

Supreme Court Limits State-Action Immunity in Hospital Merger

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On February 19, 2013, the Supreme Court visited a corner of the antitrust map that it last glimpsed during the Reagan Administration—the state action doctrine. The case that prompted this sojourn, *FTC v. Phoebe Putney Health System, Inc.*,¹ arose when a hospital authority in Albany-Dougherty County, Georgia attempted to acquire the only other hospital that provided acute-care services in the county. The Federal Trade Commission (“FTC”) challenged the merger, claiming that it would enable the hospital authority to raise prices for such services, but saw its case rebuffed when lower courts held that the state action doctrine shielded the hospital authority’s decision from antitrust scrutiny. A unanimous Supreme Court reversed, holding that there was no “affirmative evidence” that the State of Georgia intended to authorize hospital authorities to engage in anticompetitive mergers.

State-Action Immunity

The state-action doctrine exempts the actions of state actors, typically local governments and other political subdivisions, from the federal antitrust laws when they act pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. The doctrine proceeds from the premise that states acting in their sovereign capacity are immune from the federal antitrust laws and are generally permitted to impose market restraints “as an act of government.”² It extends the principle of sovereign immunity to political entities created by the state (e.g., local governments or private entities) that carry out the state’s regulatory program.³ As the Supreme Court has previously explained, the doctrine protects conduct that (1) follows a policy “clearly articulated and affirmatively expressed” by the state and (2) is “actively supervised by the State.”⁴

The Proposed Merger and FTC Objections

Under a Georgia statute, counties and municipalities are authorized to create “hospital authorities” that can exercise public functions and have the power to acquire hospitals and other public health facilities.

The Hospital Authority of Albany-Dougherty County (“Authority”) acquired Phoebe Putney Memorial Hospital (“Memorial”) in 1941. In 2010, the Authority began discussions to acquire the only other hospital in the county, Palmyra Medical Center (“Palmyra”). Together, Memorial and Palmyra accounted for 86 percent of the relevant market for acute-care hospital services.

Shortly thereafter, the FTC issued an administrative complaint alleging that the proposed purchase would create a virtual monopoly and reduce competition in violation of § 5 of the Federal Trade

Commission Act⁵ and § 7 of the Clayton Act.⁶ The FTC then filed suit to enjoin the transaction. The district court dismissed the case at the outset, holding that the Authority was immune from antitrust liability under the state-action doctrine.⁷ On appeal, the Eleventh Circuit agreed with the district court, reasoning that because the state legislature could have “reasonably anticipated” the challenged anticompetitive conduct, the Authority was entitled to immunity.⁸

The Supreme Court’s Opinion

The Supreme Court reversed the Eleventh Circuit’s decision. Justice Sotomayor, writing for a unanimous Court, explained that because Georgia did not clearly articulate a state policy of displacing competition through hospital authorities, the Authority was not entitled to immunity under the state-action doctrine.

The Court held that the Eleventh Circuit stretched the concept of foreseeability too far. The “clear articulation” test requires an authorization to act or regulate in a way that is inherently anticompetitive, not just an authorization that could potentially result in anticompetitive behavior.⁹ For example, although hospital authorities are given the power to purchase other hospitals, they are also permitted to engage in many other types of conduct that have no potential to negatively affect competition. Even the power to acquire hospitals does not ordinarily produce anticompetitive effects. The possibility that a merger would occur and would reduce competition was insufficient to show that the State anticipated that its authorization would produce anticompetitive effects.¹⁰

Because the Authority failed to produce any clearly articulated evidence showing that the Georgia legislature sought to displace competition by consolidating hospital ownership, the Court determined that it had failed to show that these anticompetitive effects were “affirmatively contemplated” by the State.¹¹ The powers granted to hospital authorities under the statute, including the ability to make and execute contracts, set rates, and borrow money, mirror general powers routinely conferred on private corporations.¹² The Court said that at most, the statutory grant of power to hospital authorities reflected neutrality toward any purported “policy to allow hospital authorities to make acquisitions that substantially lessen competition,” and therefore did not pass the “clear articulation” test.¹³ The Court declined, however, to rule on a proposed “market participant” exception to immunity where an entity engages in proprietary activities.¹⁴

The Court acknowledged the Authority’s argument that it needed to consolidate in order to fulfill the State’s objective of providing affordable health care, but found that this was not sufficient to justify extension of the state-action immunity doctrine.¹⁵ That objective, while valid, did not logically suggest that the State intended hospital authorities to pursue that end by engaging in anticompetitive behavior. Even the State’s regulation of the industry and authorization of discrete forms of anticompetitive conduct, the Court explained, were insufficient to establish that the State affirmatively contemplated other forms of anticompetitive conduct.¹⁶

Impact of the Opinion

Phoebe Putney will almost certainly be hailed as a major victory for critics of the state action doctrine.¹⁷ The opinion observes that state-action immunity, like other antitrust exemptions, is disfavored. And the opinion offers what, on its face, appears to be a clear limitation on the scope of the exemption. Going forward, immunity from antitrust law will only attach when displacing competition is “the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.”¹⁸

But initial reactions aside, this standard does not appear too difficult to meet. Indeed, the opinion suggests that an entity seeking immunity under the state-action doctrine need not even point to a statement in the legislative record demonstrating the state's intent to displace competition. Rather, according to the Court, "state-action immunity applies if the anticompetitive effect was the 'foreseeable result' of what the State authorized."¹⁹

Entities that believe their actions should be immune from antitrust treatment under the state-action doctrine should reevaluate the extent of the state's delegation of authority and consider whether the entity's contemplated conduct is an inherent, not just likely, effect. Where the effect on competition is obvious or where the entity can point to some evidence that the state intended to displace competition, it should have a relatively easy time claiming immunity from antitrust enforcement.



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¹ 568 U.S. ---, 2013 U.S. LEXIS 1064 (Feb. 19, 2013).

² *Parker v. Brown*, 317 U.S. 341, 350, 352 (1943).

³ Office of Policy Planning, Report of the State Action Task Force, at 6–7 (2003).

⁴ *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

⁵ 38 Stat. 719, 15 U.S.C. § 45.

⁶ 38 Stat. 731, 15 U.S.C. § 18.

⁷ 793 F. Supp. 2d 1356, 1366–81 (2011).

⁸ 663 F.3d 1369, 1375–76 (2011).

⁹ 568 U.S. ---, 2013 U.S. LEXIS 1064, at *23–29 (Feb. 19, 2013).

¹⁰ *Id.* at *27–29.

¹¹ *Id.* at *20.

¹² *Id.* at *20–21 (citing Ga. Code Ann. § 31-7-75).

¹³ *Id.* at *36.

¹⁴ *Id.* at *18 n.4.

¹⁵ *Id.* at *29–32.

¹⁶ *Id.* at *32–35.

¹⁷ Statements following the decision suggest as much. *See, e.g.*, Statement of FTC Chairman Jon Leibowitz on the U.S. Supreme Court Ruling in Favor of the Commission in the Phoebe Putney/Palmyra Park Hospital Case (Feb. 19, 2013), *available at* <http://www.ftc.gov/opa/2013/02/phoebe.shtm> ("Today's ruling is a big victory for consumers who want to see lower health care costs, and the Court's opinion will ensure competition in a variety of other industries, as well.").

¹⁸ 568 U.S. ---, 2013 U.S. LEXIS 1064, at *24.

¹⁹ *Id.* at *20.