Supreme Court Limits State Action Immunity in *Federal Trade Commission v. Phoebe Putney Health Systems*

03.01.2013 | UPDATES

In a closely watched decision, a unanimous U.S. Supreme Court has reversed an 11th Circuit decision that invoked the state action doctrine to prevent the Federal Trade Commission (FTC) from challenging a state hospital authorities' proposed acquisition of a competing hospital. In its ruling, the Supreme Court held that the State of Georgia's general grant of power to the authority to acquire hospitals did not reflect a clearly articulated affirmatively expressed policy to make acquisitions that would substantially lessen competition.

The decision has broad applicability to various state agencies, cities, counties, municipalities, and other governmental and private entities that act pursuant to state law, e.g., public and private utilities, hospital districts, communications providers, transportation companies, port authorities and professional associations.

**BACKGROUND**

The state action doctrine recognizes a state's right to impose market restraints that might otherwise violate the antitrust laws. This immunity may be extended to subordinate governmental entities and private actors who act in accordance with a "clearly articulated and affirmatively expressed" state policy to displace competition. In 2011, the FTC filed suit to enjoin the proposed consolidation of two of three independent hospitals in a six-county area in Georgia. The FTC alleged that after the acquisition, the acquiring entity, Phoebe Putney Healthy System, Inc. (Phoebe) and its parent, would have a market share of more than 85% and that the acquisition would substantially reduce competition in the market for acute care hospital services. Phoebe was owned by the Hospital Authority of Albany-Dougherty County (the Authority). Under Georgia's Hospital Authorities Law (the Law), political subdivisions may provide for the operation and maintenance of health care facilities in counties and municipalities of the state. The Law further permits authorities to "exercise public and essential governmental functions" and delegates to them numerous general powers, including the ability to acquire and lease hospitals.

In denying the FTC's request for a preliminary injunction enjoining the acquisition and granting the defendants' motion to dismiss, the district court held that the defendants' acquisition activity was immune under the state action doctrine. The 11th Circuit affirmed. The Supreme Court reversed.

**THE SUPREME COURT HOLDING**

In finding that the parties were entitled to state action immunity, the district court and the 11th Circuit relied upon the general powers accorded to the Authority and found that any anticompetitive effect of the acquisition was a "foreseeable" result of the authority granted by the State of Georgia. Specifically, the legislature could have "readily anticipated" that the grant of powers to lease and acquire facilities could have an anticompetitive effect. In reversing the lower court's decision, the Supreme Court stated that "simple permission to play in a market" does not "foreseeably entail permission to roughhouse in that market unlawfully." 568 U.S. at ___ (*quoting Kay Elec. Cooperative v. Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011). While the legislature's intent to displace competition may be implied, it will only be found where the state has "affirmatively contemplated" the displacement and such displacement is the "inherent, logical or ordinary result of the exercise of authority delegated by the state legislature." 568 U.S. at ___.

In *Phoebe Putney*, the Supreme Court found that such a conclusion could not be reached simply from the general grant of authority under the Law. The Supreme Court also found that it could not be implied from the unique powers and responsibilities granted to the Authority, such as its eminent domain powers or the certificate of need process required before authorizing any significant expansion in the capacity of medical facilities.

**THE IMPLICATIONS OF THE PHOEBE PUTNEY DECISION**

Governmental entities and private entities subject to governmental regulation are advised to review the grant of authority pursuant to which they act, or are seeking to act, and determine whether their conduct is covered by the Supreme Court's refinement of the clear articulation test. If the grant of authority is not sufficiently clear, parties may seek further clarification from the legislature or modify their conduct accordingly.

© 2013 Perkins Coie LLP

**CONTACTS**
Susan E. Foster  
Partner  
Seattle  
D +1.206.359.8846

Cori Gordon Moore  
Partner  
Seattle  
D +1.206.359.3849

RELATED SERVICES

PRACTICES
• Antitrust & Unfair Competition Litigation

INDUSTRIES
• Healthcare