Antitrust Advisory

FEBRUARY 21, 2013

Supreme Court Unanimously Rules Unforeseeability Bars Immunity Defense for Allegedly Anticompetitive Hospital Merger

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On February 19, 2013, the U.S. Supreme Court unanimously held that state-action immunity does not protect a state-created hospital authority from antitrust scrutiny over a proposed hospital merger where the anticompetitive effect of such merger was not a “foreseeable result” authorized by the state. FTC v. Phoebe Putney Health System, Inc., 568 U.S. ___ (2013). The proposed merger-to-monopoly between Phoebe Putney Health System, Inc. (“Phoebe Putney”) and Palmyra Park Hospital, Inc. (“Palmyra Park”) had been deemed protected by state-action immunity by both a district court and the U.S. Court of Appeals for the Eleventh Circuit. In overturning the lower courts, the Supreme Court considered whether the state law that created the hospital authority that owned Phoebe Putney “clearly articulate[d] and affirmatively express[ed] a state policy to permit acquisitions that substantially lessen competition.”

The Supreme Court decision clarifies and limits the foreseeability inquiry that has crept into state-action immunity analyses. Phoebe Putney is the first merger case to reach the Supreme Court since 1974, but the decision did not address substantive merger law matters. It was also the first hospital merger case that received any Supreme Court review; the Court’s analysis would seem to signal that hospital markets are correctly receiving full antitrust scrutiny.

Background

Pursuant to a 1941 Georgia state law, political subdivisions in the state are permitted to provide health care services through municipal “hospital authorities.” Under the law, hospital authorities have the power “to acquire by purchase, lease, or otherwise and to operate projects.” Employing the state law, the City of Albany and Dougherty County established a hospital authority (“Authority”) that acquired Phoebe Putney Memorial Hospital (“Memorial”). In 1990, the Authority restructured its ownership of Memorial by forming a private nonprofit corporation, Phoebe Putney, which would lease Memorial from the Authority for $1 per year and would have exclusive power over the operation of the hospital.

In 2010, Phoebe Putney began merger discussions with Palmyra Park. Phoebe Putney and Palmyra Park own the only two hospitals in the Albany, Georgia area. Together, the two hospitals have 86 percent market share in the six counties surrounding Albany for the provision of acute-care hospital services provided to commercial health care plans. Following the negotiations with Palmyra Park, Phoebe Putney presented the proposed acquisition to the Authority with a plan for the Authority to purchase Palmyra Park and then lease it to Phoebe Putney for $1 per year. The Authority approved the proposed acquisition.

The Lower Courts’ Decisions

The Federal Trade Commission (“FTC”) issued an administrative complaint against the proposed transaction, alleging that it would result in a virtual monopoly and reduce competition. The FTC also filed suit to enjoin the
transaction pending its administrative proceedings. The U.S. District Court for the Middle District of Georgia denied the request for a preliminary injunction and granted the hospitals’ motion to dismiss, holding that Phoebe Putney’s actions were immune from antitrust liability under the state-action doctrine. 793 F. Supp. 2d 1356 (M.D. Ga. 2011). Under the state-action immunity doctrine, a local governmental entity’s action pursuant to a “clearly articulated and affirmatively expressed state policy to displace competition” is exempt from federal antitrust law scrutiny.

On appeal, the U.S. Court of Appeals for the Eleventh Circuit affirmed. 663 F.3d 1369 (11th Cir. 2011). The Court of Appeals found that the Authority, as a local governmental entity, was entitled to state-action immunity if the challenged anticompetitive conduct was a “foreseeable result” of the state’s legislation. Noting the “impressive breadth” of powers given to hospital authorities under the state law, the Court of Appeals concluded that the anticompetitive result of the transaction was contemplated by the state law.

The Supreme Court’s Decision

In a unanimous decision written by Justice Sotomayor, the Supreme Court reversed and remanded, holding that the Court of Appeals “applied the concept of ‘foreseeability’… too loosely.” Setting the stage for its analysis, the Court noted that “state-action immunity is disfavored,” and thus it is only recognized “when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that ‘is the State’s own.’” Relying on Community Communications Co. v. Boulder, the Court held that in deciding whether state-action immunity applies in a particular case, the local governmental entity’s challenged activity “must be undertaken pursuant to a ‘clearly articulated and affirmatively expressed’ state policy to displace competition.” 455 U.S. 40 (1982). Citing its “clear articulation test” from Hallie v. Eau Claire, the Court explained that “a state legislature need not ‘expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects…’ rather that… the anticompetitive effect was the ‘foreseeable result’ of what the [s]tate authorized.” 471 U.S. 34 (1985).

The Court found that there was no evidence that Georgia affirmatively contemplated an anticompetitive effect from hospital authorities consolidating hospital ownership. Acknowledging the acquisition and leasing powers granted to the Authority, the Court held that such “general powers” to act are “insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively.” Responding to the lower courts’ reliance on the Authority’s power to acquire and lease hospitals, the Court stated that “we reject … the proposition that ‘the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances’ because such an approach ‘would wholly eviscerate the concepts of clear articulation and affirmative expression that our precedents require.’”

Elaborating on its reasoning, the Court explained that while a legislature cannot “be expected to catalog all of the anticipated effects” of a statute delegating authority, “the [s]tate must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the state itself.” Thus, a state policy can only be found to displace federal antitrust law when such result is “the inherent, logical, or ordinary result of the exercise of authority delegated by the state.” Within the market for hospital services, the Court noted that “the power to acquire hospitals … does not ordinarily produce anticompetitive effects, [because it would] raise federal antitrust concerns only in markets that are large enough to support more than one hospital but sufficiently small that the merger of competitors would lead to a significant increase in market concentration.”

The Court’s decision bolsters the antitrust agencies’ enforcement efforts with respect to actions taken by political subdivisions by clarifying the scope of the state-action immunity. The case now will proceed to the merits of the FTC’s claim that the acquisition is anticompetitive.

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