

# ANTITRUST AND TRADE PRACTICES ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## Department of Justice Urges Repeal of Antitrust Exemption for Tennessee Public Hospitals

May 26, 2011

### Key Points

- Tennessee State Representative Phillip Johnson requested that the U.S. Department of Justice, Antitrust Division comment on a proposed amendment to repeal Tennessee's antitrust exemption for private act metropolitan hospital authorities ("public hospitals").
- In a letter dated May 18, 2011, the Antitrust Division urged the Tennessee legislature to adopt the proposed amendment, opining that applying the antitrust laws to the conduct of public hospitals in Tennessee would promote hospital competition and benefit Tennesseans.<sup>1</sup>

### The DOJ's Case for Repeal

Tenn. Code Ann. § 7-57-501 et seq. grants broad authority to public hospitals in Tennessee. Under this statute, public hospitals may exercise "all powers necessary or convenient to effect any or all the purposes for which [they are] organized," and they may do so "regardless of the competitive consequences." In 2005, the U.S. Court of Appeals for the Sixth Circuit held that this statute creates an antitrust exemption for public hospitals for a wide range of potentially anticompetitive actions, including exclusive contracts with health insurers.<sup>2</sup>

Representative Johnson's letter discussed the impact of the statute on two acute care hospitals in Jackson, Tennessee – one a public hospital and the other privately owned. The letter reportedly stated that the public hospital had "used its organizational structure, size and market presence to demand exclusive insurance contracts with many of the major insurance plans . . . for the past fifteen years."

The Antitrust Division began its analysis by stating that its experience has shown that such exclusive contracts can restrict competition between hospitals and harm consumers. The Antitrust Division further opined that anticompetitive conduct by dominant hospitals—including dominant public hospitals—can lead to higher prices and lower quality care to Tennessee's

<sup>1</sup> A copy of the Antitrust Division's comments can be found at: <http://www.justice.gov/atr/public/comments/271584.htm>

<sup>2</sup> See *Jackson, Tennessee Hosp. Co., LLC v. West Tennessee Healthcare, Inc.*, 414 F.3d 608, 612 (6th Cir. 2005).

healthcare consumers. The type of anticompetitive conduct that the Antitrust Division had in mind when making this statement included: exclusive contracting with commercial insurers, anticompetitive acquisitions, unlawful predatory pricing, certain types of economic credentialing and horizontal agreements with competitors. The Antitrust Division urged repeal of the antitrust exemption so that alleged anticompetitive conduct could be investigated, prosecuted and deterred, all of which protects competition.

#### What's Next?

Whether the public hospital exemption will be repealed remains to be seen. While the proposed legislation reportedly has been heavily lobbied, the bill has been rolled to 2012 in the Tennessee House Commerce Committee and referred to the General Subcommittee of Senate Commerce, Labor and Agriculture.

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