U.S. Supreme Court rules for FTC in hospital merger case

February 27, 2013

In Federal Trade Commission v. Phoebe Putney Health System, Inc., 568 U.S. ___ (2013), a unanimous decision issued on February 19, 2013, the U.S. Supreme Court found that a merger of two Georgia hospitals being challenged by the Federal Trade Commission (FTC) was not immune from the federal antitrust laws under "state action" immunity.

State action immunity basically exempts from the federal antitrust laws anti-competitive actions by a state as a sovereign entity. Substate governmental entities, however, are not deemed to be a "sovereign," and their actions are immune from the antitrust laws only if the state legislature clearly articulates a policy to displace competition through the actions of the particular governmental entity. In other words, states must "affirmatively contemplate" that the governmental entity by its actions would displace competition.

In the Georgia hospital merger case, the state action issue evolved from the Georgia legislature having created "Hospital Authorities" for various counties in Georgia and giving those Hospital Authorities general corporate powers. The particular Hospital Authority involved in the FTC case covered Dougherty County, which included Albany, Georgia.

The Albany-Dougherty County Hospital Authority owned Phoebe Putney Memorial Hospital (Memorial), which was operated by a subsidiary of the Hospital Authority. The Hospital Authority agreed to acquire a second hospital within the geographic jurisdiction of the Hospital Authority for $195 million, which was owned and operated by HCA, Inc. This hospital, Palmyra Medical Center (Palmyra), was located just two miles from Memorial. Together, Memorial and Palmyra accounted for 86 percent of the market for acute care hospital services provided to commercial health care plans and their customers in the six counties surrounding the town of Albany, Georgia. Memorial accounts for 75 percent of that market on its own.

When the acquisition of Palmyra was announced, the FTC challenged the merger on the grounds that it would substantially lessen competition in the six-county market for acute care hospital services. The defendants successfully resisted FTC's attempt

to obtain a preliminary injunction in federal district court on the basis of state action immunity. The FTC appealed to the Eleventh Circuit of Court of Appeals, in which the defendants again were successful, based upon state action immunity. However, the Court of Appeals did state in its opinion that the Court "agree[d] with the [FTC] that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly." But the Court of Appeals concluded that the transaction was immune from antitrust liability because of the state action exemption.

The FTC filed a Petition for Certiorari, asking the U.S. Supreme Court to hear its challenge of the Court of Appeals decision. The U.S. Supreme Court agreed to hear the case, and in its unanimous decision, the Supreme Court ruled that Georgia had not clearly articulated and affirmatively expressed a policy allowing Hospital Authorities to make acquisitions that substantially lessen competition, and, therefore, state action immunity does not apply.

The Supreme Court emphasized that " . . . given [that] the fundamental national values of free enterprise and economic competition . . . are embodied in the federal antitrust laws, state action immunity is disfavored . . . ," and, therefore, must be narrowly defined. Based upon this general acknowledgment that the federal antitrust laws embody the national values of free enterprise and economic competition, the Supreme Court concluded that, even though the Hospital Authorities were given general corporate powers which would include the authority to acquire or merge various hospitals within its jurisdiction, there was no clear indication by the Georgia legislature that that authority included anticompetitive acquisitions.

Takeaways

- To trigger state action immunity when governmental entities are involved (such as public hospitals), the state's legislative authorization for the governmental entity to act must clearly indicate or expressly articulate that the intent of the state is to displace competition through the authorized actions of the governmental entity; i.e., the legislature must clearly articulate and affirmatively express in some clear manner such a policy to displace competition.
- This case clarifies and narrows, the opportunity to rely upon the state action immunity barring application of the antitrust laws to health care entities that operate under state legislative authority.
- This case is a re-affirmation that the federal antitrust enforcement agencies are serious in their continuing pronouncements of enforcing the antitrust laws to assure that competition is not hindered in the health care markets by the joint actions of health care participants.
- This case is a reminder that any proposed consolidation, merger, joint venture or other transaction involving competitors, including private entities, in any segment of the health care market should include an early antitrust

analysis to assure that the proposed transaction is not likely to be viewed as substantially lessening competition in the particular market affected by the transaction.

Read the statement of the FTC Chairman about the case on the FTC website.