

February 27, 2013

U.S. Supreme Court Opinion Addresses Availability of State-Action Antitrust Immunity

RESOURCE LINKS

Supreme Court's Decision in *FTC v. Phoebe Putney Health System, Inc.*:
http://www.supremecourt.gov/opinions/12pdf/11-1160_1824.pdf

On February 19, 2013, in *FTC v. Phoebe Putney Health System, Inc.*,¹ a case that highlights vigorous enforcement activities by the Federal Trade Commission ("FTC") in the health care arena, the Supreme Court of the United States issued a unanimous opinion ("Opinion") that overturned a ruling by the U.S. Court of Appeals for the Eleventh Circuit and limited the invocation of the state-action doctrine where state laws grant government authorities general corporate powers. This new decision supports the FTC's position that it has the authority to pursue a challenge to the hospital

acquisition at issue in the case. Although the Opinion addressed the specific legislative powers granted to a hospital authority under state legislation, the Opinion will likely impact judicial interpretation of other state legislation that purports to provide parties with immunity from the federal antitrust laws, such as state hospital cooperation acts, and similar types of legislation being created to allow cooperation and integration of hospital and provider systems.

The following are key takeaways from the Opinion:

- 1) The Supreme Court reiterated that state-action immunity is a disfavored exception.
- 2) The Opinion demonstrates that state legislation purporting to provide immunity from federal antitrust laws will be afforded careful examination. In that regard, the Opinion makes clear that to successfully invoke state-action immunity, state laws should be explicit in their intent to displace competition.
- 3) Parties contemplating state-action immunity should examine relevant enabling legislation to determine whether language exists to support a clear "intent to displace competition."

State-Action Immunity

The Supreme Court first recognized state-action immunity in *Parker v. Brown*, 317 U.S. 341 (1943), in which the Court, relying on principles of federalism and state sovereignty, held that the federal

¹ *FTC v. Phoebe Putney Health Sys. Inc.*, No. 11-1160, slip op. at 1 (U.S. Feb. 19, 2013).

antitrust laws did not prohibit anticompetitive actions prescribed by the states “as an act of government.”² The state-action doctrine extends to a local governmental entity so long as the acts of the entity are pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition. As explained in the Opinion, this is determined based on whether the state’s laws are either explicit in their intent to displace competition or would naturally result in anticompetitive effects (i.e., where the anticompetitive effect was the inherent, logical, or ordinary result of what the state authorized).

In the *Phoebe Putney* case, the Supreme Court determined that the general corporate powers that Georgia delegated to hospital authorities do not reveal any explicit intent to displace competition and are not the types of powers that would inherently or foreseeably result in the suppression of competition. (Although not relevant in this case, when the actors are private parties rather than governmental entities, the state must also “actively supervise” the conduct that would otherwise be deemed anticompetitive.)

Path to the Supreme Court

The *Phoebe Putney* case stems from the FTC’s challenge of the acquisition of Palmyra Park Hospital (“Palmyra”) by a hospital authority in Georgia (“Phoebe Putney”). In 2010, Palmyra and Phoebe Putney reached an agreement regarding the acquisition of Palmyra by Phoebe Putney. In 2011, the FTC issued an administrative complaint alleging that the transaction between Palmyra and Phoebe Putney would substantially reduce competition in the market for acute care hospital services, a violation of Section 5 of the Federal Trade Commission Act³ and Section 7 of the Clayton Act.⁴

The FTC and the State of Georgia then filed a lawsuit against Phoebe Putney and other respondents in federal district court to enjoin the transaction pending the administrative proceedings. The State of Georgia later withdrew from the case. The key question in this case was whether a Georgia statute creating hospital authorities (and then giving them general corporate powers, such as the power to acquire other corporate entities) expresses a statutory intent to displace competition, thereby making the acquisition of Palmyra by Phoebe Putney immune from challenge by the FTC.

On June 27, 2011, the U.S. District Court for the Middle District of Georgia denied the FTC’s request for a preliminary injunction and granted respondents’ motion to dismiss the case—holding that the state-action doctrine insulated respondents from antitrust liability.⁵

On December 9, 2011, the Eleventh Circuit affirmed the district court’s opinion, holding that Phoebe Putney’s acquisition of Palmyra was immune from liability under the state-action doctrine, even though the transaction would “substantially lessen competition or tend to create, if not create, a monopoly.”⁶ Relying on the foreseeability issue of the state-action analysis, the Eleventh Circuit held that the Georgia Legislature, in granting the broad corporate powers to hospital authorities—including the power to acquire hospitals—must have anticipated that such acquisitions could produce

² *Parker v. Brown*, 317 U.S. 341, 351-53 (1943).

³ 38 Stat. 719, 15 U.S.C. § 45.

⁴ 38 Stat. 731, 15 U.S.C. §18.

⁵ *FTC v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356 (M.D. Ga. 2011).

⁶ *FTC v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

anticompetitive effects. The Eleventh Circuit also held that it was foreseeable that acquisitions could consolidate ownership of competing hospitals and eliminate competition.

Key Issues on Certiorari

The Supreme Court granted certiorari on two questions related to the state-action doctrine: (1) whether the Georgia Legislature, through the powers vested in hospital authorities, clearly articulated and affirmatively expressed a state policy to displace competition in the hospital services market; and, if so, (2) whether state-action immunity is nevertheless rendered inapplicable as a result of the fact that Phoebe Putney had minimal participation in negotiating the terms of the sale of Palmyra and had, or would have had, limited supervision of the two hospitals' operations. The Supreme Court only reached a determination on the first question.

The Supreme Court's Analysis

The Supreme Court found that the Eleventh Circuit had applied the state-action foreseeability concept to the Georgia statute "too loosely."⁷ With the understanding that statutes are rarely accompanied by enumerated lists of legislative intent, the Supreme Court clarified that an allegedly state-authorized anticompetitive effect can qualify as clearly articulated and affirmatively expressed if the displacement of competition was the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."⁸

Additionally, the Supreme Court found that the general corporate powers granted by Georgia to hospital authorities were similar to those granted to private corporations, and those general corporate powers are typically used in ways that do not trigger federal antitrust concerns. As such, the mere grant of the general corporate powers did not support a finding that a state, by delegating such powers, had contemplated that they would be used anticompetitively. Moreover, although the Supreme Court acknowledged that the Georgia Legislature may have anticipated anticompetitive effects emanating from the powers conferred, there was no evidence that the Georgia Legislature intended for those powers to have anticompetitive effects. Because the delegation of authority did not include permission to use those powers anticompetitively, the "clear articulation" test was not satisfied and state-action immunity therefore did not apply.

Impact

The *Phoebe Putney* case gives more muscle to the FTC's enforcement efforts in the health care arena and is part of a line of recent challenges by the FTC to hospital transactions. In addition, the Opinion reaffirms that claims of state-action immunity may be subject to intense scrutiny. Although only addressing a Georgia law, the Opinion could have a far-reaching impact on other similar state laws, including hospital or provider cooperation acts.

⁷ *FTC v. Phoebe Putney Health Sys. Inc.*, No. 11-1160, slip op. at 11 (U.S. Feb. 19, 2013).

⁸ *Id.*

For more information about this issue of *IMPLEMENTING HEALTH AND INSURANCE REFORM*, please contact one of the authors below or the member of the firm who normally handles your legal matters.

Patricia M. Wagner

Member of the Firm
Epstein Becker Green
Washington, D.C.
(202) 861-4182
PWagner@ebglaw.com

Ross K. Friedberg

Associate
Epstein Becker Green
Washington, D.C.
(202) 861-1845
RFriedberg@ebglaw.com

Daniel C. Fundakowski

Associate
Epstein Becker Green
Washington, D.C.
(202) 861-1868
DFundakowski@ebglaw.com

Information published in *IMPLEMENTING HEALTH AND INSURANCE REFORM* is not intended to be, nor should it be considered, legal advice. Readers should consult an attorney to discuss specific situations in further detail.

Information published in *IMPLEMENTING HEALTH AND INSURANCE REFORM* is not intended to be, nor should it be considered, legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligation on you and your company.

www.ebglaw.com

© 2013

Epstein Becker & Green, P.C.

Attorney advertising.

If you would like to be added to our mailing list, please [click here](#), complete the form below or contact:

Lisa C. Blackburn
Business Development Manager
National Health Care and Life Sciences Practice
Epstein Becker & Green, P.C.
1227 25th St., NW, Suite 700
Washington, D.C. 20037
phone 202/861-1887 – fax 202/296-2882
lblackburn@ebglaw.com

Name: _____ Title: _____

Company/Firm/Organization: _____

Street Address: _____

City: _____ State: _____ Zip Code: _____

Phone No.: _____ Fax No.: _____

E-mail Address: _____

ATLANTA

Robert N. Berg
Michael V. Coleman
J. Andrew Lemons
Kenneth G. Menendez
Marisa N. Pins
Evan Rosen
Alan B. Wynne

BOSTON

Barry A. Guryan

CHICAGO

Amy K. Dow
Lisa J. Matyas
Griffin W. Mulcahey
Kevin J. Ryan

HOUSTON

Mark S. Armstrong
Daniel E. Gospin
Pamela D. Tyner

LOS ANGELES

Adam C. Abrahms
Dale E. Bonner
Ted A. Gehring
J. Susan Graham
Kim Tyrrell-Knott

NEW YORK

Nicholas S. Allison
Eric L. Altman
Jeffrey H. Becker
Vinay Bhupathy*
Michelle Capezza
Stephanie Carrington
Aime Dempsey
Sarah K. diFrancesca
Kenneth W. DiGia
Jerrold I. Ehrlich
James S. Frank
Arthur J. Fried
Paul A. Friedman
Jay E. Gerzog
John F. Gleason
Robert D. Goldstein
Wendy C. Goldstein
Robert S. Groban, Jr.
Gretchen Harders
Jennifer M. Horowitz
Kenneth J. Kelly
Joseph J. Kempf, Jr.

Jane L. Kuesel
Stephanie G. Lerman
Purvi Badiani Maniar
Wendy G. Marcari
Eileen D. Millett
Leah A. Roffman
Tamar R. Rosenberg
William A. Ruskin
Jackie Selby
Catherine F. Silie
Victoria M. Sloan
Steven M. Swirsky
Natasha F. Thoren

NEWARK

Joan A. Disler
James P. Flynn
Daniel R. Levy
Philip D. Mitchell
Maxine Neuhauser
Michael J. Slocum
Sheila A. Woolson

STAMFORD

David S. Poppick

WASHINGTON, DC

Kirsten M. Backstrom
Emily E. Bajcsi
Clifford E. Barnes

James A. Boiani
George B. Breen
Lee Calligaro
Jesse M. Caplan
Jason E. Christ
Eric J. Conn
Tanya V. Cramer
Anjali N.C. Downs
Gregory H. Epstein
Steven B. Epstein
Ross K. Friedberg
Daniel C. Fundakowski
Brandon C. Ge
Stuart M. Gerson
David C. Gibbons
Shawn M. Gilman
Jennifer K. Goodwin
Daniel G. Gottlieb
Philo D. Hall
Douglas A. Hastings
Robert J. Hudock
William G. Kopit
Amy F. Lerman
Christopher M. Locke
Katherine R. Lofft
Julia E. Loyd
Mark E. Lutes
Kara M. Maciel
Benjamin S. Martin
Teresa A. Mason*

David E. Matyas
Colin G. McCulloch
Frank C. Morris, Jr.
Leslie V. Norwalk
Kathleen A. Peterson
Daniela A. Pirvu
René Y. Quashie
Jonah D. Retzinger
Serra J. Schlanger
Deepa B. Selvam
Alaap B. Shah
Lynn Shapiro Snyder
Adam C. Solander
Ophir Stemmer
David B. Tatge
Daly D.E. Temchine
Bradley Merrill Thompson
Carrie Valiant
Patricia M. Wagner
Robert E. Wanerman
Constance A. Wilkinson
Kathleen M. Williams
Lesley R. Yeung

*Not Admitted to the Practice of Law