No. 97-30887

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SURGICAL CARE CENTER OF HAMMOND, L.C., d/b/a ST. LUKE'S SURGICENTER

Plaintiff-Appellant,

v.

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA PARISH, d/b/a NORTH OAKS MEDICAL CENTER, and QUORUM HEALTH RESOURCES, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF SUGGESTION OF REHEARING EN BANC

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission (FTC) are principally responsible for enforcing the federal antitrust laws. The panel's erroneous interpretation of the scope of state action immunity from the antitrust laws for state political subdivisions threatens both public and private enforcement of those laws. Accordingly, the United States and the FTC have a strong interest in the proper determination of this appeal. These concerns previously led us to file an amicus brief in a similar case now pending in this Court. See Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant, Willis-Knighton Medical Center v. City of Bossier City, No. 97-31199 (5th Cir.).

QUESTION PRESENTED

Whether the alleged anticompetitive conduct of a Louisiana hospital service district is immune from the federal antitrust laws as state action simply on the ground that anticompetitive conduct was foreseeable in light of state statutes authorizing the hospital district to contract and otherwise act like a private market participant, without regard to whether that conduct was pursuant to a state policy to displace competition by regulation, monopoly public service, or any other alternative to the competitive market.

STATEMENT

1. St. Luke's SurgiCenter, an outpatient surgery center, sued North Oaks Medical Center, whose nearby hospital offered, among other things, surgical services. The complaint claimed antitrust violations under Section 2 of the Sherman Act, 15 U.S.C. 2, based on alleged anticompetitive acts including "exclusive" contracts with five managed care plans, Surgical Care Center of Hammond v. Hospital Service District No. 1, No. Civ. 97-1840, 1997 WL 465289, at *1 (E.D. La. Aug. 11, 1997), (i.e., contracts preventing the plans' members from using St. Luke's services, Complaint ¶ 25), as well as a diverse array of other actions and refusals to act. Surgical Care Center of Hammond v. Hospital Service District No. 1, No. 97-30887, 1998 WL 543883, at *1, n.1 (5th Cir. Aug. 29, 1998); Complaint ¶ 38.(1) The district court, viewing North Oaks as a political subdivision of the state of Louisiana, found the challenged conduct to be immune from the federal antitrust laws under the state action immunity doctrine of Parker v. Brown, 317 U.S. 341 (1943), and therefore dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P.

2. This Court (Judges King, Smith, and Parker) affirmed. Relying primarily on Martin v. Memorial Hospital, 86 F.3d 1391 (5th Cir. 1996), the Court held that, as a state political subdivision, North Oaks was "entitled to Parker immunity if its anticompetitive conduct is the foreseeable result of the [Louisiana] statutory scheme" authorizing hospital districts and specifying their powers and duties. 1998 WL 543883, at *2. The Court concluded that "[t]he exclusive nature of the contracts was reasonably foreseeable by the Louisiana legislature" and so held that conduct immune as state action. Id. at *5. Regarding the other alleged conduct, the Court said only that "we agree with the district court that while North Oaks may have engaged in 'cutthroat' and 'hardball' business practices by trying to lure patients to North Oaks, it is conduct that is a reasonably foreseeable result of the Louisiana statute." Id.

Judge King was "troubled by [this Court's] opinion in Martin" but found it to be controlling. Id. (King, J., specially concurring).

ARGUMENT

Rehearing En Banc Is Proper Because The Panel Decision Is Contrary To Supreme Court Decisions Regarding State Action Immunity

As Judge King indicated in her special concurrence, this is a troubling decision. Rehearing by the full Court is appropriate because the panel's construction of the test for state action immunity under the federal antitrust laws conflicts with controlling Supreme Court decisions. Moreover, the panel's test would undermine not only federal antitrust policy, but also state policies and even the federalism upon which the state action doctrine rests.

I. State Action Immunity Protects State Subdivisions Only When They Act Pursuant to State Policy to Displace Competition

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court determined that statutes do not limit the sovereign states' autonomous authority over their own officers, agents, and policies in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman Act. Id. at 351. Accordingly, it held that when a "state in adopting and enforcing [a] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government[,] . . . the Sherman Act did not undertake to prohibit" the restraint, id. at 352. But while states may adopt and implement policies that depart from the policies of the Sherman Act,(2) subordinate political subdivisions, such as

hospital districts and municipalities, "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985). The conduct of such subordinate entities qualifies for state action immunity only if it is undertaken pursuant to a state policy to displace competition in favor of an alternative means of promoting the public interest.

Even explicit state authorization of conduct constituting a Sherman Act violation does not suffice for immunity unless that authorization clearly evidences a state policy to displace competition as the primary means of directing the economy to the common benefit. Hallie, 471 U.S. at 39 ("[T]he State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful."). Accordingly, in Hallie, the Court emphasized that the subdivision must prove not only its authority to act, but also "that a state policy to displace competition exists." Id.

The state need not follow any particular formula in expressing its intent to displace competition; indeed, it need not even refer expressly to anticompetitive effects if it is clear from the nature of the policy the state has articulated that it contemplates such an outcome. See Hallie, 371 U.S. at 43. The municipal conduct at issue in Hallie was a refusal to supply sewage treatment facilities outside its borders except to those who agreed to become annexed to the city. Id. at 41, 44-45 n.8. The state statute did not refer to competition, but it authorized the city to refuse to provide sewage treatment to adjacent unincorporated areas unless they agreed to annexation, with obvious effects on sewage collection and transportation services competing with the city's. After reviewing "the statutory structure in some detail," id. at 41, the Court found it "clear that anticompetitive effects logically would result from this broad authority to regulate." Id. at 42. Thus, the Court concluded, "the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unincorporated areas." Id.

Similarly, in City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991), the challenged municipal ordinance restricting the size, spacing, and location of new billboards was immune because the state had clearly articulated a policy to rely on zoning rather than competitive market forces to regulate billboards. Id. at 373. Although the state legislature had not specifically stated that it expected municipalities to use their zoning powers to limit competition, the Court found "suppression of competition" to be the "foreseeable result" of what the statute authorized because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." 499 U.S. at 373.

In short, the critical question in cases like this is whether the state has decided to displace competition (or at least has decided to authorize subdivisions to choose to do so), as an act of government to which federalism principles demand deference. To evidence such a decision sufficiently, the state law must at least clearly articulate a public policy that intrinsically departs from the Sherman Act's competitive model. In the absence of such a state policy, the conduct of a nonsovereign political subdivision, even conduct that falls within its authority under state law, does not constitute state action for purposes of the Sherman Act.

II. The Panel Held Conduct Immune from the Sherman Act In the Absence of a State Policy to Displace Competition

a. The panel recognized that the policy underlying the relevant statutes was actually one of enhancing the ability of hospital service districts to compete in the market, 1998 WL 543883, at *3, rather than one of displacing competition by some alternative regime. Nonetheless, it awarded state action immunity solely on the finding that it is reasonably foreseeable that a public business entity, armed with the authority to take actions private business entities routinely take, such as entering into contracts, might act anticompetitively, just as some private business entities do from time to time.(3)

The panel in so ruling badly misapplied the Supreme Court's foreseeability test. The Supreme Court's state action decisions use the concept of foreseeability to mean that the nature of the authorized conduct itself -- such as regulation (Omni) or monopoly public service (Hallie) -- demonstrated that the state legislature must have contemplated that competition would be displaced, i.e., that the authorized conduct would have anticompetitive

effects. Here, however, the state authorized only functions that are routinely carried out by economic actors in freely competitive markets without anticompetitive consequences. None of these authorizations implies any policy to depart from the Sherman Act's competitive model in the markets in which North Oaks competes.

The panel's ruling will have dangerous consequences. It means that any time a state authorizes its subdivisions to compete on more or less equal terms with private firms in the competitive marketplace, by that authorization it also grants these subdivisions a special license to violate the antitrust laws with impunity, and thereby to limit the very competition the authorization was intended to foster. This would divorce the state action doctrine from its roots in "principles of federalism and state sovereignty." See Omni, 499 U.S. at 370; Parker, 317 U.S. at 352. It would allow nonsovereign, subordinate entities independently to decide -- without any state policy to displace competition -- not to obey the federal antitrust laws when participating in competitive markets. This result has nothing to do with deferring to state sovereignty.

Indeed, the panel's version of the state action doctrine has the potential to undercut state policy as well as federal law. See Hallie, 471 U.S. at 47 (noting that the requirement that a municipality act pursuant to state policy provides protection against the danger that the municipally owned enterprise "will seek to further purely parochial interests at the expense of more overriding state goals"). Automatically affording subdivisions immunity from the Sherman Act when the state has sought to promote competition by authorizing their participation on an equal basis in competitive markets interferes with the state's ability to implement its policies. As the Supreme Court observed in rejecting a broad claim of state action immunity in FTC v. Ticor Title Insurance Co., 504 U.S. 621, 635 (1992), "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it."

At the same time the ruling undermines the principle that in enacting the Sherman Act, "Congress mandated competition as the polestar by which all must be guided in ordering their business affairs." City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 406 (1978). The Supreme Court in Lafayette and subsequent decisions has made it clear that this fundamental national policy applies equally to local government participants in competitive markets. It is true, to be sure that the Court has held that municipalities, unlike private defendants, need not be actively supervised by the state in carrying out a state policy to displace competition. But that holding rested on the assumption that state action immunity would be available to the municipality only if it was acting pursuant to a clearly articulated state policy. When combined with the protections afforded by the political process, a sufficiently clear articulation of state policy adequately protects the public interest. Hallie, 471 U.S. at 46-47. By contrast, granting a nonsovereign entity a license to violate the federal antitrust laws when the state has merely authorized participation in a competitive market "would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the Parker 'exemption.'" Lafayette, 435 U.S. at 415.

b. The panel may have thought it was compelled to reach its result by the prior decision in Martin v. Memorial Hospital at Gulfport, 86 F.3d 1391 (5th Cir. 1996). We have argued in another case in this Court that Martin turned on a finding of a state policy to displace the kind of competition at issue there by an alternative means of controlling conduct, as state action immunity requires.(4) Brief for the United States and the Federal Trade Commission as Amici Curiae In Support of Appellant, Willis-Knighton Medical Center v. City of Bossier City, No. 97-31199 (5th Cir.) at 17-18 (these pages are attached here for the Court's convenience). On that reading, Martin does not require the panel's result.(5) If the panel agrees, it can simply grant panel rehearing and reverse the district court. But if the Court concludes that the state action test of Martin is the same test as the panel applied in this case, then en banc consideration is important and necessary, and when the en banc Court reverses the district court's dismissal here, it should take the opportunity to overrule Martin as well.

CONCLUSION

The Court should grant rehearing en banc.

Respectfully submitted.

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ATTACHMENT

Brief for the United States and the Federal Trade Commission as Amici Curiae In Support of Appellant, Willis-Knighton Medical Center v. City of Bossier City, No. 97-31199 (5th Circuit), Pages 17-18.

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 1998, I caused the Brief of the United States and the Federal Trade Commission as Amici Curiae in Support of Suggestion of Rehearing En Banc to be served by commercial carrier for delivery within 3 calendar days, on _____.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 35.5 (which the Clerk's office informed the undersigned apply to this brief).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5th Cir. R. 32.2.7(b)(3), THE BRIEF CONTAINS: A. 2633 words.

2. THE BRIEF HAS BEEN PREPARED: A. in proportionally spaced typeface using: WordPerfect Version 7.0 for Windows95 in CG Times, 14 point text, 12.5 point footnotes.

3. IF THE COURT SO REQUESTS, THE UNDERSIGNED WILL PROVIDE AN ELECTRONIC VERSION OF THE BRIEF AND/OR A COPY OF THE WORD OR LINE PRINTOUT.

4. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE- VOLUME LIMITS IN 5th Cir. R. 35.5, MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

_____
David Seidman

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1. Because St. Luke's complaint was dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., we treat its allegations as true. Green v. State Bar of Texas, 27 F.3d 1083 (5th Cir. 1994). Our submission is limited to questions of state action immunity, and we express no view regarding any other aspect of this case.

2. States do not have unlimited freedom to do so. See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (affirming order not to enforce state law because of conflict with policies of the Sherman Act). The boundaries of that freedom are not at issue here.

3. The predictability of anticompetitive conduct is legendary: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 128 (Modern Library ed., 1937).

4. The Martin Court wrote:

[T]he Mississippi Code does not merely provide general authority for the hospital to enter contracts. . . . The very purpose of the statutory authorization is to enable the hospital to displace unfettered competition among physicians in the performance of critical operations such as chronic dialysis in ESRD units so as to promote efficiency of health care provision, reduce the hospital's supervisory burden, and control its exposure to liability.

86 F.3d at 1400 (emphasis added). While we have been unable to find any basis for the emphasized finding of statutory purpose, what matters here is that the Martin decision finds the purpose and rests on that finding.

5. Even were this Court to find in the Louisiana statutes the same policy Martin found in the Mississippi statutes, that would not control the result here, because the alleged anticompetitive conduct here has nothing to do with

"competition among physicians in the performance of critical operations" within a hospital. Only a policy to displace competition between hospital service districts and their competitors would be relevant to the allegations here, and we are aware of no suggestion of such a policy.