

## Supreme Court Unanimously Rejects Antitrust Immunity in Hospital Merger Case

February 26, 2013

### What you need to know:

The Supreme Court issued a unanimous decision siding with the FTC against a hospital merger in Georgia.

### What you need to do:

Companies should conduct careful analysis before investing time and effort in a controversial merger.

On February 19, the Supreme Court issued a unanimous decision in *FTC v. Phoebe Putney Health System, Inc.*, siding with the FTC against a hospital merger. Based upon the wording of a Georgia statute that allows hospital authorities to make acquisitions, the hospitals had argued that the merger is protected from the federal antitrust laws under the state action immunity doctrine. Justice Sotomayor wrote a carefully worded opinion rejecting this defense. What does the *Phoebe Putney* ruling mean for the rest of us – in other states and in other industry sectors – and what does it mean for the other antitrust cases that are now before the Supreme Court?

### Background

It has been a long time since the Supreme Court has ruled on the merits of any merger. Since the Hart-Scott-Rodino Act was passed in 1976, the FTC and DOJ have reviewed thousands of mergers, and the process within these agencies usually determines whether the parties are able to go forward or are forced to give up. The FTC and DOJ watch closely whenever the Supreme Court goes near the merits of a merger case. The FTC has proclaimed that the *Phoebe Putney* decision is a substantial victory.

The case involved the only two hospitals near Albany, Georgia. One, governed by a local government's "hospital authority," contracted to acquire the other. A 1941 Georgia statute allowed local governments to create a "hospital authority" with the power to acquire hospitals. This statute renders the transaction immune from the antitrust laws, the hospitals argued. The FTC strenuously contested the immunity defense, alleging that the transaction would tend to create a monopoly.

### The State Action Immunity Doctrine

Each state is a sovereign in our federal system of government, and as a result federal antitrust laws do not apply where the state takes action as a sovereign. Subdivisions of state government are not sovereign. Their conduct is immune from the antitrust laws only if the state legislature has enacted a "clearly articulated and affirmatively expressed state policy to displace competition." This second test was at issue in the *Phoebe Putney* case.

The arguments presented by the parties did not have an obvious answer. The District Court and the Eleventh Circuit both ruled in favor of the hospitals. And, based on their questions to the parties, it appeared that the Supreme Court Justices had not made up their minds at the time of oral argument. In the end, Justice Sotomayor's opinion spoke for all of the Justices by invoking a general point of principle with bipartisan appeal. "State-action immunity is disfavored," the ruling explained, because it contradicts "the fundamental national values of free enterprise and economic competition." The Court held that the Georgia statute did not "clearly articulate" a "state policy to displace competition," and added that antitrust immunity should not be a "trap for unwary state legislatures."

### Implications of the Unanimous Decision

The Supreme Court's *Phoebe Putney* decision has three important implications:

- The FTC will be emboldened in its vigorous review of hospital mergers.
- Those involved in drafting state legislation will need to clearly articulate their intent if they wish to displace federal antitrust laws.
- Two other important antitrust cases are before the Supreme Court this year. *FTC v. Watson Pharmaceuticals* will address the FTC's campaign against certain patent litigation settlements in the pharmaceutical industry, and *American Express Co. v. Italian Colors Restaurant* will determine whether an arbitration clause may bar antitrust class actions. These questions are much more likely to be divisive. The principle of free market competition is attractive to all of the Supreme Court Justices, liberals and conservatives alike. This does not mean, however, that the FTC and DOJ can be confident of victory in the other antitrust cases now before the Supreme Court.

### For More Information

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