No. 11-1160

# In The
# Supreme Court of the United States

FEDERAL TRADE COMMISSION,

*Petitioner,*

v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF FOR JOSEPH STUBBS, M.D. AND DR. CORLEEN THOMPSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

KERMIT S. DOROUGH, JR.
*Counsel for Amici Curiae*
KERMIT S. DOROUGH, JR., LLC
310 West Tift Avenue
Albany, GA 31701
(229) 888-2757
bodorough@att.net

August 27, 2012

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES CITED:

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued



OTHER AUTHORITIES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

## INTEREST OF *AMICI CURIAE*[1]

Joseph Stubbs, M.D., a board certified internist, has been a primary care physician for adults in Albany, Georgia since 1982. Dr. Stubbs is keenly interested in maintaining two competing hospitals in Albany for numerous reasons, including reducing healthcare costs, improving the quality of care, and affording choice to patients and healthcare professionals. The two hospitals located in Albany were competitive until the late 1990's, when Phoebe Putney Memorial Hospital, Inc. (hereinafter "PPMH") and Phoebe Putney Health System, Inc. (hereinafter "PPHS") began negotiating exclusive contracts with commercial payers, using tying arrangements to cardiovascular, obstetrics, and neonatal services – services available only at Phoebe Putney Memorial Hospital (hereinafter "Phoebe Putney").

PPMH and PPHS (hereinafter "Phoebe entities"), within a few years of first negotiating the exclusive contracts, came to dominate the local market. The Phoebe entities leveraged their contracts with commercial payers to charge commercial insurers, claims administrators, and commercially insured patients

[1] Pursuant to Rule 37.6, *amici curiae* Stubbs and Thompson certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* and their counsel has made a monetary contribution to the preparation and submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk pursuant to Rule 37.3.

more than a competitive market would allow. Most of Dr. Stubbs' patients were contractually obligated to seek treatment at Phoebe Putney, even though many preferred Palmyra Medical Center (hereinafter "PMC").

Dr. Stubbs was chief of staff at PMC from 2003 to 2005, and is aware Palmyra Park, Inc. (hereinafter "Palmyra") was unable to invest in significant improvements, due to declining revenues. The Phoebe entities aggressively contested Palmyra's efforts to obtain certificates of need for obstetrics and cardiac catheterization services.

Dr. Stubbs was a founding director of the Coalition for Affordable and Competitive Healthcare (hereinafter "CACH"), a consortium of local industries, including Cooper Tire & Rubber Company, Miller Brewing Company, and The Procter & Gamble Paper Products Company. Representatives of CACH appeared before local elected officials, the Hospital Authority of Albany-Dougherty County (hereinafter "Authority"), and civic organizations to present evidence confirming healthcare costs in Dougherty County exceeded those in other plants located elsewhere in the United States.[2]

Dr. Stubbs is particularly upset that the members of the Authority, who serve as fiduciaries, have

---

[2] Cooper Tire & Rubber Company closed its local plant in 2009.

routinely neglected the interests of those they were appointed to serve. He was disillusioned when the Authority did not investigate the documentation submitted by CACH, took no action when knowledge of exorbitant salaries paid to executives of the Phoebe entities, questionable expenditures by these individuals, and excessive charges at Phoebe Putney became public, was indifferent to the allegations of illegal business practices asserted in the lawsuit Palmyra filed against the Authority and the Phoebe entities,[3] mechanically approved the purchase of PMC, without regard for the consequences this would have for the community, and, more recently, entered into a 40-year lease with PPMH for Phoebe North, Inc. (hereinafter "Phoebe North"),[4] notwithstanding the Supreme Court's decision to review this case.

Dr. Stubbs has served as president of the Georgia chapter of the American College of Physicians-American Society of Internal Medicine (1999-2003), and as president of the American College of Physicians (2009-2010).

---

[3] PPMH is, pursuant to § 4.03 of the "lease and transfer agreement", required to comply with all federal, state and local laws. (R-88). *Amici curiae* Stubbs and Thompson will reference the district court record, to document references which are not included in the "Joint Appendix".

[4] The Phoebe entities have operated PMC as Phoebe North since the Authority purchased PMC and immediately leased the facility to PPMH.

Dr. Corleen Thompson is an epidemiologist and a biostatistician. She is trained in the study of diseases in population groups and has, throughout her professional career, worked in substantive areas related to indigent health and healthcare. Dr. Thompson's research interests include the study of coronary artery disease, hypertension, breast cancer, prostate cancer, and obesity, and formulating strategies for reducing these diseases.

Dr. Thompson has resided in Albany since 1994, when she accepted a position with the Southwest Georgia Community Health Institute. Her duties included consulting with healthcare agency personnel, state and county health department staff, and private sector personnel, and implementing health-related surveys and other studies. Dr. Thompson served as coordinator for the Medical Disaster Planning Task Force following Tropical Storm Alberto.

Dr. Thompson has been an outspoken critic of the business practices of the Phoebe entities.[5] She addressed the Authority at the public hearing held on May 24, 2012, and submitted a review of articles published in scholarly journals, which verified acquisition of a hospital by a competing hospital invariably results in increased prices. The review of articles further cited research which confirms there is no

[5] See generally, Georgia Watch, Hospital Accountability Project: *Phoebe Putney Memorial Hospital* (2009), available online at http://www.georgiawatch.org/wp-content/uploads/2009/07/gw-phoebe-putney-memorial-hospital.pdf.

difference between for-profit and nonprofit hospitals in their willingness to exploit market power. The review of articles concluded:

> Increased premiums will result in fewer employers being able to provide health insurance for their employees. This will result in a higher number of people without insurance. Costs will then be shifted to industry and other employers, including local governmental entities. Operational costs for local businesses will increase, which will compromise their competitiveness. Higher healthcare costs will make Dougherty County less attractive to prospective employers, and higher healthcare costs for local government will be shifted to the taxpayers.

Dr. Thompson holds a doctorate from the University of North Carolina-Chapel Hill. She has served as adjunct faculty at Mercer University School of Medicine and Morehouse School of Medicine.

*Amici curiae* Stubbs and Thompson have a fundamental interest in preserving competition in the market where they reside, which is comprised of Baker, Calhoun, Dougherty, Lee, Mitchell, Terrell, and Worth counties.[6] *Amici curiae* Stubbs and Thompson believe

[6] These seven counties have a population of 187,500, according to the 2010 census. Census figures for Georgia counties are available online at http://quickfacts.census.gov/qfd/states/13000.html. The Federal Trade Commission (hereinafter "FTC"), in its evaluation of "the relevant geographic market", did not include Calhoun County. (R-51).

the second hospital is now uniquely positioned to improve healthcare in the community, as Palmyra recently obtained a certificate of need for obstetrics, and the Phoebe entities would not dare engage in further questionable business practices should the Authority be ordered to divest Phoebe North.

## STATEMENT OF THE CASE

The Authority owns Phoebe Putney (R-40), a 443-bed hospital located in Albany, Georgia. (R-38). The Authority relinquished primary responsibility for operation of Phoebe Putney in 1990, when it entered into a "lease and transfer agreement" (hereinafter "lease") with PPMH. (R-40-41).[7] The Phoebe entities "control Phoebe Putney's revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance". (R-41).

PMC, a 248-bed hospital located in Albany, Georgia, opened in 1971. PMC was, until December 15, 2011, owned and operated by Palmyra, a subsidiary of HCA, Inc. (hereinafter "HCA"), a for-profit health system. (R-39).

Palmyra filed suit against the Authority and the Phoebe entities in July 2008 (R-124-129), alleging the Phoebe entities had "leveraged [their] monopoly

[7] PPMH is a subsidiary of PPHS. (R-38).

power over the medical services requiring CONs to force Blue Cross (and other insurers) to exclude Palmyra from their provider networks". *Palmyra Park Hosp. v. Phoebe Putney Memorial Hosp.*, 604 F.3d 1291, 1296 (11th Cir. 2010). Palmyra further alleged the Phoebe entities, in negotiations with Blue Cross and CIGNA, "threatened to demand significantly higher reimbursement rates for the tying products if [the insurers] contracted with Palmyra for the tied products". *Id*. at 1297.[8] The district court dismissed the case, though Palmyra's complaint was reinstated on appeal. *Id*.

The CEO for the Phoebe entities retained Robert Baudino to begin negotiations with HCA, with the objective of purchasing PMC, in July 2010 (R-42), and Mr. Baudino and his Sovereign Group were retained on August 3, 2010 as "the exclusive representative of PPHS for the transaction". (R-136-139).[9]

Mr. Baudino informed the Phoebe entities HCA would be receptive to selling PMC, even though it "[was] not seeking a buyer", provided the Phoebe entities were willing to pay "[an] aggressive premium cash purchase price", and there was "[n]o risk of antitrust enforcement activity – **meaning the Albany-Dougherty County Hospital Authority must be**

[8] The Phoebe entities also negotiated an agreement with the local Public Employees' Plan which excluded PMC. *Id*.

[9] Sovereign Group has or will receive a commission of 1%. (R-42-43).

**the purchaser to trigger State Action Immunity from antitrust enforcement**", on September 13, 2010. (R-140-144) (emphasis added).

PPHS' Board of Directors authorized Mr. Baudino to extend an offer, to purchase PMC, on October 7, 2010. (R-46). The CFO for the Phoebe entities, in a handout presented to PPHS' Board of Directors at this or a subsequent meeting, asserted the purchase of PMC would allow them to "**avoid antitrust lawsuit**", "**control all hospital beds in [the] county**", and "**increase negotiation power with all payors**". (R-145) (emphasis added).[10]

The CEO for the Phoebe entities and PPHS' general counsel met with the chairman and vice-chairman of the Authority on October 21, 2010, during which these gentlemen were notified of the on-going negotiations. The two members of the Authority were required to execute confidentiality agreements, preventing them from discussing the transaction with other members of the Authority. (R-46; 170-177).[11]

---

[10] Negotiations addressed and the purchase price included settlement of Palmyra's antitrust lawsuit. The Phoebe entities had enormous exposure in that litigation, as Palmyra contended its gross revenues from Blue Cross fell from $24 million in 1999, the last full year PMC enjoyed in-network status, to $6 million in 2001. *Id.* at 1303. HCA considered the sales price to be "wildly accretive from any way you might look at it". (Doc. 87, p. 44 of 52).

[11] These gentlemen had no further meetings with representatives of the Phoebe entities until the week of December 13, 2010. (Doc. 87, p. 39 of 52).

Mr. Baudino, in a November 10, 2010 letter to HCA, discussed a previous transaction in which two hospitals were purchased by a hospital authority, "resulting in the state action immunity doctrine attaching to eliminate all risk of antitrust enforcement action". Mr. Baudino stated "[**s**]**hould HCA agree to sell Palmyra Medical Center to PPHS**, the transaction would be similarly structured as an acquisition by the Hospital Authority of Albany-Dougherty County . . . **to prevent an antitrust enforcement action**". (R-153-155) (emphasis added).

The Authority had not sought to acquire PMC, since it leased Phoebe Putney to PPMH in 1990, prior to December 21, 2010. (Doc. 87, p. 44 of 52).[12] The Phoebe entities did not request or obtain authority to negotiate on behalf of the Authority. (Doc. 87, p. 40 of 52).

Sovereign Group, in a November 16, 2010 letter to HCA, notified HCA the Phoebe entities had increased their initial offer, and made reference to Mr. Baudino's "proven" method to avoid antitrust scrutiny and enforcement by structuring the purchase so that the hospital authority is the ostensible buyer. (R-147-152).

---

[12] Indeed, § 4.21 of the lease **prohibited** the Authority from owning or operating "any hospital or other health care facility other than [Phoebe Putney]". (R-94) (emphasis added). PPMH waived this provision in the lease at a meeting on December 22, 2010. (Doc. 87, p. 34 of 52).

HCA insisted upon a $35 million "break-up fee", which must be paid to Palmyra in the event a "court or other Governmental Entity of competent jurisdiction" prohibits the sale. PPHS must also pay a $35 million "rescission fee" in the event "any court or other Governmental Authority of competent jurisdiction" subsequently issues a ruling invalidating the purchase of PMC. (R-47; see also, Doc. 45-11, p. 56 of 75).

PPHS' Board of Directors approved the final deal with HCA, agreeing to guarantee a $195 million payment, at a meeting on December 2, 2010. (R-47).

The CEO of the various Phoebe entities held private meetings with individual Authority members between December 14 and December 20, 2010. (R-48).[13]

HCA insisted upon a "termination fee", which required payment of $17.5 million, in the event the Authority did not approve the purchase agreement in the exact form negotiated, on December 20, 2010. (R-159-165).

The Authority approved the purchase at its meeting the following day, without undertaking any substantive analysis of the agreement, asking any questions about the purchase price, or how the loan would be repaid, or how the acquisition of PMC would

[13] This allowed the Phoebe entities to avoid the Open Meetings Act. OCGA § 50-14-1 *et seq*.

impact healthcare costs in Dougherty County. The Authority did not insist upon or even request a fairness opinion. (R-60). The Authority also approved a "management agreement", which would have conveyed responsibility for operation of PMC to PPMH. (R-49).

The FTC refused to approve the sale of PMC, and filed an administrative complaint, seeking to prevent the transaction. The FTC and the State of Georgia also filed a complaint, seeking a temporary restraining order and preliminary injunction, until such time as the administrative proceeding was adjudicated. (R-28-66). The district court, which initially granted a temporary restraining order and preliminary injunction, dismissed the complaint and dissolved its injunction, concluding the Authority is not subject to federal antitrust law. *FTC v. Phoebe Putney Health System, Inc.*, 793 F.Supp.2d 1356 (M.D.Ga. 2011), aff'd, 663 F.3d 1369 (11th Cir. 2011), cert. granted, 2012 WL 985316.

The FTC appealed, and obtained an injunction, prohibiting the Authority from purchasing Palmyra pending a decision by the circuit court. The ruling of the district court was subsequently affirmed. *FTC v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369 (11th Cir. 2011), cert. granted, 2012 WL 985316. An order dissolving the injunction was entered on December 15, 2011.

The Authority purchased PMC that same day, and immediately entered into a "management agreement", with PPMH, for operation of "Phoebe North".[14]

The Phoebe entities thereafter announced their intention to "consolidate the two hospitals under the same license".[15]

The Supreme Court granted certiorari by order dated June 25, 2012.

The Authority and the Phoebe entities issued a "joint statement" in a response to that decision, asserting: "We are confident we will prevail in this matter". The respondents further announced their intentions to proceed with a long-term lease for Phoebe North.[16]

The Phoebe entities subsequently confirmed they were considering converting Phoebe North into a women's and children's hospital, and/or consolidating inpatient rehabilitation services at that location.[17]

---

[14] Jennifer M. Parks, Albany Herald: *Hospitals to Merge with Phoebe*, December 15, 2011.

[15] Jennifer M. Parks, Albany Herald: *Phoebe North Transition Continues*, January 19, 2012.

[16] Jennifer M. Parks, Albany Herald: *Supreme Court to Hear Phoebe Case*, June 25, 2012.

[17] Jennifer M. Parks, Albany Herald: *Phoebe Group Backs Unit for Women, Kids*, July 12, 2012. Such extensive renovations would involve termination of certain services, including the emergency room, surgical wards, and intensive care. Phoebe North would, in that event, no longer be capable of operating as an acute-care facility.

Dr. Thompson filed a "petition for injunctive relief or, in the alternative, petition to set aside lease of Palmyra Medical Center/Phoebe North, Inc.", in the Superior Court of Dougherty County, on July 12, 2012.[18] Dr. Thompson alleged the Authority and PPMH would, if allowed to proceed with the proposed lease, "argue their rights have vested and/or it would be unfair to compel the Authority to divest PMC/Phoebe North, in view of the complete repositioning of the hospital and their investment in PMC/Phoebe North, should the Supreme Court reverse the ruling of the circuit court".

A hearing was held on Dr. Thompson's motion for a temporary restraining order, on July 18, 2012, and an "order denying plaintiff's motion for a temporary restraining order (TRO)" was entered on July 23, 2012.

The Authority and PPMH entered into the long-term lease for Phoebe North two days later.[19]

[18] Dr. Thompson contended neither the Authority nor the Phoebe entities would have been prejudiced by an injunction, as the management agreement for Phoebe North does not expire until December 11, 2013.

[19] Jennifer M. Parks, Albany Herald: *Hospital Authority Approves Lease*, July 26, 2012.

## SUMMARY OF ARGUMENT

The Antitrust Modernization Commission concluded that the Supreme Court's standards should be applied "with greater precision and to recognize that immunizing anticompetitive conduct through the state action doctrine can cause significant consumer harm".[20] This case affords an opportunity for the Supreme Court to more clearly define the contours of state action immunity. *Amici curiae* Stubbs and Thompson respectively submit express statutory language should be required, to establish a policy to displace competition, in those instances where a quasi-governmental entity and/or a private actor is involved.

The Antitrust Modernization Committee has further recommended a tiered approach to active supervision of political subdivisions.[21] This is clearly appropriate in situations such as that presented in the case *sub judice*, where the Authority is not directly accountable to the public, and is not directly involved in the operation or management of its charge. The failure to implement additional safeguards, to include a full evidentiary hearing, would facilitate further abuses of the state action doctrine.



[20] Antitrust Modernization Commission, *Report and Recommendation*, p. 371 (2007), available online at govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[21] *Id*. at 373.

## ARGUMENT

### I. THE GEORGIA LEGISLATURE, BY PROVIDING HOSPITAL AUTHORITIES WITH GENERAL CORPORATE POWERS, DID NOT AUTHORIZE THOSE HOSPITAL AUTHORITIES TO DISPLACE COMPETITION.

#### A. The Georgia legislature's grant of general corporate powers to hospital authorities does not amount to a "clearly articulated and affirmatively expressed" state policy to displace competition.

The "foreseeability" standard has been criticized by numerous scholars,[22] as it is impossible to reconcile allowing defendants to invoke state action immunity in the absence of express legislation with the requirement that the court confirm the policy was "clearly articulated". Professors Areeda and Hovenkamp argue something more than mere "foreseeability" is necessary for a state to have authorized anticompetitive

---

[22] Peter C. Carstensen, *Controlling Unjustified, Anticompetitive State and Local Regulation: Where Is Attorney General "Waldo"?*, 56 Antitrust Bull. 773, 781 (2011) (arguing "foreseeable" should be "equated with substantially certain"); Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv.L.Rev. 667, 674 (1991) ("The clear articulation requirement has proved hard to apply, plunging federal antitrust courts into a morass of state legislative intent"); Daniel Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 Emory L.J. 1227, 1229 (1995) (arguing the Supreme Court has experienced "enormous difficulties in establishing a workable and credible case law" with reference to the applicability of the state action doctrine).

conduct.[23] These gentlemen contend inferring "clear articulation" from the mere grant of ordinary corporate powers to a political subdivision disserves principles of federalism as well as competition policy.[24]

The Eleventh Circuit Court of Appeals, rather than engage in a "close examination of [the] state legislature's intent",[25] summarily concluded "the Georgia legislature clearly articulated a policy authorizing the displacement of competition". *FTC v. Phoebe Putney Health System, Inc.*, *supra*, 663 F.3d at 1377. From the opinion:

> [T]he Georgia legislature must have anticipated anticompetitive harm when it authorized hospital acquisitions by the authorities. It defies imagination to suppose the legislature

---

[23] Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 225 (3d ed. 2006). Professors Areeda and Hovenkamp observe "the meaning of 'foreseeable' is not self-evident". *Id*. The FTC describes "foreseeability" as "merely a useful tool in inquiring about state policy to displace competition", rather than as "an end in itself. Some lower courts, however, have adopted a far more expansive interpretation of *Town of Hallie*, confusing authority with policy and effectively turning the state action doctrine into a lowest common denominator rule". See Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force*, pp. 11-12. Washington, D.C.: Federal Trade Commission (2003), available online at www.ftc.gov/os/2003/09/stateaction report.pdf.

[24] *Antitrust Law*, *supra*, n. 23, ¶ 225.

[25] See *Town of Hallie*, *infra*, 471 U.S. at 44, n. 8, 105 S.Ct. at 1719, n. 8.

> could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences. The legislature could hardly have thought that Georgia's more rural markets could support so many hospitals that acquisitions by an authority would not harm competition.

*Id*.

The provisions of the Hospital Authorities Law which empower the authority to "exercise any or all powers now or hereafter possessed by private corporations" [*Id*. at 1376], and to "acquire by purchase, lease or otherwise . . . projects, . . . which, again, include hospitals" [*Id*. at 1377], convinced the circuit court the Georgia legislature must have anticipated anticompetitive consequences when the Hospital Authorities Law was enacted. The court's reasoning is conceptually flawed, as the authority to purchase a hospital is not a sanction for anticompetitive conduct.[26] Indeed, the respondents initially sought FTC approval of the proposed transaction,[27] with knowledge they would assert the state action doctrine should the

---

[26] See *Antitrust Law*, *supra*, n. 23, ¶ 225 ("We would thus also disagree with decisions holding or suggesting that the power to buy and sell property implies the power to enter into unlawful mergers"; citing *FTC v. Hosp. Bd. of Lee County*, *infra*).

[27] See U.S. Dept. of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (2010).

FTC, as HCA anticipated, refuse to authorize the acquisition of PMC.

The circuit court rejected the contention that the express exclusion from antitrust scrutiny in one provision of the Hospital Authorities Law is inconsistent with its ruling. At issue is OCGA § 31-7-72.1, enacted in 1993, to authorize merger of hospital authorities located in the same county. Subsection (e) provides:

> It is declared by the General Assembly of Georgia that in the exercise of the power specifically granted to them by this Code section, hospital authorities are acting pursuant to state policy and shall be immune from antitrust liability to the same degree and extent as enjoyed by the State of Georgia.

The FTC argued the subject amendment evinced "the Georgia legislature concluded that other provisions of the law, including those that authorize the authorities to acquire hospitals, did not clearly articulate a policy to displace competition". 663 F.3d at 1377.[28] The principle of *expressio unius est exclusio alterius* certainly supports the contention that the Georgia legislature did not believe anticompetitive conduct, such as acquisitions of competing hospitals, was "foreseeable" when OCGA § 31-7-72.1 was enacted.

---

[28] There is no other provision in the Hospital Authorities Law which affords express exemption for acquisitions of hospitals by authorities from antitrust law, or otherwise condones anticompetitive conduct.

The conclusions of the circuit court are, on initial reading, highly speculative, and the indifference to legislative history and judicial precedent is inconsistent with the instructions: "A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent". *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 394, 98 S.Ct. 1123, 1127, 55 L.Ed.2d 364 (1978) [citing *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434-435 (5th Cir. 1976)].[29]

The circuit court did not discuss *Thomas v. Hosp. Auth. of Clarke County*, 264 Ga. 40, 440 S.E.2d 195 (1994), rehearing denied, 264 Ga. 40, 441 S.E.2d 404

---

[29] It is unreasonable to assume a law passed by the Georgia legislature authorizes the displacement of competition, insofar as Georgia has a strong public policy against contractual restrictions on competition and trade. *Atlanta Center Ltd. v. Hilton Hotels Corp.*, 848 F.2d 146, 148 (11th Cir. 1988). Art. III, § VI, ¶ V(c) of the Constitution of the State of Georgia provides:

> The General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.

*E.g.*, *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991) (statutes which defeat or lessen competition or encourage monopolies are unconstitutional); *Georgia Franchise Practices Commission v. Massey-Ferguson, Inc.*, 244 Ga. 800, 262 S.E.2d 106 (1979) (Franchise Purchases Act unconstitutional, as provisions "intended to have the effect to defeat or lessen competition, or to encourage monopoly").

(1994). The plaintiff sued a hospital authority, seeking damages for injuries sustained in a slip-and-fall. The hospital authority asserted the defense of sovereign immunity, which, under the Georgia Constitution,[30] extends "to the state and all of its departments and agencies". The Georgia Supreme Court concluded hospital authorities are not entitled to sovereign immunity, because they are "not, in any sense, an agency or department of the state". 440 S.E.2d at 196. From the opinion:

> [W]e believe the operation of a hospital is not the kind of function, governmental or otherwise, entitled to the protection of sovereign immunity. The very functions performed by a Hospital Authority are performed by private hospitals and the Hospital Authority is in direct competition with these private hospitals for patients. **If an instrumentality of the government chooses to enter an area of business ordinarily carried on by private enterprise, i.e., engage in a function that is not "governmental", there is no reason why it should not be charged with the same responsibilities and liabilities borne by a private corporation. Nor is there any reason why those individuals who do business with that instrumentality should be accorded less protection than they would have in a facility run by a private corporation.**

[30] Art. I, § II, ¶ IX, Constitution of the State of Georgia.

*Id*. at 197 (emphasis added). Additionally, the circuit court did not consider *Cox v. Athens Regional Medical Center, Inc.*, 279 Ga.App. 586, 631 S.E.2d 792, 797 (2006), in which the Georgia Court of Appeals held OCGA § 31-7-11(a)[31] "**represents the Georgia General Assembly's decision to let market forces control health care costs in Georgia**". (emphasis added).

The Eleventh Circuit, in *Askew v. DCH Regional Health Care Auth.*, 995 F.2d 1033 (11th Cir. 1993), cert. denied, 510 U.S. 1012, 114 S.Ct. 603, 126 L.Ed.2d 568 (1993), held a health care authority's purchase of a privately-owned hospital enjoyed antitrust immunity. The Health Care Authorities Act of 1982[32] authorized health care authorities "[t]o acquire . . . and operate health care facilities", "[t]o receive, acquire, take and hold . . . real and personal property of every description, . . . and to manage, improve and dispose of the same", and "[t]o . . . acquire, operate or support subsidiaries and affiliates, either for profit or nonprofit, to assist such authority in fulfilling its purposes". 995 F.2d at 1039-1040. Ala.Code § 22-21-318(c) specifically stated "a health care authority could carry out its functions to the full extent of its

---

[31] That statute requires hospitals to, "upon request, provide a written summary of certain hospital and related services charges . . . [which] shall be composed in a simple clear fashion so as to enable consumers to compare hospital charges and make cost-effective decisions in the purchase of hospital services".

[32] Ala.Code § 22-21-310 *et seq*.

powers **notwithstanding that as a consequence of such exercise of such powers[,] it engages in activities that may be deemed 'anticompetitive' within the contemplation of the antitrust laws of the state or of the United States**". *Id*. at 1040 (emphasis added).

The circuit court considered the proposed purchase of a private, nonprofit hospital, by a hospital board, in *FTC v. Hosp. Bd. of Lee County*, 38 F.3d 1184 (11th Cir. 1994).[33] The hospital board "allege[d] that the state action doctrine immunize[d] the acquisition from federal antitrust laws because the Florida Legislature foresaw **possible** anticompetitive effects when it gave the Board the **implicit** power to make acquisitions". 38 F.3d at 1185-1186 (emphasis added). The FTC filed suit to prevent the hospital board's purchase of the nonprofit hospital.

The pertinent statute, an amendment to the special act which established the hospital board, authorized the hospital board to "establish and provide for the operation and maintenance of additional hospitals [and] satellite hospitals". *Id*. at 1189. The circuit court concluded "anticompetitive conduct **could**

[33] The private hospital was experiencing "financial difficulties", and there is no evidence to suggest those difficulties resulted from violations of the Sherman Act such as gave rise to the litigation between Palmyra and the various Phoebe entities. Both *Askew* and *FTC v. Hosp. Bd. of Lee County* are readily distinguished from the case *sub judice*, as the public hospitals in those cases had not been leased to a private actor.

**have been** reasonably anticipated" by the legislature "when it gave the Board the **implicit** power to acquire other hospitals". *Id*. at 1192 (emphasis added). The circuit court rejected the FTC's contention that the court could not assume the Florida legislature anticipated hospital boards would engage in anticompetitive behavior in the absence of express statutory language. From the opinion: "By attempting to impose a narrow definition on the term 'foreseeable', the Commission essentially seeks a bright line test which turns the test of foreseeability into a test of inevitability, falling just short of requiring the state to expressly indicate its intention to displace competition". *Id.* at 1190.

Professor Hovenkamp, in a recent article, asserts *FTC v. Phoebe Putney Health System, Inc.* "is incorrect for a number of reasons:

> *First*, the state's own antitrust laws almost invariably make clear that by authorizing firms to 'contract' or 'acquire,' they did not mean to authorize anticompetitive acquisitions. *Second*, inferring a state action immunity from ordinary corporate powers creates a virtual blanket antitrust exemption for most of the activities engaged in by most American business corporations. For example, virtually all business corporations are 'authorized' by corporate law to make contracts, to own property, or to acquire assets, including the assets or equity of other corporations. Collectively this group of powers runs across the full range of potential antitrust violations,

> from price-fixing agreements to tying and exclusive dealing, boycott agreements, mergers, and most instances of anticompetitive exclusion. Indeed, it would overrule a great many Supreme Court decisions in which the challenged conduct was lawful as a matter of state corporate law.
>
> 'Authorization' in the context of antitrust's state action immunity has two meanings; the first is state authority to do the act. The second is state intent to permit the relevant actor to act anticompetitively, and thus to displace the antitrust laws. A statute giving a quasi-government entity the power to 'execute contracts' covers only the first category. Surely no state court would conclude that a simple authorization of state corporations to enter into contracts justified contracting that involved unlawful race discrimination, fraud, or embezzlement, or even state law antitrust violations.[34]

Professor Hovenkamp discusses *Surgical Care Center of Hammond v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231 (5th Cir. 1999), cert. denied, 528 U.S. 964, 120 S.Ct. 398, 145 L.Ed.2d 311 (1999). The hospital owned by the defendant hospital district was managed by Quorum, a third party. The suit was filed by

---

[34] Herbert Hovenkamp, *Antitrust's State Action Doctrine and the Ordinary Powers of Corporations* (July 12, 2012) U Iowa Legal Services Research Paper, pp. 2-3 (citations omitted), available online at http://ssrn.com/abstract=2012717.

a privately owned hospital, which operated an outpatient surgery center, alleging the hospital district "enjoyed a monopoly in the local market for acute care services and was attempting to extend its monopoly to outpatient surgical care". 171 F.3d at 232. The plaintiff alleged "various anticompetitive acts", including "pressuring five of the seven largest managed care plans in the market into contracts calculated to exclude St. Luke's from the market for outpatient surgical care. Specifically, [the hospital district] allegedly used its monopoly power to ensure that its contracts with the plans included provisions for exclusivity and tying, in violation of the Sherman Act and [state law]". *Id.*

The hospital district and Quorum filed motions to dismiss, which were granted, as the district court concluded "the exclusive contracts were the 'foreseeable result' of statutory authority to contract 'with any entity to promote the delivery of health services'". Quorum was dismissed, as the district court concluded it "acted only as an agent of the district and 'therefore requires no separate grant of immunity'". *Id*. at 233.

A panel of the Fifth Circuit Court of Appeals initially affirmed. 153 F.3d 220 (5th Cir. 1998). The circuit court granted rehearing and, in an *en banc* decision, reversed, and thereby overruled an earlier decision relied upon by the district court. From the opinion:

> [A]ny reading of *Martin* that finds immunity in a state legislature's general grant to its agency of authority to conduct its affairs is incorrect. As we will explain, a state may express its will as it prefers, but insulation of its instruments from the Sherman Act must be fairly signaled.

171 F.3d at 233.

The Fifth Circuit recognized "a distinction between a statute that in empowering a municipality necessarily contemplates the anticompetitive activity from one that merely allows a municipality to do what other businesses do". *Id*. at 235. The circuit court, discussing *FTC v. Hosp. Bd. of Lee County*, *supra*, rejected the expansive interpretation afforded "foreseeability" by the Eleventh Circuit. From the opinion:

> In defining the foreseeability test, the court held "that the anticompetitive conduct [need only] be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." 38 F.3d at 1190-91. The court's application of its foreseeability test, however, is broadly consistent with the result here. In finding antitrust immunity, the court emphasized that when the legislature authorized a hospital to acquire other hospitals, it already knew that the hospital was a monopoly. See *Id*. at 1192. That is the polar opposite of this case, in which the state sought to eliminate a competitive disadvantage suffered by the public hospital and

> instead establish a market in which the hospital could compete on equal terms. The Eleventh Circuit, though, loses much of its persuasive force by skating close to an overly lax view of the necessity of expressed legislative will. This is so because implementing federalism here produces a rule of construction with two sides – a path to be traversed because federalism is disserved by straying off in either direction.
>
> First, courts will not police states to insist that its legislatures use words federally dictated. We will find a purpose to insulate local government when language and context fairly locate a state policy to displace competition. Second, – the other side – is that courts will not infer such a policy to displace competition from naked grants of authority. These are the enabling statutes by which myriad instruments of local government across the country gain basic corporate powers. To infer a policy to displace competition from, for example, authority to enter into joint ventures or other business forms would stand federalism on its head. A state would henceforth be required to disclaim affirmatively antitrust immunity, at the peril of creating an instrument of local government with power the state did not intend to grant. The immediate practical effect would be the extension of the *Parker* principle downward, contrary to the teaching that local instruments of government are subject to the Sherman Act.

*Id*. at 236.

The *en banc* opinion cites *Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991), cert. denied, 502 U.S. 1094, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992), another case in which a private hospital sued a hospital district and associated entities, alleging the defendants had leveraged their "monopoly in perinatal services to increase the hospital's market share in non-perinatal services", by refusing to "allow certain health maintenance organizations to contract for perinatal services unless the HMOs agreed to use Antelope for non-perinatal services as well". 940 F.2d at 399. The circuit court, upon review of state law, concluded "the State of California has not displaced competition with regulation in the provision of hospital services, and that the defendants are therefore not shielded by state-action immunity". *Id*. at 402. The grant of summary judgment was, accordingly, reversed.[35] Consideration of state law confirmed "the state has given the defendants no power to regulate the hospital services market, but has merely authorized them to provide hospital services along with regular competitors". *Id*. at 403. Two factors which influenced the decision were an amendment which allowed hospital districts to transfer assets to private nonprofit corporations, and an act of the legislature repealing the certificate of need process. These actions reflected a "policy to enhance competition rather than to replace it". *Id*.

---

[35] The grant of summary judgment on the plaintiff's RICO and fraud claims was affirmed. *Id*. at 404-406.

Similarly, OCGA § 31-7-75(7), which authorizes hospital authorities to lease community hospitals, requires that the hospital authority confirm "that such lease will promote the public health needs of the community by making additional facilities available in the community or **by lowering the cost of health care in the community**". (emphasis added).[36] "A 2008 amendment to the CON statute, OCGA § 31-6-42(b.2), provides that a hospital seeking a CON for [basic perinatal] services does not have to establish a 'need' for them". *Palmyra Park Hosp. v. Phoebe Sumter Medical Center*, 310 Ga.App. 487, 714 S.E.2d 71, 72 (2011) (grant of certificate of need to provide basic perinatal services reinstated).

The Georgia legislature's grant of general corporate powers to hospital authorities does not amount to a "clearly articulated and affirmatively expressed" state policy to displace competition. The legislative history of the Hospital Authorities Law and judicial precedent verifies a public policy which seeks to promote, rather than frustrate, competition.

---

[36] The Authority entered into the lease with PPMH to "provide[ ] the Hospital with a new, flexible structure **which will remove various restrictions and limitations imposed upon the** [**Authority**] **and will allow the Hospital to respond to existing competitive threats and to seize available opportunities both within and outside Dougherty County**". (R-75) (emphasis added).

## II. THE FEDERAL COURTS CANNOT PERMIT A "POLITICAL SUBDIVISION" TO STRUCTURE A TRANSACTION TO AVOID ANTITRUST SCRUTINY, WHEN ITS PRIMARY OBJECTIVE IS TO BENEFIT A PRIVATE ACTOR.

### A. The purchase of Palmyra Medical Center is a sham transaction which cannot be countenanced by the federal courts.

The Eleventh Circuit, citing *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 379, 111 S.Ct. 1344, 1353, 113 L.Ed.2d 382 (1991), asserted it was precluded from considering the FTC's contention that the purchase of Palmyra Medical Center involved no "genuine state action". *FTC v. Phoebe Putney Health System, Inc.*, *supra*, 663 F.3d at 1376, n. 12.[37] The Supreme Court will ultimately address the question which the district and circuit courts declined to consider, being whether the Authority was, as the FTC alleges, merely a "strawman" in the purchase of PMC, so that there was no genuine state action.

*Amici curiae* Stubbs and Thompson are unable to cite a decision in which defendants have so blatantly manipulated the state action doctrine. There are, however, numerous circuit and district court opinions

---

[37] "We may not 'deconstruct[ ] . . . the governmental process' or prob[e] . . . the official 'intent' to determine whether the government's decision-making process has been usurped by private parties". *Id.* (citing *Omni*, *supra*, 499 U.S. at 377, 111 S.Ct. at 1352).

in which immunity was denied, some of which will be discussed below. Initially, however, it is important to consider *FTC v. University Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991). University Health, Inc. (UHI), which had leased University Hospital, a community hospital, from the Richmond County Hospital Authority, sought to purchase St. Joseph Hospital, a nonprofit hospital owned by Health Care Corporation of Sisters of St. Joseph of Carondelet. UHI maintained § 7 of the Clayton Act did not apply to asset acquisitions by nonprofit hospitals, as such institutions, by definition, are prohibited from "operating for the benefit of private individuals". The district court denied a preliminary injunction, and the FTC appealed.

The Eleventh Circuit rejected UHI's contention that the Clayton Act does not apply to nonprofit hospitals, and further rejected UHI's contention that active supervision by the state was not required. **There was no state action, as the hospital authority had delegated responsibility for operation of the hospital to UHI.** The transaction was enjoined, as the FTC established it would lessen competition.

The purchase would have been permitted, under the reasoning set forth in the circuit court's opinion, had UHI simply loaned the hospital authority the money to purchase St. Joseph's, with the understanding that the hospital authority would have promptly leased St. Joseph's to UHI.

A pay phone provider sued the city of Detroit and a competitor, after the defendants entered into

an exclusive contract to provide pay phones at the city jail, in *Michigan Paytel Joint Venture v. City of Detroit*, 287 F.3d 527 (6th Cir. 2002). Though the circuit court affirmed the grant of summary judgment, it recognized courts have an obligation to determine "whether the municipality or the regulated party made the effective decision that resulted in the challenged anticompetitive conduct.

> If the municipality or a municipal agent was the effective decision maker, then the private actor is entitled to state action immunity, regardless of state supervision. **If the private actor was the effective decision maker, due to corruption of the decision-making process or delegation of decision-making authority, then it is not immune, unless it can show that it was actively supervised by the state.**

*Id*. at 538 (emphasis added).

Physicians and their professional corporation sued a public benefit corporation, created by the state of New York to perform the "essential public and governmental function" of operating a public hospital, and the physicians who entered into an exclusive professional services agreement with the public benefit corporation, in *LaFaro v. New York Cardiothoracic Group*, 570 F.3d 471 (2d Cir. 2009). The district court dismissed the lawsuit, concluding all defendants enjoyed state action immunity.

The circuit court affirmed the grant of summary judgment for the public benefit corporation, but

reversed summary judgment for the defendant physicians, holding: "The allegations of misconduct by the private defendants are not a tangential attack on the authority of the governmental entity to enter into anticompetitive agreements, but rather on the authority of the private defendants to act beyond the scope of the agreement with [the public benefit corporation] and/or the policy articulated by the legislature in the [public benefit corporation's] enabling statute". 570 F.3d at 480.

*LaFaro* cites *Electrical Inspectors, Inc. v. Village of East Hills*, 320 F.3d 110 (2d Cir. 2003), cert. denied, 540 U.S. 982, 124 S.Ct. 467, 157 L.Ed.2d 373 (2003), a case in which an electrical inspections company sued several municipalities and a nonprofit board, which had been appointed as the exclusive agent to inspect electrical services within those municipalities, alleging violations of the Sherman Act and other federal and state laws. The circuit court affirmed the grant of summary judgment to the municipalities, though the grant of summary judgment for the nonprofit board was remanded, as the district court had failed to "determine whether the Board was adequately supervised". 320 F.2d at 129.

The Third Circuit Court of Appeals held defendants did not have antitrust immunity, absent a showing that the state actively supervised physician peer review determinations, in *Miller v. Indiana Hosp.*, 930 F.2d 334 (3d Cir. 1991), appeal after remand, 975 F.2d 1550 (3d Cir. 1992), cert. denied, 507 U.S. 1045, 113 S.Ct. 1883, 122 L.Ed.2d 744 (1993).

The grant of summary judgment in favor of the defendants, including the Pennsylvania Department of Health, was vacated, as there was no evidence in the record that the department "received or examined the record of the peer review proceeding". 930 F.2d at 339.

Cases involving exclusive contracts are somewhat analogous to the case *sub judice*, insofar as the private actor, who receives direct benefit from a contractual relationship with a political subdivision, seeks to invoke state action immunity. *Delta Turner, Ltd. v. Grand Rapids-Kent County Convention/Arena Auth.*, 600 F.Supp.2d 920 (W.D.Mich. 2009), addressed such a situation. The plaintiff, which owned an entertainment facility in Grand Rapids, Michigan, sued the convention/arena authority, which owned another facility in Grand Rapids, and SMG, which managed the facility. The plaintiff alleged an agreement between SMG and a promoter was "intended to monopolize arena events and revenues". 600 F.Supp.2d at 926. The defendants filed motions to dismiss.

The district court discussed numerous decisions which "have further defined the limits of state action immunity for private parties". *Id*. at 930. Precedent established: "**When a private actor (such as a non-profit corporation) acts on behalf of the local government but makes 'independent decisions without the input, advice, involvement, or oversight of . . . any . . . governmental body', the antitrust immunity accorded to the governmental entity does not apply**". *Id*. at 931. (citing *Michigan Paytel Joint Venture*, *supra*, 287 F.3d

at 537-538) (emphasis added). SMG's motion to dismiss was denied, as "[t]he record [was] devoid of any specifics concerning either defendants' role in developing, executing and overseeing the [agreement between SMG and the promoter], making any reasoned consideration of the immunity defenses merely superficial, and thus, unreliable for purposes of legal analysis". *Id*. at 932. See also, *Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 825 F.Supp.2d 1072 (D.Colo. 2011) (defendant apartment complex operator, which had an agreement with university which required most freshmen to reside in apartment complex, not entitled to state action immunity); *United States v. Blue Cross Blue Shield of Michigan*, 809 F.Supp.2d 665 (E.D.Mich. 2011) (healthcare insurer, which had most-favored pricing clauses in agreements with hospitals, not entitled to state action immunity).

A review of the record, albeit incomplete, substantiates the allegation that this was a sham transaction, and that the Authority, which had no funds and no employees, was not involved in the negotiations, and had no interest in purchasing PMC, simply approved the purchase to advance the interests of the various Phoebe entities, including extricating themselves from a potential judgment which could have crushed their "nonprofit" empire.

The evidence establishes the transaction was structured for the express purpose of avoiding antitrust scrutiny. This conduct cannot be countenanced.

### B. *Midcal*'s second prong must be applied, as the Hospital Authority acted at the behest and on behalf of a private commercial participant.

The Supreme Court held "there is little or no danger that [a municipality] is involved in a *private* price-fixing arrangement" in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 24 (1985). Professors Areeda and Hovenkamp question whether this presumption is appropriate in those situations where the governmental entity is in direct competition with private business.[38]

The Supreme Court has held "this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market". *Omni*, *supra*, 499 U.S. at 374-375, 111 S.Ct. at 1351. See also, *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 948 (Fed. Cir. 1993) ("policies underlying *Parker* do not extend to circumstances where the state acts not in a legislative/regulatory capacity, but as a 'commercial participant in a given market'"), cert. denied, 510 U.S. 1140, 114 S.Ct. 1126, 114 L.Ed.2d 1126 (1994); *A.D. Bedell Wholesale Co., Inc. v. Phillip Morris Inc.*, 263 F.3d 239, 265, n. 55 (3d Cir. 2001) ("There is a market participant exception to actions which might otherwise be entitled to

[38] *Antitrust Law*, *supra*, n. 23, ¶ 1227.

*Parker* immunity"), cert. denied, 534 U.S. 1081, 122 S.Ct. 813, 151 L.Ed.2d 697 (2002).[39]

Chief Justice Burger's concurrence in *City of Lafayette*, *supra*, expressed his view that "[t]here is nothing in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality". 435 U.S. at 418, 98 S.Ct. at 1139. Chief Justice Burger believed the state action doctrine should, in such situations, require evidence beyond a showing that the state "merely 'contemplated' the activities being undertaken". He suggested that the municipality be required to "demonstrate that the exemption was not only part of a regulatory scheme to supersede competition, but that it was *essential* to the State's plan". *Id*. 435 U.S. at 425, n. 6, 98 S.Ct. at 1143, n. 6.[40]

---

[39] See generally, Scott Weese, *Eminent Need: Proposing a Market Participant Exception for Municipal Parker Immunity*, 9 Cardoza Pub.L., Policy & Ethics J. 529 (2011).

[40] The purchase of PMC would not survive should the Supreme Court insist upon active supervision. Georgia enacted the "Hospital Acquisition Act" [OCGA § 31-7-400 *et seq.*] in 1997. OCGA § 31-7-400(2) excludes, from its application, "the restructuring of a hospital owned by a hospital authority involving a lease of assets to any not for profit or for profit entity which has its principal place of business located in the same county where the main campus of the hospital in question is located and which

(Continued on following page)

Some commentators have expressed the view that it is more important to examine whether there is a danger that private persons involved in the quasi-governmental body will pursue their own economic interests rather than the state's policies.[41] Legislation supplanting competition "in the name of quality assurance and consumer protection tends to be overly exclusive, prescriptive and anticompetitive in part because [such laws] emerge[ ] from a political process that is highly responsive to the concerns of industry participants and comparatively neglectful of the true interests of ordinary consumer-voters".[42]

Areeda and Hovenkamp believe that "[m]uch more important are the body's structure, membership, decision-making apparatus, and openness to the public. Without reasonable assurance that the body is more broadly based than the very persons who are to be regulated, outside supervision seems required."[43]

---

is not owned, in whole or in part, or controlled by any other for profit or not for profit entity whose principal place of business is located outside such county". See also, OCGA § 31-7-89.1(b).

[41] Elhauge, *supra*, n. 22, at 668 (arguing that the state action doctrine should focus on the decision-making process of the actors claiming a state action defense, and concluding: "financially interested actors cannot be trusted to decide which restrictions on competition advance the public interests; disinterested, politically accountable actors can").

[42] Clark Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J.Health Pol., Policy & Law 587, 593 (2006).

[43] *Antitrust Law*, *supra*, n. 23, ¶ 227.

Professor Carstensen contends the risk is greater "that public intervention in the market will be excessive, misguided, and unquestioned" in those instances where the board is local,[44] as there is less information, scrutiny, and accountability. Quasi-governmental (sometimes referred to as "hybrid") boards, such as the Authority, are often comprised of professionals who believe themselves to be capable of self-regulation.[45]

The FTC has suggested the test for requiring active supervision should turn not only on the governmental characteristics of the entity, but also on a more focused examination of the risk that the entity may be pursuing private, rather than public, interests. The State Action Task Force suggested that a need for active supervision be presumed where the organization is subject to control by persons who are themselves participants in the regulated markets, or, alternatively, a vigorous case-by-case focus on whether "the challenged conduct is the result of private actors pursuing their own interests rather than state policy".[46]

There is substantial commentary from scholars who have evaluated cases in which the federal courts have applied antitrust law in the field of healthcare.[47]

---

[44] Carstensen, *supra*, n. 22, at 781.

[45] Havighurst, *supra*, n. 42, at 598.

[46] *Report of the State Action Task Force*, *supra*, n. 23, at 55-56.

[47] See generally, Jennifer Conners, *A Critical Misdiagnosis: How Courts Underestimate the Anti-competitive Implications of*

(Continued on following page)

The importance of competition in healthcare is magnified because consumers are generally disengaged from negotiations between providers and insurers.[48]

The state action doctrine should not be available to a private actor who relies upon a relationship, no matter how tenuous, with a political subdivision, to further its own interests. The purchase of PMC eliminated the Phoebe entities' only competitor, which had been crippled by antitrust violations. Such a transaction should, necessarily, involve heightened scrutiny, as without further investigation, to include an evidentiary hearing, the federal courts cannot determine which entity made the decision, and whose interests – those of the public or the private actor – are advanced.

Abstention from meaningful review will allow entities in privy with political subdivisions to manipulate the state action doctrine. The Supreme Court should recognize a market participant exception to

---

*Hospital Mergers*, 91 Cal.L.Rev. 543 (2003); Nicole Harrell Duke, *Hospital Mergers versus Consumers: An Antitrust Analysis*, 30 U.Balt.L.Rev. 75 (2000); Thomas L. Greaney, *Whither Antitrust? The Uncertain Future of Competition in Health Care*, Health Affairs 21:2 (2002); Peter Hammer and William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 Colum.L.Rev. 545 (2002); Clark Havighurst, *supra*, n. 42; Barak Richman, *Antitrust and Nonprofit Hospital Mergers: A Return to Basics*, 156 U.Penn.L.Rev. 121 (2007).

[48] See generally, Clark L. Havighurst and Barak Richman, *The Provider Monopoly Problem in Health Care*, 89 Or.L.Rev. 847 (2011).

the doctrine in those instances where quasi-governmental bodies engage in commercial, nongovernmental functions, unless the state has explicitly vested that entity with authority to displace competition.[49]

## CONCLUSION

The judgment of the Eleventh Circuit should be reversed, and this case should be remanded to the United States District Court for the Middle District of Georgia, for an evidentiary hearing.

Respectfully submitted,

KERMIT S. DOROUGH, JR.
*Counsel for Amici Curiae*
KERMIT S. DOROUGH, JR., LLC
310 West Tift Avenue
Albany, GA 31701
(229) 888-2757
bodorough@att.net

[49] Havighurst, *supra*, n. 42, at 604. See also, James Ponsoldt, *Balancing Federalism and Free Markets: Toward Renewed Antitrust Policing, Privatization, or a "State Supervision" Screen for Municipal Market Participant Conduct*, 48 SMU L.Rev. 1783, 1810 (1995) (arguing there should be an exception to *Town of Hallie* to make the active supervision prong of *Midcal* applicable in such situations).