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Client Alert

Supreme Court Nixes "State Action" Immunity for Hospital Acquisition in Georgia

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In a February 19, 2013 unanimous decision in *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, the Supreme Court overturned the 11th Circuit Court of Appeals, holding that an acquisition of a competing hospital by a Hospital Authority created by the State of Georgia was not immune from antitrust scrutiny under the "state-action" doctrine.

Under Georgia's Hospital Authorities Law, political subdivisions may create special-purpose 'hospital authorities' to provide for the "operation and maintenance of needed health care facilities" and may "exercise public and essential governmental functions," including the authority to acquire health facilities. After the Hospital Authority of Albany-Dougherty County decided to purchase the second of two hospitals in the county and lease it to the private company that already operated the first, the FTC issued an administrative complaint alleging that the transaction would substantially reduce competition in the market for acute-care hospital services and sought a preliminary injunction against the acquisition. Both the District Court and the 11th Circuit concluded that the Hospital Authority, as a local government entity, was entitled to state-action immunity from antitrust laws because the challenged anticompetitive conduct was a 'foreseeable' consequence of its enabling legislation.

The Supreme Court, however, reversed, holding that because the State had "not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition," state-action immunity does not apply. The Court recognized that under the state-action doctrine, immunity from federal antitrust laws may extend to political sub-divisions and non-state actors who are carrying out the State's legislative policy. However, state-action immunity is disfavored and will only attach if the non-sovereign state actor's actions are undertaken as part of a "clearly articulated and affirmatively expressed" state policy to displace competition, such as where the anticompetitive effect was an "inherent, logical and ordinary" result of exercise of the authority delegated. Here, the Court found that there was no evidence that the State affirmatively contemplated that the Hospital Authority would displace competition by consolidating hospital ownership and eliminating competition. The Court noted that the Hospital Authority's powers were similar to those any private corporation is authorized to undertake under state law, but that such general authority does not imply authorization to behave in ways that would violate the antitrust laws. The Court explained that the 11th Circuit interpretation of "foreseeability" was too loose and that "a reasonable legislature's ability to anticipate" the possibility that general powers could be exercised in an anticompetitive ways "falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative."

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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