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BREAKING NEWS: Court Grants Cert in Phoebe Putney; What Will Happen in North Carolina Dentists?

Christopher Sagers (Cleveland-Marshall College of Law) · Monday, June 25th, 2012

This morning the Court granted certiorari in *Federal Trade Commission v. Phoebe Putney Health*, No. 11-1160, on appeal from an execrable pair of opinions in the Eleventh Circuit and the Middle District of Georgia.

At issue is a local hospital merger that would give the acquiror 100% in its county and upwards of 90% in a larger multi-county area of rural southern Georgia. The Commission's otherwise slam-dunk 13(b) action was stymied, however, because the merger received an extremely cursory, purely formal and after-the-fact rubber-stamp from a largely inactive county hospital commission created under a 1941 Georgia statute. Primarily at issue was whether the state of Georgia had "clearly articulated" its intention that the local commission would act in some way to restrain trade. Prior Eleventh Circuit authority found the local hospital commissions to be "political subdivisions" and, as such, to enjoy state action immunity under Town of Hallie so long as there was "clear articulation." Clear articulation in turn depends on whether a restraint of trade is a "foreseeable" consequence of action taken by the state as sovereign. The courts below said such a restraint is foreseeable, but for no more reason that the 1941 state statute gave these local commissions general corporate powers, including the power to acquire hospitals.

I personally find this all utterly absurd.

But the Court's grant of cert is really quite exciting:

? The opinion will offer the Court's first thoughts on the state action immunity in just over twenty years. Will the new opinion bear the upbeat, pro-enforcement optimism of *Ticor*, or the rather defeatist, what-good-would-enforcement-do cynicism of *City of Columbia*?

? The parties' two opening briefs — a brief for the Commission by the Solicitor General, and the defense reply written by former SG Seth Waxman — are both really, really good, and they pose the issues in fairly starkly different terms. The SG's brief predictably sets out a workmanlike (and, to me, persuasive) demonstration of a circuit split. But the brief in opposition takes a surprisingly different approach. Instead of simply taking issue with the purported circuit split demonstration, Mr. Waxman argues that the Commission simply misperceives the issue. The brief begins by saying that if the Eleventh Circuit held, as the Commission argues, that a mere grant of "general corporate powers" is sufficient to establish "clear articulation," then the Eleventh Circuit was wrong and should be reversed. Rather, says Mr. Waxman, the Eleventh Circuit found there to be

more here than just “general corporate powers.” That seemed a rather striking gambit to me, as the grant of powers, in my mind, contains very little except the power to make contracts and buy things and so on.

? The technical issue of state action immunity before the Court goes to the deepest, theoretical foundations in political philosophy or political economy on which the state action doctrine depends. Whether it is enough for a state to create a local commission with the power to acquire private businesses goes to the most basic questions in the ordering of our economic society. We have a commitment to competition as a policy to which we once expressed deep fealty; the question here is how much we still care about it.

? And what will happen in *In re North Carolina Board of Dental Examiners*? That case, currently on appeal to the Fourth Circuit from the Commission’s finding of liability, raises different technical issues, but goes to the same broader problems of political economy. Should a state really be allowed to just give a bunch of essentially private persons license to constrain their markets? If the Court is interested in *Phoebe Putney*, maybe it will take an interest in *North Carolina Dental* as well.

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