

INSIGHTS

Supreme Court Clarifies Antitrust Immunity For State-Sanctioned Conduct

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On February 19, 2013, the U.S. Supreme Court, in a [unanimous decision](#), found that a merger of two Georgia hospitals was not immune from federal antitrust laws under the "state-action" exemption, reversing a decision of the Eleventh Circuit Court of Appeals. The Supreme Court's ruling has implications for activities of local governmental entities, such as counties and municipalities, as well as private actors exercising authority delegated by a state.

In this case, *Federal Trade Commission v. Phoebe Putney Health System, Inc.*,¹ the Hospital Authority of Albany-Dougherty County (Authority), a non-profit entity formed by the city of Albany and Dougherty County pursuant to Georgia law, owned and operated Phoebe Putney Memorial Hospital. In 2010, the Authority authorized the purchase of the only other hospital in Dougherty County, Palmyra Medical Center. The Federal Trade Commission (FTC) sought to block the merger on the grounds that it would create a virtual monopoly and would substantially lessen competition in the market for acute-care hospital services, in violation of Section 5 of the Federal Trade Commission Act and Section 7 of the Clayton Act. Both the federal district court and the Eleventh Circuit denied the FTC's request for an injunction, finding that the state-action doctrine immunized the merger from antitrust liability.

The state-action doctrine, which was first recognized by the U.S. Supreme Court in *Parker v. Brown*,² exempts from the federal antitrust laws actions by a state acting in its sovereign capacity. The doctrine was subsequently expanded to cover subdivisions of a state, such as municipalities and other local governmental entities which, although not sovereign, are immune from federal antitrust scrutiny if their activities are undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. Even anticompetitive actions of private parties implementing state policy may be entitled to immunity if the "clear articulation" requirement is met and the policy is "actively supervised" by the state itself.³

To pass the "clear articulation" test, a state legislature need not expressly state an intention for a delegated action to have anticompetitive effects. Rather, state-action immunity applies if the anticompetitive effect was the "foreseeable result" of what the state authorized. The Eleventh Circuit found that, because the Authority was granted broad corporate powers, including power to acquire and lease hospitals, anticompetitive conduct by the Authority must have been reasonably anticipated by the Georgia Legislature and therefore was foreseeable.

The Supreme Court disagreed. Writing for the Court, Justice Sonia Sotomayor noted at the outset that "state-action immunity is disfavored." The Court held that the Eleventh Circuit applied the concept of foreseeability too loosely and that the "clear articulation" standard is met only where anticompetitive effects are the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." More specifically, the Supreme Court said that grants of general corporate power to substate governmental entities, such as the Authority, do not meet the "clear articulation" requirement for state-action immunity. The acquisition and leasing powers exercised by the Authority mirror general powers routinely conferred by state law upon private corporations and are typically used in ways that raise no antitrust concerns. As a result, a state that has delegated such general powers cannot be said to have contemplated that they will be used to displace competition, for example, by consolidating ownership of hospitals.

The Supreme Court did acknowledge that public, non-profit entities like the Authority differ materially from private corporations that offer hospital services. However, neither the Georgia Legislature's objective of improving access to affordable health care, nor the Authority's non-profit status, logically suggested that the State intended hospital authorities to pursue their goals through anticompetitive mergers. Even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, such as the Legislature's certificate of need requirement, did not mean the State affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related.

The Supreme Court's decision narrows the scope of state-action immunity and has implications for conduct of local governmental entities as well as private actors, not only involving mergers and acquisitions in the health care sector, but also in other contexts and other industries. This was noted by the FTC, which issued a [statement](#) praising the Court's opinion and stating that it "will ensure competition in a variety of other industries, as well." Entities acting under existing state legislation may need to re-evaluate whether the statutes that empower them offer immunity from federal antitrust scrutiny. Even legislation that explicitly allows some activities that might be anticompetitive may now need to be read more carefully. Parties seeking to get new legislation passed to protect certain conduct that may displace competition now have a clearer roadmap for the degree of specificity required in the statutory language.

¹ 568 U.S. ____ (2013).

² 317 U.S. 341 (1943).

³ Local governmental entities are not subject to the "active state supervision" requirement because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies.