Hospital Transactions and Antitrust Enforcement after the Supreme Court’s Phoebe Putney Decision

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Views expressed by Sara Razi are her own and do not necessarily reflect the views of the Federal Trade Commission or of any Commissioner.
In a February 19, 2013 unanimous decision in *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, the Supreme Court overturned the 11th Circuit Court of Appeals, holding that an acquisition of a competing hospital by a Hospital Authority created by the State of Georgia was not immune from antitrust scrutiny under the "state-action" doctrine.
Background

• The Hospital Authority of Albany-Dougherty County agreed to purchase the second of two hospitals in the county and lease it to a private company, which was a subsidiary of the Hospital Authority, that already operated the first.

• Under Georgia's Hospital Authorities Law, political subdivisions may create special-purpose 'hospital authorities' to provide for the "operation and maintenance of needed health care facilities."

• The hospital authorities may "exercise public and essential governmental functions," including the power to acquire and lease health facilities.

• The FTC issued an administrative complaint alleging that the transaction would substantially reduce competition in the market for acute-care hospital services.

• The FTC also sought a preliminary injunction in federal district court against the acquisition.
Antitrust Law Context

• *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny made clear that the federal antitrust laws do not reach activities of the States, acting in their sovereign capacity, that effectively displace competition.

• Phoebe Putney fleshes out application of antitrust law to political sub-divisions and non-state actors—neither of which can be considered to themselves be the state acting as sovereign—but who purport to be carrying out the State's legislative policy.

• Conflict in circuits on appropriate standard.
Lower Court Decisions in *Phoebe Putney*

- FTC claimed that “state action” did not protect the acquisition because state law did not articulate intent to have hospital authorities act anticompetitively and because “active supervision” of the hospitals’ operations by Hospital Authority would not be present.
- Both the federal district court and, on appeal, the 11th Circuit concluded that the Hospital Authority, as a local government entity, was entitled to “state-action” immunity from the antitrust laws because the challenged anticompetitive conduct was a “foreseeable” consequence of its enabling legislation. The district court also noted that Hospital Authority’s role was sufficient supervision for immunity.
The Supreme Court reversed, holding that Georgia had "not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition."

State-action immunity is disfavored and will only attach if a non-sovereign state actor's actions reflect a "clearly articulated and affirmatively expressed" state policy to displace competition such as where the anticompetitive effect was an "inherent, logical and ordinary" result of exercise of delegated authority. (emphasis added)
Insufficiency of Statutory Basis for Immunity

• Court found no indication that the Georgia legislature had affirmatively contemplated that the Hospital Authority would displace competition by consolidating hospital ownership and eliminating competition.

• The Court noted that the Hospital Authority's powers were similar to those of any private corporation under state law, but that such general authority does not imply authorization to behave in ways that would violate the antitrust laws.
The Court explained that the 11th Circuit’s "foreseeability" test was too loose.

"[A] reasonable legislature's ability to anticipate" the possibility that general powers could be exercised in an anticompetitive way "falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative."
Second “State Action” Issue Unaddressed

• The Supreme Court left unaddressed a second issue – whether the “active supervision” element was applicable here, and, if so, whether the Hospital Authority’s involvement provided sufficient “active supervision” for immunity.

• FTC had claimed that Hospital Authority was effectively a rubber-stamp for transfer of hospital operations to its private, non-profit subsidiary that contracted to operate Authority owned facilities.
Significance of Unanimity

• Unanimity of Supreme Court reflects long-standing general policy of applying antitrust immunity doctrines narrowly.

• Decision supported by “liberal” justices and also by “conservative” justices who may not want the antitrust laws to defer to regulatory schemes which may operate to frustrate competition and market forces.

• Splits may be more likely to arise as to how antitrust laws should apply than in whether they should apply.
Status of *Phoebe Putney Case*

- FTC administrative case proceeding on the antitrust merits. Now in pre-trial discovery phase.
- Court of Appeals has remanded injunction action to district court.
Implications of Decision in Hospital Authority Context

• Application in other hospital authority cases involving mergers or conduct
  – Acquisitions? Joint ventures? Pricing and contracting practices? Provider networks?
  – Does enabling legislation meet the clarified standard?
  – What will it take to meet a “inherent, logical, and ordinary” result criterion?
Implications for State Licensing Boards

• How would Phoebe Putney standard bear on decisions by state licensing boards affecting competition among health care providers? Professional licensing boards?
  – Scope of practice rules
  – Supervision requirements for non-physicians
  – Corporate practice of medicine doctrine
How Directive Must Legislature Be?

• What if the enabling law explicitly defers to the subordinate body’s judgment whether to employ an anticompetitive approach?
Unresolved “Supervision” Issues

• *Phoebe Putney* does not resolve whether “active supervision” requirement in some cases may require ongoing supervision by public body of pricing and competitive activities by hospital system rather than merely supervision of merger or leasing transactions.

• Decision also does not address how to assess “active supervision” standard where public body with limited staff and funds is said to be a rubber-stamp.