Skadden

Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

February 21, 2013

US Supreme Court Narrows State-Action Doctrine in Hospital Merger Challenged by FTC

In a unanimous decision issued on February 19, 2013, the U.S. Supreme Court ruled that the state-action doctrine did not immunize Phoebe Putney Health System's acquisition of Palmyra Park Hospital in Albany, Georgia.[1] The decision immediately was hailed by FTC Chairman Jon Leibowitz as "a big victory for consumers who want to see lower health care costs" and one that "will ensure competition in a variety of other industries, as well." This ruling both clarifies the standards needed to establish state-action immunity, while raising questions about what evidence will meet these standards.

Phoebe arose out of the merger between two hospitals, Phoebe Putney Memorial Hospital (PPMH) and Palmyra Medical Center (Palmyra). PPMH was owned by the Hospital Authority of Albany-Dougherty (the Authority), which leased PPMH to Phoebe Putney Health System (PPHS), a private nonprofit corporation that operated the hospital. Palmyra, the second of the two hospitals in Dougherty County, was operated by a national for-profit hospital network, HCA, Inc. (HCA). In 2010, PPHS began discussions with HCA regarding the possible acquisition of Palmyra. Because of financing and antitrust concerns, PPHS proposed a transaction structure whereby the Authority would purchase Palmyra and lease it to a PPHS subsidiary. The Authority approved the transaction in 2011, and the FTC filed suit to enjoin the transaction shortly thereafter, alleging that the merger would result in a virtual monopoly in the market for acute care hospital services in the six counties surrounding Albany. The district court denied the request for a preliminary injunction, holding that the transaction was immune from antitrust liability under the state-action doctrine. The U.S. Court of Appeals for the Eleventh Circuit affirmed.[2]

The Supreme Court overturned, holding that the state-action doctrine did not provide immunity from the antitrust laws "because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." Prior precedent established that for state-action immunity to apply, the anticompetitive effect must be the foreseeable result of what the state authorized. Here, the Court found no evidence that the Georgia legislature "affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." While the Georgia law that established hospital authorities as special-purpose public entities granted those entities broad general corporate powers, including the power to acquire hospitals, the Court found that it did not "clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition."

Going forward, the Court's test will require analyzing whether a given state statute "clearly articulat[es] an affirmative state policy to displace competition with a regulatory alternative," in which case the state-action doctrine may apply. And, as the Court explained, a statutory construct that provides for the general regulation of an industry, and even authorizes some discrete forms of anticompetitive conduct, is not enough to

1 *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. __ (2013).

2 *Id. See also FTC v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369 (11th Cir. 2011); *FTC v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356 (M.D. Ga. 2011).

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Sharis A. Pozen
Washington, D.C.
202.371.7555
sharis.pozen@skadden.com

Clifford H. Aronson
New York
212.735.2644
clifford.aronson@skadden.com

Alec Y. Chang
New York
212.735.4142
alec.chang@skadden.com

* * *

1440 New York Avenue, NW,
Washington, D.C. 20005
Telephone: 202.371.7000

Four Times Square, New York, NY 10036
Telephone: 212.735.3000

WWW.SKADDEN.COM

establish that the state affirmatively contemplated other tangentially related forms of anticompetitive conduct.[3] The Court expressed concern that a rule allowing loose application of the clear-articulation test would require states to affirmatively disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct. However, the Court's decision leaves open the question of exactly what will qualify as a clearly articulated affirmative expression such that immunity will apply.

The *Phoebe* decision is a significant win for the FTC, which has challenged several recent hospital deals. Outgoing Chairman Leibowitz emphasized enforcement in the health care sector as one of his priorities during his tenure and had argued that if the *Phoebe* deal was allowed to proceed it would not only drive up costs to consumers in Albany, Georgia, but it also would "create a roadmap for doing so elsewhere."[4] This decision raises the bar for health care organizations, as well as other types of entities, looking for immunity from the antitrust laws by way of the state-action doctrine. As financial pressures rise for hospitals and drive consolidation of facilities to achieve efficiencies of scale, this ruling will require state legislatures to affirmatively act if antitrust laws are not to impede those efforts in some markets.

---

3 *Phoebe Putney*, 568 U.S. __.

4 Remarks of FTC Chairman Jon Leibowitz, Antitrust in Healthcare Conference American Bar Association/American Health Lawyers Association, "Are Titanic Health Care Costs Sinking Us? What the FTC Is Doing to Keep Patients Afloat," at 5 (May 3, 2012).

Additional Contacts in the Antitrust and Competition Group

Simon Baxter	Brussels	32.2.639.0310	simon.baxter@skadden.com
Jess Biggio	New York	212.735.2060	jessica.biggio@skadden.com
C. Benjamin Crisman, Jr.	Washington, D.C.	202.371.7330	benjamin.crisman@skadden.com
Frederic Depoortere	Brussels	32.2.639.0334	frederic.depoortere@skadden.com
Paul M. Eckles	New York	212.735.2578	paul.eckles@skadden.com
Shepard Goldfein	New York	212.735.3610	shepard.goldfein@skadden.com
Peter E. Greene	New York	212.735.3620	peter.greene@skadden.com
Matthew P. Hendrickson	New York	212.735.2066	matthew.hendrickson@skadden.com
Ian G. John	New York	212.735.3495	ian.john@skadden.com
James A. Keyte	New York	212.735.2583	james.keyte@skadden.com
Karen Hoffman Lent	New York	212.735.3276	karen.lent@skadden.com
John H. Lyons	Washington, D.C.	202.371.7333	john.h.lyons@skadden.com
Gary A. MacDonald	Washington, D.C.	202.371.7260	gary.macdonald@skadden.com
Jeffrey A. Mishkin	New York	212.735.3230	jeffrey.mishkin@skadden.com
John M. Nannes	Washington, D.C.	202.371.7500	john.nannes@skadden.com
Neal R. Stoll	New York	212.735.3660	neal.stoll@skadden.com
Steven C. Sunshine	Washington, D.C.	202.371.7860	steve.sunshine@skadden.com
Ingrid Vandenborre	Brussels	32.2.639.0336	ingrid.vandenborre@skadden.com
James S. Venit	Brussels	32.2.639.0300	james.venit@skadden.com

Palo Alto associate Joanna Warren assisted in the preparation of this memorandum.