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One to Watch: SCOTUS Consideration in Phoebe Putney?

Christopher Sagers (Cleveland-Marshall College of Law) · Friday, March 23rd, 2012

The next Term may see significant SCOTUS consideration of the state action immunity, the first such case since 1992. The decision below in the defendants' favor was quite plainly wrong, and so it might also become only the second antitrust case in twenty years in which the Court has ruled for a plaintiff. That would be a nice result since it would shield the plaintiff here, the Federal Trade Commission, from yet another unjustified indignity at the hands of the increasingly anti-enforcement courts of appeals (see, e.g., this recent decision).

To wit, while no petition has yet been filed, the Solicitor General has confirmed that he will seek review in *FTC v. Phoebe Putney Health System, Inc. (663 F.3d 1369*, (CCH) 2011-2 Trade Cases ¶77,722). The precise issue would be whether the Eleventh Circuit properly found the *Midcal* requirement of "clear articulation" to be satisfied where a state does no more than empower a municipal entity to enter contracts or buy and sell property. If the Court takes the case, it would likely clarify the "foreseeability" test for clear articulation first formulated by Justice Powell—something of a foe of antitrust enforcement—in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). Handicapping the certioriari process is better left to the high court bar, but we mortals can at least hope the Court will perceive something like a circuit split here. The Eleventh Circuit took a *drastic* view of what can constitute clear articulation, and it seems unlikely that many other circuits would go along with it. It seems fair to say that a majority of the Court also dislikes antitrust enforcement rather less than they dislike pork barrel government giveaways.

The *Phoebe Putney* decision was strikingly, obviously wrong. It immunized a grossly anticompetitive hospital merger even though the transaction was negotiated and executed almost exclusively by two private entities: one private hospital proposed to buy another one, in a part of small-town southwestern Georgia where there is no other major hospital within quite a distance. What is really remarkable was the transparent flimsiness of the parties' effort to secure antitrust immunity, and their lack of effort to conceal it.

Under a statewide health care policy adopted in 1941, local governments in Georgia may establish "Hospital Authorities," which are quasi-public non-profit entities that can own and operate health care facilities. The acquiring hospital in *Phoebe Putney* had been owned by one such Authority for many years, but in 1990 the Authority all but handed it over to a purely private non-profit entity. (The Authority continued nominally to own the hospital, but leased it to the non-profit, giving the non-profit full control, for an annual rent of one dollar). To simplify, I will call that non-profit entity "Phoebe Putney." In 2010, after twenty years of free-standing operation with little evidence of government oversight, Phoebe Putney officials initiated an effort to buy their only serious

competitor, a nearby for-profit owned by the national chain Hospital Corporation of America. They reached a full agreement without even having notified the Authority, and their agreement included a massive break-up fee if the Authority failed to approve it in precisely the form they had negotiated. The deal unapologetically required Phoebe Putney to take steps to secure antitrust immunity, but the steps identified were a pantomime. The Authority would nominally be the purchaser of HCA's hospital, but it would make the purchase with Phoebe Putney's money, and it would instantaneously lease the HCA hospital to Phoebe Putney—again for $1 per year—under a "management agreement" giving Phoebe Putney full control.

One juicy tidbit is that Phoebe Putney was unable to secure an investment bank's "fairness opinion" attesting that the high price it agreed to was justified. There should not be much mystery why the price was high.

Projecting that the deal would result in a 100% share within the county and 86% within a larger, six-county region, the Commission sought what one might have thought was a slam-dunk § 13(b) injunction. But the Middle District of Georgia dismissed at 12(b)(6) and the Eleventh Circuit affirmed. Neither court entertained doubt that the complaint alleged conduct that would be illegal on its substantive merits. The Eleventh Circuit found the only question at 12(b)(6) to be state action immunity, and because prior circuit authority found Georgia's Hospital Authorities to be "political subdivisions" under *Town of Hallie*, the defendant would be immune if it could meet the "clear articulation" element.

That's where things went completely haywire.

The Eleventh Circuit's substantive discussion begins with this assertion: "The [Georgia] Hospital Authorities Law . . . contemplates anticompetitive effects," as shown by the Authorities' power to "operate" health care facilities, to "construct, reconstruct, improve, alter and repair" them, to "establish rates" charged in them, to "sue and be sued," to "exchange [or] transfer" property, and to "borrow money . . . ." 663 F.3d at 1376.

To "sue and be sued"? That's relevant? To "borrow money"?!?

It gets worse. "Most important to [the] case," the court wrote, was "the power to 'acquire [health care facilities] by purchase, lease, or otherwise . . . .' " To the court that power made clear that the "legislature . . . anticipated that such acquisitions would produce anticompetitive effects," because "acquisitions could consolidate ownership, . . . eliminating competition . . . ." 663 F.3d at 1377.

This result is absurd.

Parker, *Midcal* and *Town of Hallie* establish a fundamental proposition of American political economy, of essentially constitutional scope: competition is the presumptively preferred policy throughout the United States, and while state governments may deviate from that policy within their own borders, they can do so only if they comply with relatively demanding standards meant to assure that their deviations remain politically accountable. That is, those deviations must either be sovereign acts of the states themselves, or comply with the *Midcal* and *Town of Hallie* standards.

Accordingly, local governments are "persons" that may be sued for antitrust violations, and they enjoy no protection from antitrust liability except where the *state* government has "clearly articulated" such protection (and except to the extent of the limited protection provided under the

Local Government Antitrust Act (15 USC Secs. 35 – 37). When they act in a commercial capacity, they are required by federal law to compete, and they cannot avoid doing so unless the state, acting in its sovereign capacity, "clearly" says otherwise. The Supreme Court has made clear in *Community Communications Co., Inc. v. City of Boulder*, 455 US 40 (1982), that even general grants of actual regulatory power, like home rule provisions, do not create a "foreseeable" enough likelihood of competitive restraint to clearly articulate a desire to restrain it.

So it seems unlikely that a state government repeals federal antitrust law every time it creates a municipal corporation that happens to have the power to buy stuff.

Phoebe Putney is a bad enough decision that it has already gotten a fair bit of attention. True to form, the indefatigable Professor Hovenkamp appears to have beaten everyone to the punch. His recent SSRN postingMidcal element, "active state supervision." But any of them that could manage to characterize themselves as instruments of a local government might secure *Town of Hallie* immunity even without active supervision.)

My collaborator Peter Carstensen also has an excellent paper forthcoming in the *Antitrust Bulletin*, which will be available at 56 Antitrust Bull. 773 (2011), in which he studies the generally poor treatment of anticompetitive state rules. He has some choice analysis of *Phoebe Putney*, and among other things he notes two rather remarkable facts for a case in which the state is said "clearly" to have chosen to displace competition: (1) the state's own Attorney General was the Commission's co-plaintiff, and (2) the state's constitution Ga. Const. Art. 3, section 6, paragraph 5] prohibits laws "authoriz[ing] any contract or agreement which may have the effect . . . of encouraging a monopoly . . . ."

Anyway, as a parting thought, one must simply love the local officials' reaction to the Solicitor General's decision to seek cert. The chairman of the local Hospital Authority said:

"We are stunned and disturbed by this most recent development. . . . The FTC continues to waste taxpayers' money and our community's money to challenge an already decided case, which has been confirmed by appeal."

Really? What exactly do you suppose will happen to their money once the hospital has an 86% market share?

Update

And, as expected, the Solicitor General has filed a petition for certiorari from the Eleventh Circuit's execrable December decision in *FTC v. Phoebe Putney*. Also as expected: (1) the QPs center on whether the mere granting of general corporate powers to a municipal entity can constitute a "clear articulation," because if that implicates a sufficiently "foreseeable" competitive restraint under *Town of Hallie*, then so does everything in the universe; and (2) the SG makes an elaborate case that the Eleventh Circuit has established what amounts to a circuit split—its finding of "clear articulation" from mere grant of corporate powers represents an "entrenched misapplication of th[e] [Supreme] Court's precedents that squarely conflicts with decisions from the Fifth, Sixth, Ninth and Tenth Circuits." P. 11, 23-27.

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