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Retail Marketers' Antitrust Settlement Raises the Question: When Are Exclusive "Staggered" Contracts Anticompetitive?

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If you ever noticed a coupon dispenser or colorful cardboard display while walking down the aisle of your local supermarket, there is a good chance it was put there by News Corp.'s News America Marketing (NAM) – in-store marketing's dominant player. News Corp.'s dominance, however, was allegedly the result of anticompetitive conduct, according to its former competitor Valassis Communications, Inc. In a 2017 lawsuit, Valassis alleged that News Corp.'s practice of "staggering" the expiration date of exclusive contracts with retailers violated, among other things, sections 1 and 2 of the Sherman Act and section 3 of the Clayton Act, and resulted in preventing Valassis from establishing itself as a viable competitor. After four years of litigation, the case finally went to trial last month, but the parties settled after the jury indicated it would be unable to reach a verdict. Nevertheless, Valassis' allegations raise an interesting question: what supporting facts and allegations might suggest staggered exclusive contracts constitute anticompetitive conduct?

After all, the act of staggering exclusive contracts is not *per se* anticompetitive. For instance, in reviewing the case law, one federal district court opined "[a] policy or practice of intentionally staggering contract terms may, under some circumstances, constitute anticompetitive conduct…though it must be one that forecloses a substantial share of the market." And one antitrust treatise notes that "[e]ven a high foreclosure percentage creates no injury to competition if no one is being excluded in fact by the challenged arrangement." Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶1821d2 (5th ed. 2021).

However, Valassis argued that, in addition to having staggered, long term, exclusive contracts, News Corp.'s practice of forcing retailers to agree to auto-renewal provisions and not to discuss the terms of their contracts with competitors operated to keep Valassis from reaching a "critical mass" of retailers needed to compete in the market. According to Valassis, some major retailers never became available to Valassis as a result of this conduct.

On the other hand, News Corp. relied on expert testimony to argue that each year, approximately 33% to 50% of its contracts expired – including those with certain major retailers Valassis alleged it was foreclosed from contracting with. It also relied on prior Second Circuit authority that suggested exclusive contracts might even facilitate healthy competition because companies must constantly improve prices and products so they can obtain those exclusive contracts.

Still, News Corp. faced similar allegations in the past. In 2016, it entered into a $244 million settlement with consumer goods manufacturers, which had alleged they were overcharged by News Corp. for in-store advertising. As part of the settlement, News Corp. agreed, among other things, to temporarily limit the length of exclusive contracts and renewal terms, and allow retailers to disclose the termination date of their contract to competing marketers.

These settlements make it difficult to discern exactly which circumstances would lead a court to find that a companies' program of staggering exclusive contracts violates the antitrust laws. Companies should therefore carefully consider the totality of the circumstances surrounding their staggered exclusive contracts to ensure that they are on the right side of the law.

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