

Supreme Court to Hear FTC Challenge to Anticompetitive Merger

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The U.S. Supreme Court has agreed to hear the Federal Trade Commission's (FTC) appeal of an Eleventh Circuit ruling¹ that a merger of two Georgia hospitals, Phoebe Putney Health System, Inc. (Phoebe) and Palmyra Park Hospital, Inc. (Palmyra), was exempt from antitrust scrutiny under the so-called "state action doctrine." Even though the Eleventh Circuit panel that reviewed the case agreed that the combination of Phoebe and Palmyra would likely substantially lessen competition and create a monopoly for general acute care hospital services in the Albany, Georgia area, it determined that a Georgia law creating the State's system of hospital authorities protected the merger from FTC challenge. This is the Supreme Court's first major case involving the state action doctrine in 20 years.

The state action doctrine immunizes conduct of a state or its political subdivisions from antitrust scrutiny if undertaken pursuant to a "clearly articulated and affirmatively expressed state policy" intended to replace competition with regulation.² This requirement is satisfied if anticompetitive conduct is a "foreseeable result" of state legislation. The doctrine extends to actions of private entities where the private conduct is "actively supervised" by the state.³

The district court and the Eleventh Circuit found in this case that because the state legislature had granted general corporate powers to acquire and lease out hospitals and other property to the Hospital Authority of Albany-Dougherty County (the Authority), which holds title to Phoebe's assets and ultimately approved the \$195 million transaction, the anticompetitive action was a foreseeable result of the exercise of these powers and, thus, protected state action. The FTC argues that the deal should not qualify for antitrust immunity because the Georgia law in question granted only general corporate powers to make acquisitions, and such "mere neutrality" lacks the necessary clear articulation of a state policy to displace competition.⁴ Moreover, according to the FTC, the fact that Phoebe arranged the deal on its own and sought the Authority's cursory approval at the last minute with no independent analysis of the transaction, coupled with no reasonable likelihood that the Authority would oversee Phoebe's operation of Palmyra, fails to meet the active supervision requirement for state action immunity.

The FTC claims that allowing the Eleventh Circuit's decision to stand would "exempt[] a large class of anticompetitive activity from antitrust scrutiny"⁵ and leave open a loophole for anticompetitive hospital

mergers, leading to higher prices for general acute care hospital services sold to commercial health care plans and their customers. The implications of the Eleventh Circuit's decision also extend beyond the hospital context to other state subdivisions with general corporate powers.

This case is one of several merger challenges brought by the antitrust agencies over the past year. In addition to two other enforcement actions involving hospital mergers, in October 2011, the Antitrust Division of the Department of Justice (DOJ) successfully obtained an injunction to stop H&R Block from acquiring TaxAct, a competitive provider of digital do-it-yourself (DDIY) tax preparation software, and in December 2011, AT&T abandoned its proposed \$39 billion acquisition of T-Mobile from Deutsche Telekom, four months after the DOJ had sued to block the deal. In January of this year, the FTC challenged Omnicare, Inc.'s hostile tender offer for rival long-term care pharmacy provider PharMerica, resulting in Omnicare's abandonment of the transaction.

These recent challenges demonstrate the willingness of the antitrust agencies to litigate a merger in court and their ability to win. These cases also reaffirm that deals of any size and scope, in any industry, are potentially open to intense and costly antitrust scrutiny and challenge in court. Thus, it is critically important for potential buyers and sellers to consider carefully and as early as possible the antitrust risk associated with a proposed transaction.

¹*FTC v. Phoebe Putney Health System, Inc., et al.*, 663 F.3d 1369 (11th Cir. 2011), *cert. granted*.

²*Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985) (citations omitted).

³*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted).

⁴The FTC cites to cases in four other circuit courts of appeal in support of its position.

⁵Petition for a Writ of Certiorari, *FTC v. Phoebe Putney Health System, Inc.*, No. 11-1160 (U.S. Mar. 23, 2012), at p.13, *available at* <http://www.ftc.gov/os/caselist/1110067/120323phoebeputneypetition.pdf>.

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