 operating rooms. Respondent attacked this arrangement as a tying because a patient could not use the hospital's operating rooms without taking one of the hospital's anesthesiologists.

After a trial the District Court held for the hospital. The Court concluded that the hospital faced competition from many other local hospitals and could not charge a monopoly premium for its services without driving patients away plus it found no market power or any other source of dominance, and it held that under the rule of reason the contract is pro-competitive, beneficial and lawful.

The Fifth Circuit reversed. It found that operating rooms and anesthesia are separate products, and then it concluded that although the market is not concentrated and although under traditicnal standards of market power -- There would be none in this case -- the arrangement nonetheless was unlawful per se because of generic imperfections in the market for medical services.

The Court of Appeals observed that many patients are insured. Many patients would like to use hospitals near their home and that there is a lack of perfect information in the market.

Consequently according to the Court of Appeals

the hospital had market power and the per se rule against tyings applied. When the Court turned to the hospital's arguments about pro-competitive benefits from this arrangement, the Court of Appeals simply observed that because the per se rule had been invoked these benefits could be considered only if this contract was the least restrictive alternative to arrange them, and the Court held that it was not.

The arguments we make in our brief about this subject really boil down to three: no tie, no market power and no enhancement of market power. I would like to take them up in that order.

Our basic proposition is that an arrangement such as this is best analyzed as an exclusive dealing or employment contract and not as a tying. To understand this you can think of a continuum by which hospital services can be arranged.

At one end of that continuum is the perfectly open hospital in which all qualified professionals may practice. If 8 anesthesiologists or 14 anesthesiologists want to practice in East Jefferson General Hospital they may do so, and if there are more anesthesiologists who want to work there and there is work to be had they will all work part time. That clearly would be lawful.

Many hospitals are operated in exactly that way. At the other end is group practice of medicine similar to the group health association here in the District of Columbia.

Such a group practice is closed on all sides. All physicians are under full-time contract. All medical services are sold as a package. One cannot get the podiatrist of the group health association without taking its dermatologist, its internal medicine man and its radiologist.

The only choice a patient has when medicine is practiced as a group is to go with that group or to seek medical care elsewhere. That, too, would be lawful we should think.

The Court indicated as much in Maricopa. That is a plain partnership in which people cooperate tc produce a product.

QUESTION: You do not think this arrangement resembles that?

MR. EASTERBROOK: We think this arrangement resembles each of these arrangements in part. This hospital is organized in both of those ways.

Some of the departments at this hospital are organized like the closed panel practice. The anesthesiology department is so organized.

Radiology is so organized. Cardiology, nursing services and many other services this hospital provides are organized in that way.

Other services that this hospital provides like internal medicine are organized in the first way, a way in which each physician can participate in any particular case.

QUESTION: May I ask you about your group practice example? Supposing they include a dentist and they had all the dentists in Washington in that particular group arrangement and they said you cannot get your teeth fixed unless you take all your other services from our group practice association.

MR. EASTERBROOK: Justice Stevens, I would be very surprised if we would be able to see such an arrangement --

QUESTION: I understand.

MR. EASTERBROOK: -- because if they attempted to charge a monopoly price it would be highly advantageous for some dentist to go out and set up a practice and collect it. But if in fact one did not say Washington but one said this is a very small town in which there is only one dentist --

QUESTION: I am assuming Washington in my example.

MR. EASTERBROOK: Yes.

QUESTION: I would like you to answer my example assuming Washington.

MR. EASTERBROOK: I think there is an anti-trust problem in that case, Justice Stevens.

QUESTION: You mean a monopoly of dentistry and then the -- But what if they --

MR. EASTERBROOK: Not unless -- Let me qualify it, Justice Stevens. I think there would be a problem if the dentists or if this association did anything which had the effect of excluding others from setting up competing organizations, but if all you see is that one organization whether it be a very large supermarket or whether it be a very large medical organization provides the services in one town that seems not troublesome so long as it does not exclude competition by others.

QUESTION: Well, of course, the issue would be whether it did. They would only perform dentistry if the patient agreed to have all other medical work done by the association. That is the hypothesis.

You say that would be perfectly all right?

MR. EASTERBROOK: I think that would be perfectly lawful, but one need not reach any such proposition in order to understand this case.

I think if all you did was look in on one town

and find all you could see practicing -- There was one health maintenance organization of two internal medicine specialists, one cardiologist and so on -- that the fact that there was just one group practice of medicine in say Charlottesville, Virginia would not make that group practice of medicine unlawful.

QUESTION: Does our opinion in Goldfarb have any implications here directly or indirectly? As you remember all of the lawyers in Northern Virginia at least got together and agreed on a fixed price and would not perform any services for clients except at that price.

MR. EASTERBROOK: What distinguished Goldfarb and Maricopa on the one hand, Your Honor, from Broadcast Music and this case on the other is that in Goldfarb that was no intergration of any sort. It was just a naked price fixing agreement.

Those lawyers did not cooperate in any way in the provisions of services except to fix their prices.

QUESTION: They cooperated to the extent they all agreed to the same prices. That is a pretty good cooperation is it not?

MR. EASTERBROOK: Exactly. But that is all they did. They did nothing but fix the price. In Broadcast Music --

QUESTION: Well, they did more than that. They refused to perform a service for anyone who would meet the price which is closely related, of course.

MR. EASTERBROOK: Yes.

On the other hand in Broadcast Music the people who got together and furnished the blanket license were cooperating in the creation of a new project. They were behaving exactly as partners in a business venture, and similarly the physicians who get together in a hospital together with the nurses and others are participating in one business venture which competes against other business ventures.

It is true that they participate as partners, charge a price and each of them takes his share of that income. But that is exactly the same way a large law firm practices that one cannot get a part-time job, for example, at a large law firm in the District of Columbia and work part-time at another law firm in the District of Columbia.

An arrangement by which Covington and Burling says you cannot be part-time at Covington and part-time at Wilmer, Cutler and Pickering would not be thought to be a violation of the anti-trust laws.

That in fact is what the hospital has done here. It has said to these anesthesiologists you cannot

spend half of your time with our patients or part of your time with our patients and part of your time with the patients of someone else somewhere else. We want your full attention to our patients full time.

That I think is just a perfectly ordinary business decision quite apart from a naked cartel. In fact, on the question whether you can think of this as a tying I think the initial question has to be how the patients would perceive what it is they are buying.

Do they perceive two separate products which they are being forced to buy even though they would prefer to buy only one of them?

QUESTION: Mr. Easterbrook, what you are discussing now I take it are largely matters of fact. Did the District Court make findings in many of these areas that the Court of Appeals upset them on a thoroughly erroneous basis?

What is the factual state of this particular point you are making? How do patients see the furnishing of anesthesiologists?

MR. EASTERBROOK: The District Court made no findings of fact on this other than to observe that anesthesiology is ordinarily procured through a surgeon. That is --

QUESTION: How did the District Court know

that?

MR. EASTERBROOK: There was testimony in the record from at least four witnesses, anesthesiologists and one internal medicine specialist, who testified that that is the way in which anesthesia is ordinarily procured.

Dr. Hyde testified and agreed that that is the way it is ordinarily procured although he testified that because his specialty is obstetric anesthesiology that he has some patients who remembered him and would like to be served by him. He agreed that --

QUESTION: So there was factual --

MR. EASTERBROOK: Right. But he agreed that in the run of cases patients contract for surgery with a surgeon and rely on the surgeon to procure an anesthesiologist. The Court of Appeals on the other hand without finding any conclusion of the District Court clearly erroneous or indeed not citing anything in the record simply stated that anesthesiology and operating rooms are separate products which should be obtainable separately.

So far as I know it had no part of the record in mind when it made that statement.

QUESTION: Or any hospital but this one, especially a hospital that had hired anesthesiologists.

MR. EASTERBROOK: Yes, Your Honor. I have no idea what it had in mind at all.

From the point of view of the buyer, however, what the buyer wants to obtain in most cases is an operation. He would like his tonsils taken out if that is the operation he has in mind or perhaps open heart surgery.

His interest is in having that prticular amount of medical care. It is cerainly the case that this is most unlike the traditional tying case of say when IBM sells its tabulating machine. Someone then goes into the market, wants to procure tabulating cards to run through the machine and puts together two products at some later date.

It is just nothing that is put together at one later date in order to make an operation. The operation --

QUESTION: Does the hospital in this case separately bill the anesthesiologists?

MR. EASTERBROOK: It does. The hospital during the time of the trial in this case -- Circumstances have changed slightly since, but the patient's bill would contain a separate line item for all anesthesia services.

QUESTION: What other line items?

MR. EASTERBROOK: Blood, drugs, television sets in their room. Every particular medical service would be separately billed, and the reaons for that is to reflect what has been done for this patient. If someone went into East Jefferson General Hospital and never had an operation he would not be billed for anesthesiology.

If he went, for example, into traction for a back problem no anesthesia charge would appear on the bill. The hospital is attempting to charge for those aspects of its complete spectrum of medical care that are provided to a patient.

QUESTION: What does that figure for anesthesiology cover? Does it cover the service or how about materials that are used?

MR. EASTERBROOK: At the time of the trial in this case, Your Honor, there were two charges that appeared, one of which would cover all of the equipment and all of the professional services whether by an anesthesiologist or a nurse anesthetist and the other which would cover drugs only.

As I understand the current arrangements there are now three charges, one for the professional services of the anesthesiologists and the nurse anesthetists, a separate charge for equipment and general access to

anesthesia, and a third charge for drugs.

QUESTION: What about the anesthesia itself?

MR. EASTERBROOK: That is included under drugs.

QUESTION: That is under drugs?

MR. EASTERBROOK: Yes.

QUESTION: No one suggested that that is a separate product I do no suppose.

MR. EASTERBROOK: Not in this case, and I hope no one would no more for that matter than one would argue that you have a right to your own supplier of food or linens in the hospital also things for which you are apt to see charges appear on one's bill. You go into a hospital. You take their linen service. You take their food service. You take their nurses.

All of those may appear as separate items, but I would hope that they are not all one gigantic anti-trust conspiracy.

QUESTION: Mr. Easterbrook, does the billing procedure whereby they split the anesthesia bill as I understand it apply to all three of those items? I mean is the procedure by which the anesthesiologists and the hospital share the payment for those items the same?

MR. EASTERBROOK: The procedure at the time of the trial in this case, Your Honor -- Again, I am

distinguishing because it has changed slightly since -- is that drugs would be put to one side of the bill for professional services, equipment and so on.

Eight percent would be deducted for charity and bad debts, and the remainder, 92 percent of the original bill, would be divided 50/50 between the hospital which would cover space, equipment, their training and overhead and the anesthesiologists.

QUESTION: That 50 percent would cover the anesthetists, too, because they are paid by the hospital.

MR. EASTERBROOK: No, the 50 percent retained by the hospital at that time would cover the nurse anesthetists, and the other 50 percent separation would cover the M.D. anesthesiologists. The way the billing is now done currently --

QUESTION: Mr. Easterbrook, is it your view that the product here is a surgical service?

MR. EASTERBROOK: It is, Your Honor.

QUESTION: What does that embrace?

MR. EASTERBROOK: I am sorry. I did not hear.

QUESTION: What does the surgical service embrace within the concept of the product at issue?

MR. EASTERBROOK: It embraces in the context

of hospital service essentially everything from when one enters the hospital and has laboratory services performed, obtains space in the operating room, has the operation performed by the internal medicine specialists. The surgeon will be attended at that opertion by a large number of nurses, scrub nurses, surgical nurses, all of whom are employees of the hospital. He will then be wheeled into a recovery room, provided recovery room services again by full-time employees of the hospital and some M.D.s and is finally sent to his room and after that discharged.

That whole package of services is we think one product, and it is not appropriate to attempt to disentangle further and to require separate suppliers to be available for those separate products.

QUESTION: Are radiologists also included?

MR. EASTERBROOK: Oh, yes, Your Honor. The radiologist, the pathologist, all of the laboratory work as well.

QUESTION: How about the surgeon?

MR. EASTERBROOK: So far as the question whether it is a single product for anti-trust purposes is concerned we think the surgeon is also part of that package. Again, I think I have to go back to what I said at the beginning that one can put together medical

services in many ways and many hospitals do.

Some hospitals are completely open staff right from the beginning, that is, that there are separate surgeons, separate anesthesiologists, separate radiologists, separate pathologists and all of them act as independent contractors. There is certainly nothing in the anti-trust laws that prohibit hospitals from doing that.

On the other hand, we would think there is nothing in the anti-trust laws that prohibits the hospital from selling them as a service. In fact, these different ways of assembling a medical product are just the forms of competition in this market.

QUESTION: How did you say the radiologist is furnished here?

MR. EASTERBROOK: In East Jefferson the radiologist is under full-time exclusive contract to the hospital.

QUESTION: He is not an employee?

MR. EASTERBROOK: No. He is not an employee.

QUESTION: He is like the anesthesiologist.

MR. EASTERBROOK: He is like the anesthesiologist although not like the nurse although one of the points we --

QUESTION: How about the surgeon?

MR. EASTERBROOK: If the surgeon is a cardiologist the surgeon will be under full-time exclusive contract to the hospital. Cardiology is closed.

QUESTION: And one who needs his service has to take him?

MR. EASTERBROOK: If he wants to go to East Jefferson General Hospital. He has, of course, quite a large number of other hospitals to go to, and that is our market power point, Your Honor, that assuming this is best analyzed as a tying the per se rule still does not apply unless there is market power.

We think there are several problems in the market power holding of the Court of Appeals in this case. The first is that under Fortner it is not evidence of market power simply to sell two products in a package.

As Fortner said it is possible to sell -

QUESTION: Is this argument related to your argument about no market power?

MR. EASTERBROOK: Yes.

QUESTION: Your second argument?

MR. EASTERBROOK: Second argument that there is no market power.

As Fortner said it is possible to have cheap

credit and sell expensive houses, and that is not a question of market power. What you would look for the Court said in Fortner is some elevation of the package price.

It is undisputed in this record that no one at trial testified that this arrangement raised the package price of operating rooms and anesthesiology. The executive director of the hospital testified to the contrary that this had reduced the package price and there was no contrary evidence of any sort. Nor did the Court of Appeals suggest that this had raised the package price of the anesthesiology-operating room package.

So we suggest that under the first and most narrow interpretation of Fortner II there is no market power in this case.

The second reason why we have argued that there is no market power in this case is because the market is properly characterized as one of anesthesia services. The hospital is acquiring anesthesia services to put into this package of surgery and medical care by looking throughout the nation.

The anesthesiologists who have ended up in New Orleans came in one case from Minnesota and another case from Florida and another case from California, and it

again is undisputed in this record that there is nationwide movement of anesthesiologists. That means that both for what the hospital is doing the hospital can turn to the nation as a whole to hire its employees or acquire its exclusive contracts and similarly the anesthesiologists can turn to the nation as a whole, that is, those who believe the competitive opportunities in New Orleans are not what they might be, can easily go to Florida.

As Dr. Adriani, Respondent's specialist expert, testified in this case anesthesiologists are like nomads, and they are like nomads precisely because they lack patient contact, that they are brought into a case by a surgeon as part of the hospital's package rather than on the basis of individual contacts with patients.

Ultimately our argument in this case is that this contract is best understood as a means of organizing that nationwide competition to the benefit of patients. Exclusive contracts are a method by which hospitals can set anesthesiologists to bidding against one another for the position.

In fact --

QUESTION: Is there any impact of insurance in this respect?

MR. EASTERBROOK: Not on the competition for the position at hospitals, Your Honor. There is absolutely none, and that is one reason why we think the Fifth Circuit was mistaken in believing that there is something special about medicine. No impact whatsoever.

Dr. Hyde was asked at one point in the trial why he did not have or did not want an exclusive contract, and his answer was at page 76 of the transcript of the second day and I quote "That gets to practice by the lowest bidder, and I think that is not our intent in the practice of medicine".

Well, I can understand the argument that the anti-trust laws do not require practice by the lower bidder, but the argument that they prohibit practice by the lowest bidder is nothing short of flabbergasting.

Thanks very much.

CHIEF JUSTICE BURGER: Mr. Ganzfried.

ORAL ARGUMENT OF JERROLD J. GANZFRIED, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. GANZFRIED: Mr. Chief Justice, and may it please the Court:

The United States contends that the Court of Appeals incorrectly found that the hospital's exclusive dealing contract was an illegal tying. This decision

should be reversed not only because of its adverse impact of the health care industry but also because it distorts important principles of anti-trust law that are of more general application to other segments of the economy.

In our view the primary flaw in the Court of Appeals' opinion is its fixation on labels rather than substance. We start from the premise stated in Times-Picayune and reiterated in Sylvania that competitive realities and substance must dominate anti-trust analysis.

With this guiding principle in mind I would like to turn to the tying cases decided by this Court deciding with the Motion Pictures Patent case which was not cited in our brief but which is reported in Volume 243 of the U.S. Reports.

What emerges from this case, the Motion Picture Patents through Fortner II in 1977 is this: That concern with tying arrangements flows from the potential transfer of economic power from one market into a second market.

Ultimately the concern is that two independent monopolies will be created. Now it is common ground that we do not have to wait until that result occurs before action can be taken so the task is to predict

when there is a possibility or a substantial threat that such economic harm will result.

Now as it happens the concept of a tying is not easily defined because any sale of a multi-component product or service is susceptible of being called a tying even where the bundling of components in a single package is pro-competitive, produces efficiencies or is done for a legitimate business reason. This has led to a good deal of confusion because if the line is drawn too mechanically as we believe it was in this case then these pro-competitive benefits will be lost even when there is little or no danger of competitive harm.

QUESTION: May I interrupt to ask just one question?

MR. GANZFRIED: Surely.

QUESTION: I guess you are arguing now there is no tie which is Mr. Easterbrook's first position.

MR. GANZFRIED: That is the first point.

QUESTION: He also argues there is no market power and thirdly there is no enhancement of market power. Do you support all three of those contentions?

MR. GANZFRIED: We do although on one of his arguments on market power we take no position, that is, that the appropriate market is the national market for purchasing services of anesthesiologists.

Now in following this through the Court has recognized that not all package sales are illegal. For example, Times-Picayune --

QUESTION: Are you going to suggest how we should make this distinction?

MR. GANZFRIED: As to which are and which are not --

QUESTION: The tying which is a package deal.

MR. GANZFRIED: I believe I will and that is this: that ultimately the concern with tyings is that you have power in one separate market that you can transfer to a second market. In order to do this first you have to --

QUESTION: Are you suggesting this is essential before we can have a tying?

MR. GANZFRIED: That is right. That is right.

First, you have to define the relevant market for the tying product and then determine whether there is substantial market power in that market because if there is none then you have no power to transfer elsewhere. You have no leverage that you can exert into a second market.

QUESTION: Why is that not true here?

MR. GANZFRIED: Well, it is not true here for

several reasons, first, because we do not believe there is a second market. There is one market. Thre is one product.

There is a package that has been put together by the hospital that should be viewed as the exclusive dealing arrangement that it is.

QUESTION: Well, if you are not right about that then you have a couple of much harder arguments I take it.

MR. GANZFRIED: Well, I have other arguments. I do not know that they are necessarily much harder.

The next is that even if there are two products here and two markets, the hospital does not have market power in the market for the tying product which is surgical facilities. The findings of the District Court as to the absence of market power in that market appear to be supported by the record.

The Court of Appeals did not find the District Court's conclusions as to market power to be clearly erroneous and so we support them. What the Court of Appeals did was to recognize that under the traditional analysis set down by this Court this case is fairly easily decided, and that is that the hospital lacks sufficient market power in the market for the tying product.

But becuase it viewed certain so-called market imperfections that Mr. Easterbrook has referred to it decided to ignore what it recognized was the traditional analysis and the analysis that was required in the case. I think the point I would like to get to is that the ease with which the Court of Appeals could under the guise of following accepted tying doctrine as it has been set down by this Court and how it could reach the result that it did which in our view savages an important notion of anti-trust law indicates that perhaps some tightening up of the definition is in order.

What we propose and is described in more detail in our brief is this: that the only time that there is a real concern, a real threat that market power in the first market is going to be transferred and used in a second market is where there is ability to acquire substantial market power in that second market.

I would like to give an illustration. Suppose that a company has a dominant position in the market for rubber stamps for making documents, and it requires that all people who buy its rubber stamps also buy ink.

Now we are assuming that there is power in the rubber stamp market in this, but in this instance there is no chance that that power could be transferred to the ink market. The reason is that the portion of the ink

market that is used in conjunction with the rubber stamp market is miniscule.

It is so small in fact that a company could not use this tying to obtain power in the ink market.

QUESTION: May I give you a hypothetical and ask you how your approach would treat it? Supposing that in this case the record showed -- I do not suppose it does -- that there is an effective competitive ceiling on what the hospital can charge for its service, but the anesthesiologists are able to charge more and that the hospital wants an exclusive dealing arrangement so that they can split the fees of the anesthesiologists and get part of the return that the anesthesiologists get and, therefore, enhance the price of the hospital service.

Would you say that made it bad or not if that is what the record showed?

MR. GANZFRIED: Well, if I can just get one thing clarified and that is whether the ceiling on the price that the hospital can charge --

QUESTION: The market.

MR. GANZFRIED: Market ceiling.

QUESTION: Just a market ceiling. Insurance companies make it practical to charge more, but they in effect obeyed that ceiling by getting a part of the

return that the anesthesiolcgists are able to get.

MR. GANZFRIED: Would that be bad, and the answer to that is possibly yes but it is something that should be analyzed under the rule of reason. In a particular circumstance it might be, but it does nct warrant per se prohibition.

QUESTION: Well, if it does not does the record in this case tell us whether or not that is what happened here?

MR. GANZFRIED: As I understand the record it does not.

QUESTION: It does not really tell us, does it?

MR. GANZFRIED: No. In fact what the record does tell us --

QUESTION: Does it tell us why they have this exclusive arrangement?

MR. GANZFRIED: Yes. The reason is --

QUESTION: Because the doctors did not want it.

MR. GANZFRIED: We believe the reason is that when the hospital was opened in 1971 there was some concern that when --

QUESTION: As I understand the doctor testified he did not want the exclusive arrangement but

nevertheless the hospital insisted on it.

MR. GANZFRIED: He said that in 1976 he did not want it to be exclusive. His group had been the target of some claims of unethical practice for having entered into this exclusive contract.

QUESTION: If it is the hospital that wants it what are we to infer is the reason for the arrangement?

MR. GANZFRIED: I do not think that you need to infer. I think you can just look directly to the findings of fact in the District Court as to what the advantages of the arrangement were, and they are recited at pages 32 and 33 of the appendix to the petition.

Now the point that I would like to conclude with, and I think it is the area in which our submission may be construed as moving a bit beyond the cases, and that is the notion of requirement of substantial market power in the tied market. I would like to point out why in fact it is not such an extension.

That is because the focus on whether a tying may promote substantial independent power in the tied market conforms to economic reality and has been noted in this Court's decisions. Going back to the Motion Picture Patents case the concern was with the effect on competition in this tied market has been made quite clear.

In that case the Court observed that the evil in tying the use of the patented projector to the films was that it allowed the company to fix the price of films as effectively as it could fix the price on the tying patented projector. That concern has been followed through in more recent cases that are referred to in the brief.

Thank you.

CHIEF JUSTICE BURGER: Mr. Landis.

ORAL ARGUMENT OF JOHN M. LANDIS, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. LANDIS: Mr. Chief Justice, and may it please the Court:

As the Petitioners point out in their reply brief our perspective in this case is quite different than theirs. Whereas the Petitioners suggestion in this case will decide the legality of all exclusive contracts at all hospitals we do not.

We believe that this case concerns one particular contract at one particular hospital, and that contract has got to be judged under the particular market and competitive conditions that are reflected in the record of this case. Whereas the Petitioners ask the Court to decide this case by making certain assumptions regarding those competitive conditions and

regarding those market conditions, we do not.

We submit that this case -- We submit that when the Petitioners' assumptions are compared with the record of this case they just do not stand up. I would like to discuss two crucial assumptions that the Petitioners' arguments are based on.

Perhaps the most important assumption is that the Petitioners asked the Court to assume that there is no competition among anesthesiologists to begin with, and this is obviously an important assumption becuase if it is correct the Petitioner should win the case. After all, if there is no competition to begin with then it would be hard to argue that a tying arrangement restrains competition.

However, we submit the argument that that assumption is not correct. The record indicates that anesthesiologists can and do compete against each other for patients' business when they are able to, when they are permitted to.

The basis of the Petitioners' argument or their assumption that there is no competition is their view of the market structure in the health care industry. They contend that patients purchase medical care regardless of the kind, regardless of the nature from hospitals rather than from doctors.

According to the Petitioners patients simply present themselves at the door of the hospital and ask for medical treatment, and they really have no greater interest in who performs surgery on them or who more directly in this case who puts them to sleep for that surgery than they would as to who supplies the thermometer that is given to them in the hospital.

QUESTION: As a practical matter, is it not very likely that the attending physician of the patient has referred him to this place the way a solicitor in England refers cases to barristers? Is that not very likely the way it happens here?

MR. LANDIS: Yes, sir.

QUESTION: People just do not find a hospital the way they find a supermarket.

MR. LANDIS: In the majority of cases the anesthesiologist would be selected by the surgeon, not by the patient. Now there are a few cases in which the patient may select the anesthesiologist, but the important point is the patient delegates that decision to the surgeon, and under the kind of contract that we have at issue here the surgeon has no more choice, no more freedom of choice, no more discretion than would be the patient.

QUESTION: Well, is it true that the patient

has to take the surgeon the hospital provides?

MR. LANDIS: The --

QUESTION: The patient has to take the surgeon the hospital provides.

MR. LANDIS: Initially -- That is another point which we disagree with the Petitioners. Patients do not come to hospitals for surgery. They go see their surgeon initially I am sure in the vast majority of cases outside the hospital.

In fact, that is what the record reflects in this case. If the decision is made that the patient requires surgery the surgeon will admit the patient to a hospital, and that hospital as the record relfects is likely to be the one closest to the surgeon's office, likely to be the one closest to the patient's home.

But it is one at which the surgeon has clinical privileges. In fact --

QUESTION: Even though that be true, as I understand it the surgeon has to take this package that the hospital provides including anesthesiologists.

MR. LANDIS: The surgeon does not purchase the hospital services.

QUESTION: I know he does not, but he has to use those facilities, does he not, under this arrangement or not?

MR. LANDIS: The only decision the surgeon makes as to what he uses is the operating room.

QUESTION: Yes.

MR. LANDIS: Certainly the surgeon who had been using East Jefferson General Hospital under this contract probably knew that he would not have a choice of anesthesiologists, but the point is the decision to choose an anesthesiologist does not arise until the patient is already in the hospital and whether it be made by the patient or by the anesthesiologist once that patient is in the hospital for surgery --

QUESTION: Or by the surgeon you mean.

MR. LANDIS: Yes, excuse me, by the surgeon. But once the patient is in the hospital neither the surgeon nor the patient is going to change hospitals because they cannot have the anesthesiologist of their choice.

QUESTION: As I understand it even though the surgeon may not come with the package everyone else does including the anesthesiologist. Is that true?

MR. LANDIS: No, not everyone. As Mr. Easterbrook pointed out I think the cardiologists are under contract with the hospital at the present time, the radiologists and perhaps the pathologists.

QUESTION: But they do come with the package.

MR. LANDIS: If you accept that this is a package.

QUESTION: Well, I mean if you are going tc be in that hospital and you need a radiologist you are going to use the radiologist.

MR. LANDIS: And you will be billed a separate charge fcr that service.

QUESTION: Yes.

MR. LANDIS: Now anesthesiology is no longer a speciality that is under contract at the hospital. The anesthesiologists whc practice there including Dr. Hyde bill their own patients. They bill the patients separately.

The hospital bills the patients for the drugs that he used, but the professional service is billed separately from the hospital, billed directly by the physician.

QUESTION: Does your argument depend on your assumption that people go to the hospital that is nearest to where they live?

MR. LANDIS: No, I do not believe --

QUESTION: I thought you said the doctor goes to the hospital that is nearest his office and the patient goes to the hospital that is nearest his home. Your case does not depend on that does it?

MR. LANDIS: No, sir. It does not. That was --

QUESTION: Well, look to somebody other than me please.

MR. LANDIS: That was an observation that both courts made in connection with making the findings regarding the market. No, our case does not depend upon that finding.

The point is that the competitive conditions are not like the Petitioners would have this Court assume. East Jefferson is not a clinic such as the Mayo Clinic or the Cleveland Clinic where physicians join together as partners to render comprehensive medical care.

QUESTION: Wait a minute. The Mayo Clinic is not a partnership.

MR. LANDIS: Excuse me. I used that in the generic term. I meant to us it --

QUESTION: And it does not own any hospitals.

MR. LANDIS: My point is that it is not a clinic where comprehensive care is rendered to a patient, and the patient as Mr. Easterbrook said when he goes in he accepts the services of a surgeon, anesthesiologist and so forth. Now a law firm would be more analogous to that situation than it is to East

Jefferson General Hospital.

East Jefferson General Hospital is an acute care hospital, and it is neither owned nor controlled nor associated other than perhaps by contracts with the physicians who use its facilities.

QUESTION: Mr. Landis, how large a hospital is it? How many beds?

MR. LANDIS: It is I believe between 500 and 600 beds now. It has been expanding so rapdily that I am not sure exactly where it is now. It is approximately 500 I would think.

QUESTION: Assuming you wanted to go to that particular hospital you just cannot be treated by any doctor you want. Say you have an internal medicine problem. If you want to go to that hospital you are going to have to use some doctor that is on a staff, are you not, who is admitted to practice in the hospital?

MR. LANDIS: My point is that patients do not go to hospitals. They go initially to a physician. They go to an internist, a surgeon, whatever specialist they require.

That physician would make the decision as to what hospital to put the patient in. Now perhaps if a physician was on the staff of more than one hospital he might ask the patient --

QUESTION: It sounds to me like you do not really support all of the Court of Appeals' opinion.

MR. LANDIS: I am not sure to what you are referring.

QUESTION: Well, I thought in defining their market they thought that a lot of patients prefer hospitals closer to their home so they want to go to that hospital.

MR. LANDIS: To that extent you are correct, Your Honor. I think the market is probably actually smaller than even the Court of Appeals believed. Now I am talking --

QUESTION: Or it could be larger.

MR. LANDIS: It could be larger. I am talking --

QUESTION: It could be larger. If you were going to go where your doctor took you, you do not really care.

MR. LANDIS: The point is the market for anesthesiology services is essentially limited to the hospital.

QUESTION: Mr. Landis, this and many of the other points you have just been covering are all factual questions are they not? We may all have some recollection of what happened to us when we were in the

hospital, but there is no reason to think things are done the same way in Washington as they are in New Orleans or somewhere else so when you talk now about why a patient goes to a hospital are you referring to something in the record?

MR. LANDIS: Yes, Your Honor. There was testimony at trial by a number of physicians who testified about how patients and surgeons may choose anesthesiologists, and my opening point was that the Court should rely on that record, on that evidence in deciding this case and not on the assumption that there is no competition in the industry.

QUESTION: May I interrupt with one question about the facts now because when I asked the Solicitor General why there was this arrangement he referred me to finding 19 on pages 32A and 33A. Is that the finding that the Court of Appeals set aside as clearly erroneous, the one about the reasons for the agreement?

MR. LANDIS: Yes, sir. The District Court said that the exclusive contract was motivated by the purposes of the hospital to render better medical care, and the Court of Appeals said that was clearly erroneous.

However, the record as we tried to point out in our brief indicates that the reason the hospital

entered into this contract back in 1971 was that it had to attract an anesthesiologist to work there. It was an unproved venture.

It had no track record, and it had to attract someone just as in the General Electric case when they started selling and marketing regional antenna systems or local antenna systems. They had to keep the whole package together because it was an unproven venture.

Just as in that case circumstances changed and the justification for the tie disappeared. The same circumstances occurred here.

QUESTION: Your view is what you call a tie was an originally lawful agreement, but it became unlawful when the anesthesiologist was no longer interested in preserving his exclusive position.

MR. LANDIS: I think there was a valid business justification for the tie in the beginning, and that was that it was needed to attract an anesthesiologist to the hospital. That has not been the case for a number of years, and I do not think even the Petitioner would --

QUESTION: What do you think the record shows was the reason why the hospital preserved the arrangement?

MR. LANDIS: I think the economics of it

explain that. The hospital in exchange for essentially doing nothing was given 50 percent of the revenues produced by the anesthesia department.

As we --

QUESTION: You cannot say they did nothing. They paid the nurse anesthetist and they provided the facilities and the place to --

MR. LANDIS: The facilities were built separately. You are right. They did do something. They paid the nurse anesthetist, but one of the purposes of a tying arrangement is to disguise price.

The contract artificially limited the number of anesthesiologists that were out there by allowing the hospital to skim off profits that otherwise could have been used to attract additional anesthesiologists. For example, the Court of Appeals noted in footnote 10 of its opinion that at the time of trial in 1980 there were over 10,000 operations performed per year at the hospital.

Using a very conservative figure in that footnote of $100 per operation the court calculated that the revenues produced were approximately $1 million a year, and probably $200 an operation would be more realistic because in 1978 when there were only seven operating rooms in use the department of anesthesia

generated $1.6 million. That is shown at page 51 of the appendix.

The hospital took 50 percent of those revenues, and it paid the nurse anesthetists and had something left over which it put back into its operating fund. The hospital is a nonprofit operation, but --

QUESTION: But if the hospital has market power why does it have to go through all of this shenanigans? Why does it not just raise the cost of the hospital services?

MR. LANDIS: I think the hospital's opening its staff when the medicare rules changed indicates why they had to do that. While this case was on appeal to the Fifth Circuit the medicare rules did change.

The rules no longer permit hospitals to receive reimbursement for anesthesia in excess of the compensation paid to the anesthesiologist. Now if the purpose were really to create efficiency, make the operation more efficient that should not be any reason for the hospital to change its system.

However, the hospital immediately "opened its staff" and terminated the contract and ended the very contract we are attacking. If their motive was one of efficiency the new rules would not have effected that.

However, if their motive was one of receiving

excess profits that they could not get in other ways that they could not get reimbursement for for other services but could get it here that rule would directly affect that motive. We submit that that is exactly what happened in this case.

From what we have said so far it should be obvious that we believe the legality of the exclusive contract must be judged from the perspective of its impact on patients and on anesthesiologists, and in their reply brief at pages 2 and 11 the Petitioners point out their disagreement with that position.

They say it is wrong to consider the perspective of the patient, is wrong to consider the perspective of the anesthesiologist. This must be considered only from the viewpoint of the hospital.

Now again if they are right then they should win the case becuse we have never alleged much less tried to prove that this contract restrained competition among hospitals. On the other hand, we have alleged and we have proved that the contract injured patients by depriving them of an opportunity to choose an anesthesiologist either through themselves or through their surgeons.

QUESTION: Mr. Landis, is it your position that the patient should have a right as a matter of

anti-trust law to choose a specialist that a hospital normally provides?

MR. LANDIS: No, Your Honor, but it is my position that before that right is taken away there has got to be a good reason, and I submit there is no good reason in this case.

QUESTION: Are you suggesting that there is no benefit that flows from the hospital having the sort of arrangement that this hospital has?

MR. LANDIS: That is exactly what I am suggesting. I think the record supports that.

QUESTION: Can you think of any more chaotic situation than where every patient had the right to choose every specialist who performed in a hospital?

MR. LANDIS: Your Honor, the Fifth Circuit pointed out that this case did not raise that issue. It did not raise the issue --

QUESTION: No, but I am asking you what you --

MR. LANDIS: I think certainly there are limits and that would be a justification if the situation became so chaotic that the quality of care suffered. I believe that would be a valid justification for limiting their freedom of choice.

QUESTION: Even if it does not become chaotic do we need any evidence, concrete evidence, to show that

a coordinated, integrated system of all these different specialities is more efficient than having the freelancers come in at every stage whether it is a therapist who is going to assist an orthopedic patient after a hip operation or whatever? Do you mean to tell me --

MR. LANDIS: I think that is --

QUESTION: Does your case depend on there being no greater efficiency in this type of operation over the kind that you are advocating?

MR. LANDIS: I think that is the role of competition. Mr. Easterbrook said that on one end of the spectrum we could have a completely open staff and if there would more anesthesiologists in business then they would all be part time. I do not think that is correct.

Competition teaches us that the good anesthesiologists, the most skilled, would work full time and the least skilled would not work at all.

QUESTION: Would your theory apply to a law firm that has a tax division that takes care of the clients' tax problems and a probate division that takes care of drafting wills and trusts and that sort of thing?

MR. LANDIS: No, Your Honor, I think the

clinic that I describe is more closely analogous to a law firm. A hospital is not analogous to a law firm.

A hospital is not a direct competitor with doctors but it renders services on the same level. It has a horizontal complementary relationship with doctors.

QUESTION: But the principle of having all of the specialty trained people coordinated in one operation is that not something that could be taken into account in applying the rule of reason as the District Court did?

MR. LANDIS: Your Honor, all these justifications as far as efficiency were investigated at trial, and the Court of Appeals properly found on the record that either of these justifications did not exist. These efficiencies did not exist based upon the record or if they did exist they could be achieved without granting monopoly to one group of anesthesiologists. That is the least restrictive alternative analysis which this Court used last year in the Maricopa County case.

It found that although it may be beneficial for there to be a price schedule for reimbursement for medical fees there was a less restrictive way to do it. Doctors did not have to do the price fixing, and that is

the same kind of analysis that was employed here.

QUESTION: Mr. Landis, is it your view that a closed staff, privately owned and operated hospital would be a per se violation of anti-trust laws?

MR. LANDIS: Owned by whom, Your Honor?

QUESTION: Well, for example, some hospitals today are owned by public corporations. In my city of Richmond, Virginia a number of hospitals were owned by the doctors.

MR. LANDIS: I think if the hospitals were owned by the doctors that might present a different question, but assume a hospital owned by a corporation independent of the doctors I think under the right market conditions and right competitive conditions it might be a violation of the anti-trust laws. I think each case has got to be judged on the market as the per se rule requires.

It requires an analysis of the market and of the competitive impact at least the per se rule for --

QUESTION: Do you have any private hospitals in the New Orleans area?

MR. LANDIS: Yes, sir. There are quite a few.

QUESTION: Do they have closed staffs?

MR. LANDIS: Some of them do and some of them

do not. The majority of the hospitals in the New Orleans area at least until the new medicare rules had closed staffs, and that was one of the problems is that because of that you have an allocation in the market to the contract groups rather than -- A new entrant into the market essentially would have to go to work for one of those groups if he wanted to be able to practice.

That is one of the evils produced by these kinds of contracts.

QUESTION: In New Orleans they have several hospitals that are for profit.

MR. LANDIS: Yes, sir. There are.

QUESTION: They sure do.

QUESTION: Mr. Landis, why should the Court ever apply a per se rule in these cases instead of a rule of reason in each instance?

MR. LANDIS: I think with respect to tying cases the per se rule as the government points out and as the Petitioners point out is not a hard and fast per se rule. It does allow some flexibility. It does allow some analysis, and I think the way the rule has evolved --

QUESTION: Why isn't the public and the purposes of the anti-trust law basically served by just recognizing that we ought to apply a rule of reason?

MR. LANDIS: Because I think there is enough flexibility now in the current rule to properly weed out the cases that are not violations from the ones that are. If the Court believes that perhaps the rule should be evaluated I suggest that this is not the case to do it.

This is not a typical industry. This is not an industry characterized by active price competition. This is not the case to rewrite the rule on time arrangements.

I was discussing the perspective of the patients and physicians. In United States v. Loew's, Inc. the Court had this to say about tying arrangements.

They are an object of anti-trust concern for two reasons. They may force buyers into giving up the purchase of substitutes for the tied product, and they may destroy the free access of competing suppliers of the tied product to the consumer market.

That is exactly our perspective. We are looking at the consumer, that is, the patient and the competing suppliers of the tied product, that is the anesthesiologists.

When the record is considered it is not surprising that this perspective is not the one chosen

by the hospital, by the Petitioners because the record supports that the contract coerced patients, denied them freedom of choice and essentially eliminated any chance for competition among anesthesiologists.

At this point I would like to respond to the arguments of the Petitioners and the government concerning the manner in which the exclusive contract should be considered for anti-trust purposes. The Petitioners argue that the contract is merely a vehicle by which the hospital attempted to vertically intergrate its operation and that it is really no different than an employment contract.

We disagree with that position, and if the label makes any difference -- I am not sure it does -- we submit that this is a horizontal, not a vertical restraint. As I have discussed a few minutes ago hospitals all operate on the same level as doctors. They both sell things to patients.

They may not be competitors in the sense they do not sell the same products, but they sell on the same level. Through the contract the hospital combined with a competitor in the market for anesthesia to exclude another competitor. I submit that certainly is a horizontal restraint.

The Petitioners' argument that they could have

employed anesthesiologists without violating the anti-trust laws is misplaced. The fact is they did not do that.

That issue is not before the Court and the fact that that may or may not have violated the laws should not affect this case. The government argues that the exclusive contract is --

QUESTION: Let me stop you right there. Why is that a different case? Supposing they had four professional doctor anesthesiologists on their salary and therefore if a patient went to the hospital he had to take one of those four. Why would that be a different case?

MR. LANDIS: Your Honor, the fact that an anti-trust defendant can perhaps achieve the same --

QUESTION: Do you contend there would be a different competitive significance if that is true or it is just a kind of loop hole in the law?

MR. LANDIS: I think not only the fact of whether it is employment or contract would be different but other facts would be different if this were truly an employment situation. We would not have the economics at play that we have here.

We would not have the -- Presumably the physicians would be --

QUESTION: They could delegate salary doctors the authority to send out the bills I suppose. I do not understand why that would be different.

MR. LANDIS: Your Honor, as I say perhaps it could have employed the anesthesiologists without violating the law. They did not do it.

That case is not before the Court, and I do not think it is frankly relevant to this case.

QUESTION: I do not blame you for thinking that unless you want to take a position that the hired staff would also violate the anti-trust law. You do not want to press that.

MR. LANDIS: No, Your Honor. I will not take position on that becuase that is not this case and frankly I do not know. I think it could under some circumstances, but I am not prepared to answer that question.

QUESTION: Do you think you could have sued or did you sue the anesthesiologists in this case?

MR. LANDIS: No, we did not sue them, Your Honor, primarily because they were aganst this contract, too.

QUESTION: I know, but they were nevertheless a party to the contract.

MR. LANDIS: They were parties to the contract

--

QUESTION: And it was a tying contract.

MR. LANDIS: We could have sued them, but we did not just as we did not ask for damages. We asked for an injunction.

We were not interested in the monetary losses. We were interested in obtaining staff privileges for Dr. Hyde.

The government argues that this --

QUESTION: You asked for an injunction only and then the contract is expired. Does that not raise some sort of a mootness question?

MR. LANDIS: Your Honor, the Petitioners raised that issue in the Fifth Circuit, and they moved to dismiss on the grounds of mootness. We opposed the motion on the ground of the W. T. Grant case that when the --

QUESTION: It might repeat.

MR. LANDIS: The Fifth Circuit apparently agreed. I think that that case is still applicable now.

QUESTION: They have some other exclusive arrangements, do they not, for other specialities?

MR. LANDIS: The hospital currently does, yes, Your Honor.

QUESTION: For what?

MR. LANDIS: For cardiologists, radiologists and --

QUESTION: So they have exactly the same arrangement with other specialists?

MR. LANDIS: I am not sure they are exactly the same --

QUESTION: But they are the kind that you would attack.

MR. LANDIS: They are the kind that I would attack.

QUESTION: Yes.

QUESTION: If you knew what they were.

QUESTION: Even the pathologists?

MR. LANDIS: Your Honor, I think perhaps the economics may be different.

QUESTION: I am not sure the patient selects his own pathologist.

(Laughter)

MR. LANDIS: I think that may reach the limit of when these contracts can be attacked, but fortunately we do not have that case before us either.

In summary, I would like to emphasize three points. First, the Court should look to the actual market conditions and not to theoretical models of

noncompetition in deciding the legality of the case.

That requires looking at the case from the perspective of the patients and anesthesiologists, not from the perspective of the hospital. Second, that the exclusive contract injured competition is undeniable, and I do not think Petitioners deny it.

The only question relates to the significance of that. They claim that there is a national market and that any local restraint necessarily is insignificant.

We claim that national market argument is unfounded. Third, the per se rule against tying arrangments was expressly designed to prevent the evils occurred here, that is, a ccercion of consumers to buy goods from one competitor to the exclusion of all others and second the exclusion of competitors, the exclusion of potential suppliers of the tied point.

If there are no further questions we will rest on our brief.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:59 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

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