Supreme Court will hear case involving FTC's challenge to the merger of only two hospitals in Albany, Georgia

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The U.S. Supreme Court announced on June 25th that it will hear the FTC v. Phoebe Putney Health System, Inc. case involving an Federal Trade Commission challenge to the merger of the only two hospitals in Albany, Georgia. The FTC was unsuccessful in the U.S. District Court and U.S. Court of Appeals in attempting to obtain a preliminary injunction against the merger, with both courts concluding that the state action doctrine exempted the merger of the two hospitals from application of the antitrust laws.

A future ruling in this case by the Supreme Court may provide better guidance than currently exists as to how broadly a state can act to authorize political subdivisions to govern the delivery of health care services within a particular community or political subdivision with such action being exempt from the antitrust laws.

Under the state action doctrine, the federal antitrust laws do not apply to the anticompetitive conduct of political subdivisions created by a state if the conduct is authorized as part of a "state policy to displace competition" that is "clearly articulated and affirmatively expressed" in state law. If private entities are involved, they must be "actively supervised" by the state.

In April, 2011, the FTC filed a complaint challenging the acquisition of one hospital by the only other hospital in Albany, Georgia, and sought a preliminary injunction in U.S. District Court. In June, 2011, the U.S. District Court dismissed the FTC's motion, having concluded that the merger was exempt from the antitrust laws under the state action doctrine. In December, 2011, the U.S. Court of Appeals affirmed the judgment of the District Court on the basis of the state action doctrine.

The U.S. Solicitor General then filed a Petition for Writ of Certiorari with the U.S. Supreme Court on behalf of the Federal Trade Commission. The Petition was granted by the U.S. Supreme Court, thereby giving the FTC the opportunity to argue for reversal of the adverse lower court decisions.

In Georgia, the legislature had enacted the Hospital Authorities Law, which created a

hospital authority in each county or combination of counties and gave those public hospital authorities many of the same rights as private corporations to address health care services within the geographic area of the hospital authority.

Basically, the issue before the Supreme Court is whether the language in such grant of authority in the Georgia legislation is clear enough and broad enough to include hospital mergers that might otherwise be anticompetitive, and whether the grant of such rights can also protect a merger that involves a private entity created by the hospital authority. That is, can such state action exemption extend to a merger in which private entities are involved in the acquisition.

One of the two hospitals in the Albany hospitals merger was Palmyra Medical Center ("PMC"), which was owned by HCA, Inc., one of the larger hospital systems in the U.S. The other entity was Phoebe Putney Memorial Hospital ("PPHS"), which was a private corporation previously formed by the Hospital Authority of Albany-Dougherty County and which controlled Memorial Hospital. Pursuant to an agreement with PMC for the sale of PMC along with other related agreements, PPHS, according to the FTC, would gain full economic and operational control over both Memorial Hospital and Palmyra Medical Center. Neither the lower courts nor the parties disagreed that this was, in effect, a merger under the U.S. antitrust laws. The FTC alleged that, even if one looked beyond Albany, Georgia, where the merger would result in a monopoly, and included the six counties surrounding Albany as the market, the market share resulting from the merger would still increase from 75% to 86%.

Bottom Line

The Supreme Court may provide some clarity on the extent of the antitrust protection available under the state action doctrine and whether a state and/or political subdivisions can exercise less than complete regulatory oversight over healthcare participants to trigger the state action exemption.

This Petition for Writ of Certiorari to the U.S. Supreme Court is just the latest action that highlights the FTC's continuing focus on the health care industry. In the 2012 "Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program," both federal antitrust enforcement Agencies indicated their focus on and concern about possible anticompetitive effects within the health care industry from certain actions. In May of this year, representatives of both the FTC and the Antitrust Division of the Department of Justice, in separate speeches, again reiterated each agency's continuing focus on health care in their enforcement efforts. This was again further emphasized recently with the hiring of an economist who is an associate professor at the Kellogg School of Management at Northwestern University and whose research has focused on competition in health care markets to fill the newly created position at the FTC of Deputy Director for Health Care and Antitrust, whose responsibility is primarily looking at possible anticompetitive effects in the health care industry.

The Petition for Writ of Certiorari, along with the Opinions of the U.S. Court of Appeals and the U.S. District Court can be found on the U.S. Supreme Court website.