FTC v. Phoebe Putney Health System, Inc.: Supreme Court rules state law does not offer blanket protection from antitrust laws

Antitrust Alert

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This week, the United States Supreme Court issued a decision limiting antitrust immunity for state-sanctioned conduct. The Court unanimously overturned the Eleventh Circuit's ruling allowing Phoebe Putney Health System Inc. to acquire its only hospital competitor, which the Eleventh Circuit had stated was permissible under the state-action doctrine.

In its opinion, the Supreme Court ruled that the granting of general corporate powers to government entities under state law does not offer blanket protection from the antitrust laws and emphasized that immunity from the antitrust laws is "disfavored" unless a state intended to displace competition.

In April 2011, the Hospital Authority of Albany-Douglas County in Georgia, which owned and operated Phoebe Putney Memorial Hospital, approved a plan to acquire Palmyra Park Hospital, which was Phoebe Putney Memorial Hospital, Inc.'s only competitor in a six-county geographic market. The two hospitals accounted for more than 85 percent of the acute care in that geographic market.

Shortly after the Authority approved the deal, the FTC sought to enjoin the acquisition. The FTC claimed that the acquisition would substantially lessen competition in the market for acute care hospital services in southwestern Georgia. The hospitals claimed that the transaction was exempt from the antitrust laws because it was protected by the state action doctrine.

The district court agreed, dismissing the complaint and the FTC appealed the case to the Eleventh Circuit. The Eleventh Circuit agreed with the FTC's assertion that the deal would likely create a monopoly, but held that it was exempt under the state action immunity doctrine.

Following its loss at the Eleventh Circuit, the FTC sought certiorari with the United States Supreme Court. On appeal, the Supreme Court unanimously overturned the Eleventh Circuit's decision holding that the Eleventh Circuit applied the concept of "foreseeability" too loosely. Justice Sonia Sotomayor wrote for the unanimous court, emphasizing that although states may authorize conduct that violates the antitrust laws, the state must explicitly "delegate authority to act or regulate anticompetitively."

Roots of the state-action immunity doctrine

In the 1943 decision *Parker v. Brown*, the United States Supreme Court established that the federal antitrust laws do not apply to certain state conduct. This decision spawned what is now called the "state-action immunity" doctrine. Actions by

the state itself, through its legislature, for example, are almost always free from antitrust scrutiny. All other state and local conduct, however, must satisfy some variation of the two-pronged test developed in 1980 by the Supreme Court in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*: (1) the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," and (2) the policy must be "actively supervised" by the state itself.

The Supreme Court had applied a permissive "foreseeability" standard when evaluating the first prong of the test – state action immunity applies if the anticompetitive effect was the "foreseeable result" of what the state authorized. That is, the legislature need not expressly state that it expects the city to engage in anticompetitive activity; it is enough that "it is clear that anticompetitive effects logically would result" from broad authority to regulate in a particular area.

The "reasonably foreseeable" test

In *Phoebe Putney*, the Supreme Court redirected its "reasonably foreseeable" test that a state law would lead to anticompetitive conduct. That is, to avoid antitrust scrutiny, states must "affirmatively contemplate" that anticompetitive conduct is a possible result. The Court found there was no evidence that the state (Georgia) affirmatively contemplated that the hospital authorities created by the 1941 Hospital Authorities Law would displace competition through acquisitions. The acquisition and leasing powers conferred on the hospital authorities mirrored general corporate powers routinely conveyed on private corporations. The Court held that, to invoke state-action immunity, the hospital authority must show it was given authority to act or regulate anticompetitively. The Court found that no such evidence existed.

Prior to this decision, many state statutes and regulatory programs with generalized authorizations for business activities, such as mergers, joint ventures, exchanges of competitive information and other competitor collaborations, may have supported a finding of state action immunity. **The Supreme Court has now tightened the standards for such immunity**. It is available only when the state has specifically directed the anti-competitive activity in question, or where anticompetitive conduct is an "inherent, logical, or ordinary" result of the authority granted by the state.

Thus, an entity acting anti-competitively under state authority must be able to show more than that such actions were consistent with or permitted by the state. The anti-competitive acts must be a necessary and foreseeable result of the state's delegation of authority sufficient to be an "implicit endorsement" of the anticompetitive results.

For more information about the Phoebe Putney decision and its impact on your business, please contact:

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