



## Supreme Court Narrows Scope of Antitrust Immunity in Ruling on Hospital Merger

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A unanimous U.S. Supreme Court has ruled that the state-action immunity doctrine does not shield an allegedly anticompetitive hospital acquisition from the reach of federal antitrust law. In so doing, the Court has: (i) narrowed the antitrust immunity for state-authorized conduct; (ii) handed the Federal Trade Commission (?FTC?) a significant victory in its longstanding efforts to reign in the use of state-action defenses to anticompetitive conduct; and (iii) put state and local government-owned hospitals and other government-controlled entities on notice that their conduct may be subject to antitrust scrutiny.

### *Background*

Georgia law authorizes cities and local governments to create hospital authorities that operate and maintain health care facilities. The law grants hospital authorities the power to acquire and operate hospitals and other public health facilities, among numerous other powers. When the Georgia legislature enacted this law, the city of Albany established a hospital authority which promptly acquired Phoebe Putney Memorial Hospital (?Phoebe Putney?). In 2010, state-owned Phoebe Putney began discussions to acquire its closest competitor, Palmyra Medical Center, from for-profit hospital network HCA. Phoebe Putney and Palmyra are located only two miles from each other, and jointly account for 86 percent of the market for acute-care hospital services provided to commercial health care plans and their customers in the six counties surrounding Albany, GA.

In 2011, the FTC challenged the acquisition by seeking a preliminary injunction in federal district court pending a trial on the merits before an FTC Administrative Law Judge. However, both the federal district court in Georgia and the U.S. Court of Appeals in the Eleventh Circuit rejected the FTC's request for an injunction. Notably, the Eleventh Circuit "agree[d] with the [FTC] that, on the facts alleged, the joint operation of [Phoebe Putney] Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly." The court concluded, however, that the acquisition was immune from antitrust scrutiny under the state action doctrine. Phoebe Putney then completed its acquisition of Palmyra.

### *"Foreseeability" Standard Clarified - States Must "Affirmatively Contemplate" Conduct*

The state-action doctrine has been recognized by the Supreme Court since the 1940s. It confers immunity from U.S. federal antitrust law when entities act pursuant to a state policy to displace competition with regulation or monopoly public service. Typically, whether immunity applies is determined by analyzing whether the conduct at issue is undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. The Supreme Court has explained in other rulings that this "clear articulation" requirement can be met if anticompetitive conduct "foreseeably" results from the state's regulation, and the Eleventh Circuit in this case found that anticompetitive hospital acquisitions were foreseeable as a result of the power granted by Georgia's law.

The Supreme Court disagreed, stating that "the Court of Appeals applied the concept of 'foreseeability' from our clear-articulation test too loosely." Here, the state legislature must have "affirmatively contemplated" the anticompetitive conduct, and Phoebe Putney must have shown that it was "delegated authority to act or regulate anticompetitively." Mere foreseeability and the fact that a state legislature has delegated general corporate powers to a non-state entity are not sufficient to confer immunity.

### *Conclusion*

The FTC's administrative challenge to the acquisition remains pending, and Phoebe Putney has vowed to defend the transaction in court. Phoebe Putney has been operating Palmyra for nearly one year, and thus the parties and judge will have the benefit of observing the acquisition's effect on the marketplace while litigating whether the acquisition lessened competition.

In the meantime, the Supreme Court's decision could have a significant impact on government-owned hospitals and health care facilities, and perhaps may reach other industries as well. Hospital authorities and similar entities need to carefully analyze their enabling legislation prior to engaging in conduct that may raise antitrust concerns.

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