

PUBLICATION

Supreme Court Reins in State Action Immunity

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Last week a unanimous Supreme Court issued its highly anticipated opinion in *FTC v. Phoebe Putney Health System, Inc.*, addressing the "State action" exemption from application of the federal antitrust laws for the first time in over 20 years. In *Phoebe Putney*, the Court reversed the 11th Circuit, finding that the Georgia statutes allowing counties and municipalities to create local hospital authorities to own and operate hospitals did not confer State action immunity on the hospital authorities. This case involved a vigorous and persistent challenge by the Federal Trade Commission (FTC), which unsuccessfully sought to enjoin the acquisition before the federal district court and the court of appeals. The FTC then filed a petition for certiorari, which was granted and which resulted in the Supreme Court's unanimous decision in favor of the FTC.

Even though immunity from federal antitrust law is disfavored, it has long been the law that States enjoyed such immunity in enacting and implementing regulations, laws and programs which could have an anticompetitive effect in the marketplace. This immunity was extended to State subdivisions when they act "pursuant to State policy to displace competition," and to private parties when the activities are undertaken pursuant to a clearly articulated State policy anticipating anticompetitive effect *and* when the activities are "actively supervised" by the State. *Phoebe Putney*, operating pursuant to Georgia's Hospital Authorities Law, was charged by the FTC with creating a virtual monopoly by acquiring, through its hospital authority, a competing hospital. *Phoebe Putney* defended itself, arguing that Georgia's Hospital Authorities Law "clearly articulated and affirmatively expressed" State policy allowing it to act to displace competition, and that such effect on competition was the "foreseeable result" of the legislation. Accordingly, *Phoebe Putney* argued, it was cloaked with State action immunity from antitrust challenge to the acquisition.

The Supreme Court disagreed, finding "no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." The Court reviewed the Georgia enabling statutes and agreed that hospital authorities were imbued with the general corporate powers routinely allowed private corporations under State law, but found that the statutes did not clearly articulate an intention that the authorities were empowered to go farther. In this regard, the Court, quoting from another 11th Circuit opinion, recognized that "simple permission to play in a market" does not "foreseeably entail permission to roughhouse in that market unlawfully." The Court bolstered its conclusion by noting that "only a relatively small subset of the conduct permitted as a matter of State law" by the Hospital Authorities Law "has the potential to negatively affect competition." Simply put, there is insufficient indication that the State intended to create a substate entity empowered to displace competition, or that negative effect on competition was a "necessarily foreseeable" result of the Hospital Authorities Law.

The Court also rejected the notion that the State's obvious interest in improving its citizens' access to affordable quality health care, reflected in State regulation, such as its Certificate of Need program, revealed such an anticompetitive policy or intent. That improving health care is a particular goal of the State does not necessarily translate into an intention to allow pursuing that end through mergers that result in monopolies. Regulating an industry, and even condoning or requiring discrete forms of anticompetitive conduct, does not equal affirmative contemplation that other activity outside the regulatory structure would result in anticompetitive effects.

The Court also considered the argument that any doubt concerning the State's affirmative intent to displace competition should be decided in the favor of recognizing immunity to avoid improperly interfering with State policies. This notion was easily turned back by the Court's observation that it found that the Georgia law is not ambiguous on this point; it found no clearly articulated intent to displace competition; and so such anticompetitive effect could not have been clearly foreseeable to the legislature in enacting the Georgia law. More fundamentally for the Court, the suggestion of "default to immunity" is incompatible with the notion that "State action immunity is disfavored," and federalism concerns about the States' sovereign capacity to regulate their economies do not trump "essential national policies" when faced with State laws "intended to achieve more limited ends." Finally, agreeing with an argument proposed by 20 States as amici, loosely applying the clear articulation requirement runs the risk of finding immunity simply as a result of delegating corporate authorities to local governmental bodies, effectively requiring the States to declaim intent to displace competition with each grant of even the most innocent corporate power to a substate entity.

The Court has thus reined in the doctrine of State action immunity, necessitating a clear showing that displacing competition was the specific intent of State regulation, or that it is the necessarily foreseeable result of the legislation. According to the Court, anything less would be a disservice to the fundamental national policy favoring competition.

Should you have questions or concerns regarding this Supreme Court decision and how it may impact your business, please contact a member of the Firm's [Government Investigations](#) or [Health](#) Practice Groups.