U.S. Supreme Court to Consider State Action Doctrine, Class Action Certification Next Term

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Some U.S. Supreme Court watchers may have been disappointed that the Court on the last day of the October 2011 term–according to the Court's calendar–did not decide the fate of President Obama's health care overhaul legislation. That decision is most likely to come within the next three days, before the Court wraps up for the summer.

However, the antitrust community got a rare treat today. The Supreme Court granted petitions for certiorari in two closely-watched antitrust cases: a Federal Trade Commission (FTC) action challenging a Georgia hospital combination, and a consumer class action against cable provider Comcast Corporation.

In the FTC action, the Court will consider the scope of the state action doctrine. At the request of the FTC, the U.S. Solicitor General in March petitioned the Court to review a decision of the U.S. Court of Appeals in Atlanta ((CCH) 2011-2 Trade Cases ¶77,722, 663 F.3d 1369), holding that the proposed combination of the only two hospitals in Albany, Georgia, was immune from antitrust attack under doctrine. The appellate court had upheld dismissal ((CCH) 2011-1 Trade Cases ¶77,508, 793 F. Supp. 2d 1356) of the Commission's complaint for injunctive relief pending the completion of an administrative proceeding.

In April 2011, the FTC issued an administrative complaint challenging the transaction ((CCH) Trade Regulation Reporter ¶16,588). The FTC alleged that a local hospital authority's purchase of Palmyra Park Hospital's assets from HCA, Inc. and subsequent lease to Phoebe Putney Health System, Inc. (PPHS)—the operator of Phoebe Putney Memorial Hospital—would substantially lessen competition or tend to create a monopoly in the inpatient general acute-care hospital services market in Georgia's Dougherty County and surrounding areas. The agency also sought injunctive relief to prevent the consummation of the plan prior to the completion of the administrative proceeding. Pending conclusion of the court action, the FTC stayed its administrative proceedings ((CCH) Trade Regulation Reporter ¶16,620).

In its petition for certiorari, the government asked the Court to consider: (1) whether the Georgia legislature, by vesting the local government entity with general corporate powers to acquire and lease out hospitals and other property, has "clearly articulated and affirmatively expressed" a "state policy to displace competition" in the market for hospital services; and (2) whether such a state policy, even if clearly articulated, would be sufficient to validate the alleged anticompetitive conduct, given that the local government entity neither actively participated in negotiating the terms of the hospital sale nor had any practical means of overseeing the hospital's operation.

According to the petition, the case presents the question of whether a hospital's acquisition of its only rival, effectuated by using a substate governmental entity's general corporate powers, is exempt from antitrust scrutiny under the "state action doctrine." The appellate court decision conflicts with decisions of the Fifth, Sixth, Ninth, and Tenth Circuits, the agency contends.

The petition for review, *FTC v. Phoebe Putney Health System, Inc.,* Dkt. 11-1160, was granted on June 25, 2012.

Class Action Certification

The Court has also decided to consider a decision of the U.S. Court of Appeals in Philadelphia ((CCH) 2011-2 Trade Cases ¶77,575, 655 F.3d 182), upholding the certification of a class of approximately two million cable television customers in the Philadelphia area. The customers allege that Comcast engaged in monopolization, attempted monopolization, and market or customer allocation

through a series of acquisitions and cable system swap arrangements.

The appellate court ruled that the lower court satisfied the "rigorous analysis" standard established in *In re Hydrogen Peroxide Antitrust Litigation* ((CCH) 2008-2 Trade Cases ¶76,453, 552 F.3d 305) in determining that questions of fact or law common to class members predominated over individual issues, for purposes of meeting the certification requirements of Federal Rule of Civil Procedure 23(b)(3).

The High Court may see things differently.

Comcast petitioned the Court for review in January. Comcast argued that the "Third Circuit's view that 'merits arguments' are 'not properly before [the court]' at the class certification stage . . . cannot be reconciled with this Court's decision in [*Walmart Stores, Inc. v.*] *Dukes* and breaks sharply with the Eighth and Ninth Circuits, which have correctly recognized that such limitations on review of 'merits' issues at the certification stage are no longer supportable after *Dukes*."

In its petition, Comcast asked: whether a district court may certify a class action without resolving "merits arguments" that bear on prerequisites for certification under Federal Rule of Civil Procedure 23, including whether purportedly common issues predominate over individual ones under Rule 23(b)(3).

In granting certiorari, the Court limited its review to the question: "whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis."

The petition for review, *Comcast Corp. v. Behrend*, Dkt. 11-864, was granted on June 25, 2012.