## ANTITRUST

### SUPREME COURT TO HEAR FTC CHALLENGE TO GEORGIA HOSPITAL MERGER

by James M. Burns

On June 25, the United States Supreme Court granted the Federal Trade Commission's request that it review the 11th Circuit's decision in *Federal Trade Commission v. Phoebe Putney Health System*. The case involves the FTC's failed attempt to enjoin the merger of two southwest Georgia hospitals – Phoebe Putney and Palmyra Medical Center – on competitive grounds, and raises significant antitrust immunity issues.

Significantly, as explained in the FTC's petition for certiorari, the 11th Circuit rejected its claim despite *agreeing* with the FTC that the transaction would likely lessen competition for hospital services in Albany County. In reaching this rather surprising result, the 11th Circuit held that, regardless of its potential competitive implications, the transaction was immune from FTC challenge based upon the "State Action Doctrine," a state sovereignty principle that immunizes state entities from the antitrust laws when they act pursuant to a "clearly articulated state policy" to replace competition with regulation. The Doctrine was implicated in this case because the local Hospital Authority was nominally the purchaser in the transaction (using Phoebe Putney funds to pay Palmyra and then agreeing to lease Palmyra to Phoebe Putney for a dollar a year for 40 years).

In taking the case, the Supreme Court will resolve a split among the Circuits concerning what constitutes a "clearly articulated and affirmatively expressed" state policy to displace competition, as required to trigger the application of the State Action Doctrine.
The FTC, citing rulings in the Fifth, Sixth, Ninth and Tenth Circuits, contends that a State must create a regulatory structure that unambiguously displaces "unfettered business freedom" with regulation for the Doctrine to apply, and that a position of "neutrality" with respect to competition is insufficient. Specifically, the FTC argues that "Georgia has no affirmative policy of using hospital authorities to facilitate the acquisition of monopoly power by private entities, as occurred here," and thus the requirements of the State Action Doctrine have not been met.

Phoebe Putney, in contrast, will likely contend that the 11th Circuit's ruling – that the "clear articulation" test is satisfied whenever anticompetitive conduct is a "foreseeable result" of state legislation – is the proper standard, and that the lower court's conclusion that the legislation creating the hospital authority, and authorizing it to acquire and lease hospitals, made the acquisition - even if potentially harmful to competition - a "foreseeable" occurrence places it outside the scope of FTC challenge.

As the FTC notes in its petition, "the application of the state action doctrine to public hospitals is a recurring issue salient to communities across the nation," and "ensuring robust competition among hospitals is an important part of the response to the fiscal challenges presented by health care costs." As such, the Supreme Court's decision in this case will likely be of great interest next term, and once decided will likely have far-reaching impacts. Stay tuned for further developments in the Fall.

FOR MORE INFORMATION CONTACT:

James M. Burns is a member in Dickinson Wright's Washington, D.C. office, and co-leader of the firm's Antitrust Practice. He can be reached at 202.659.6945 or jmburns@dickinsonwright.com.