Supreme Court Holds General Authorization To County Hospital Authority Insufficient For Antitrust Immunity

On February 19, 2013, the United States Supreme Court unanimously decided that the acquisition by a county hospital authority of another hospital in the same county was not immune from antitrust scrutiny under the state action doctrine, even though the hospital authority had been delegated broad powers under a Georgia statute. In *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, No. 11-1160, the Supreme Court clarified the scope of the state action doctrine, which shields states and state subdivisions (such as counties, municipalities, and other authorities) from antitrust liability when they act in accordance with a clearly articulated state policy that is intended to supplant competition. The Supreme Court held that the Georgia state law did not satisfy this "clear articulation" test where the law simply granted hospital authorities general powers that "mirror general powers routinely conferred by state law on private corporations." The Court explained that "because Georgia's grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively," there is no evidence that Georgia had clearly articulated or affirmatively contemplated that hospital authorities may use their powers in a monopolistic manner. As a result, the Court held that the state action doctrine does not shield Georgia hospital authorities from antitrust liability.

The FTC's appeal stemmed from its efforts to obtain a preliminary injunction to block the combination of Palmyra Park Hospital ("Palmyra") and Phoebe Putney Memorial Hospital ("Memorial"). Memorial, a 443-bed facility is owned by the Hospital Authority of Albany-Dougherty County (the "Authority") and is leased and operated by Phoebe Putney Health System, Inc. ("PPHS"). The Authority was established in 1941 pursuant to the Georgia Hospital Authorities Law, O.G.C.A. § 31-7-70, et. seq., which authorized the creation of local hospital authorities and granted them broad powers to, among other things, acquire, lease, and operate hospitals to meet public health needs. In late 2010, the Authority authorized the purchase by PPHS of nearby Palmyra from HCA, Inc., a for-profit corporation. In 2011, the FTC sought a preliminary injunction in federal court on the grounds that the transaction would substantially lessen competition in violation of Section 7 of the Clayton Act. The United States District Court for the Middle District of Georgia denied the injunction on the basis of state action immunity, and the Court of Appeals for the Eleventh Circuit affirmed. Yesterday, the Supreme Court reversed and remanded the case.

The question decided by the Supreme Court was whether the Georgia legislature had clearly articulated a policy of displacing competition for hospital services in enacting the Hospital Authorities Law. The Court reasoned that there was no evidence that the state legislature had "affirmatively contemplated" that a hospital authority would supplant competition by consolidating local hospitals. In granting hospital authorities broad general powers, including the ability to acquire and lease hospitals, the statute's position of "mere neutrality" toward a hospital authority's actions vis-à-vis the antitrust laws was not enough to show that the state legislature had contemplated such anticompetitive conduct. Citing an amicus brief filed by twenty states in support of the FTC's position, the Court reasoned that the looser application of state action immunity that the Authority urged it to apply "would attach significant unintended consequences to states' frequent delegations of corporate authority to local bodies, effectively requiring states to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct."

In overturning the Eleventh Circuit's decision, the Court distinguished earlier cases in which it had held that a state policy of supplanting federal antitrust law was sufficiently expressed in state laws when the displacement of competition was "foreseeable" as the "inherent, logical, or ordinary result" of the authority delegated by the legislature. Such policies included zoning laws and other regulations that were "inherently

anticompetitive." In contrast, according to the Court, the Georgia law at issue grants hospital authorities the general power to act, and a reasonable legislature would presume that a hospital authority would be functioning within the limits of federal antitrust law. The Court further explained that the broader regulatory scheme requiring any party seeking to establish or expand hospitals obtain a certificate of need from state regulators does not establish that the state had affirmatively contemplated other forms of anticompetitive conduct by hospital authorities.

The *Phoebe Putney* decision has been widely anticipated by lawyers and health care clients across the United States, particularly in states, including but not limited to California and Florida, that have health care statutes not dissimilar to the Georgia statute. The holding in *Phoebe Putney* clarifies the scope of state action immunity in the context of state subdivisions, such as hospital authorities and hospital districts. It makes clear that the statutory language upon which state subdivisions rely must clearly authorize anticompetitive conduct in order for merging parties or other litigants to invoke successfully the state action immunity defense.

If you have any questions or would like to learn more about the issues raised by the Court in this decision, please contact your usual Ropes & Gray advisor.

For the full text of the Supreme Court's decision in *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, please click here.