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Phoebe Putney: A Quick Post-Mortem, and Some Thoughts on the Next Justice Stevens

Christopher Sagers (Cleveland-Marshall College of Law) · Thursday, February 21st, 2013

I often feel a certain deflation after the Supreme Court decides an antitrust case. After watching a case for months, prognosticating about it with other antitrusters, reading umpteen blog posts, reading the briefs if you're into it and even some *amici* briefs if you're *really* into it, the Court then rules one way or the other, and usually tailors its opinion pretty narrowly, breaking no meaningfully new ground. I suppose many will have that feeling about Tuesday's decision in *Federal Trade Commission v. Phoebe Putney Mem. Hosp. Sys.*, and some are already saying that Justice Sotomayor's brief opinion for a unanimous Court is just a narrow application of garden variety state action rules. And I suppose it will be overshadowed by what will be a much bigger decision later this year, regardless how the Court decides it—the reverse-payments decision in *Federal Trade Commission v. Watson.*

But I think there are a few reasons to see more in *Phoebe* than may first appear. I also have some thoughts about the opinion's author, Justice Sotomayor, and what may become (I hope I hope I hope!) her important new role in the wake of Justice Stevens' retirement.

Reasons I Think Phoebe *Matters*

• *Cataclysm Averted.* First of all, in one important respect *Phoebe* resembles the Court's most recent really big antitrust decision, *American Needle.* Like that case, some will say that *Phoebe* is really no big deal because reversal was so predictable. The lower court made what seemed like kind of a big departure from settled law, and so reversal was just a correction of doctrinal error that had ripened to circuit split. But in both cases, one should remember that *affirmance*, which really was not impossible, would have been a *disaster*. There are literally thousands or perhaps tens of thousands of state-authorized quasi-public entities littered throughout the country that participate in markets in various ways. Had *Phoebe* gone the other way, it would immediately occur to participants in those programs, all over the country, that they really ought to test the limits of their new-found profit opportunities. Many thousands more state statutes delegate authority of some kind to other public or private entities, and they too would raise new uncertainties if the Court affirmed the Eleventh Circuit's extremely broad reading of "clear articulation."

Cataclysm.

Averted.

That such a thing seemed not impossible—in either *Phoebe* or *American Needle*—really says something about the state of antitrust and the federal bench.

• *Reaffirmation of the Presumption Against Scope Limits.* As virtually her first observation after reciting the facts and lower court holdings, Justice Sotomayor reaffirmed this frequently stated sentiment:

[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, "state-action immunity is disfavored, much as are repeals by implication." [quoting *FTC v. Ticor*].

The Court has said that kind of thing a lot, of course, but in the past few decades it has most often honored it in the breach. It seems significant in and of itself that in *Phoebe*, its first state-action decision in twenty years, the Court re-emphasized a general limit on the doctrine that many lower courts have plainly forgotten.

• *Health Care Is Not "Special."* Defendants and some *amici* stressed the significance of the fact that the case involved health care, and alleged that health care markets face special economic problems. No surprise there; there has never been an antitrust defendant that didn't have a reason for the judge that its circumstances require special antitrust clemency. Indeed, I personally think the deepest, most ultimately unifying theme in all antitrust is the struggle of the general against the specific.

But, at least with respect to the *scope* of antitrust, it now appears irrelevant that the particular context may involve health care. The *Phoebe* opinion really didn't mention it. So, except as Congress explicitly says otherwise, it appears that antitrust will continue to apply to health care just as it does to other markets.

More generally, the Court silently reaffirmed in this case that the exemptions and immunities doctrines just aren't concerned with the specific context. There may be some exceptions, but at least the state action doctrine—and *Noerr* too, if you think about it—could care less about the specific market at issue. They rather address the essentially constitutional interface between a federal policy preference and state sovereignty and other political values.

• *Clarification of "Reasonable Foreseeability."* In some important sense, *Phoebe*'s business end will just be its narrow doctrinal clarification of the "clear articulation" requirement. I'm not sure how much is added or if the Court has changed its own law at all, but at the very least it looks like *Phoebe* meant to reign in lower courts that have taken clear articulation too far.

Prior to *Phoebe*, the Court's most important gloss on that term was Justice Powell's 1985 opinion in *Town of Hallie*, which explained that a state policy "clearly articulated" an intent to displace competition so long as anticompetitive consequences were "reasonably foreseeable." Perhaps since that formulation itself really adds very little, *Phoebe* adds a little more. First, borrowing from *Community Commc'ns Co. v. Boulder*, Justice Sotomayor wrote that the ultimate question is whether "the State *affirmatively contemplated*" that delegees of state authority "would displace competition" (emphasis added). That burden is met if it can be shown that anticompetitive effects were "reasonably foreseeable," but, after *Phoebe*, reasonable foreseeability requires that effects to be "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature."

Realistically, this new language may not add much, and assessing "clear articulation" in any given case will still boil down to analogizing to the facts in the Court's decisions. But if there is now one basic known fact, it is that the Court is *not* sympathetic to very general delegations of authority. The Court has now rejected both a home rule statute (*Boulder*) and the grant of "general corporate powers" as clear articulation, and *Phoebe* added this:

> Our case law makes clear that state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively.

• *"[G]eneral [C]orporate [P]owers."* Further along those same lines, it seemed to me significant that the Court followed the Commission's characterization of the major question presented, repeatedly describing the question as whether *Midcal*'s "clear articulation" requirement could be satisfied merely by giving a "substate entity" some "general corporate powers." The trial court, the Eleventh Circuit, and the defendants all stressed that the powers granted to the hospital authority were emphatically *not* just "general corporate powers."

• *A Presumption Against Clear Articulation? Some Thoughts on the Federalism Rationale.* An interesting wrinkle was some policy reasoning at the end, in which Justice Sotomayor seemed almost to suggest that the best interests of state sovereignty themselves require something of a presumption against "clear articulation." Rejecting defendants' request for a presumption in *favor* of immunity, she relied on an *amicus* brief of several states for the view that a "loose application of the clear-articulation test would attach significant unintended consequences to States frequent delegations of . . . authority," and, "declin[ing] to set . . . a trap for unwary state legislatures," she wrote that the Court would avoid any doctrinal standing that required them "to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct."

• *"Market Participant" Remains a Possible Exception.* Footnote 4 of the opinion noted that an *amicus*, the National Federation of Independent Business, had urged the Court to decide the case by recognizing a "market participant" exception to the state action immunity. *Parker* itself had recognized such a possibility, and the Court has been preserving it ever since.
Still, the odds are that if the Court ever reaches the question it will find there to be no such exception. The Court last considered the issue in *City of Columbia* in 1991, and while it there preserved the possibility of such an exemption, the Court rejected several others and seemed generally pretty skeptical of exceptions to state action immunity. Since then most lower courts to have considered the question have rejected any such exception.

• *A Reminder That Justices See Substance and Scope Differently.* One really can't forget that *Phoebe* was unanimous, and it was decided relatively quickly. The Court, in other words, saw it as an easy case. And yet, I doubt there is serious debate that, as far as antitrust is concerned, this is a conservative Court. Prior to *American Needle* in 2010, it had not ruled for any antitrust plaintiff, private or government, in nearly twenty years, despite having taken quite a number of antitrust cases in that time. In many of them—*Brooke Group, Trinko, Twombly, Weyerhauser, Leegin, Dagher, Credit Suisse, Linkline,* etc.—the Court announced new substantive or procedural rules that severely disadvantaged plaintiffs. And so I doubt *Phoebe* proves that the days of 5-4 conservative decisions ratcheting back exposure to liability are behind us.

• *The Whole Court Dislikes State Government Pork.* Finally, I think it is worth noting that most antitrust lawyers and even many federal judges seem to misunderstand what the Court finds

fundamentally at stake in state action cases. Many litigants and Court watchers seem to assume that state action cases are really about substantive antitrust policy or the social utility of the challenged state regulatory regime. I don't think so. I think the Court sees these cases solely as posing a problem of federalism, and just takes for granted the kind of state regulatory programs that raise state action issues almost always to be disagreeable, parochial pork. Justice Kennedy, for example, no antitrust hawk and the author of strongly pro-defendant opinions like *Brooke Group*, ringingly condemned state rubber stamps of price-fixing in *Ticor*. Justice Scalia, who more or less extolled the virtue of monopoly in *Trinko*, wrote an opinion in *City of Columbia* openly despairing of the corruption that he saw as the bread and butter of local government.

Phoebe does not disappoint. Quoting *City of Columbia*, Justice Sotomayor explained that the Court's state action rules sought to preserve state sovereignty, regardless how foolish or evil a state's substantive policies might be, except that states could not "permit[] purely parochial interests to disrupt the Nation's free-market goals."

Reasons I'm Still Feelin' Good JuJu for Sotomayor

During her confirmation period, an exciting Sotomayor fact for antitrusters was her concurrence in *Major League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 334 (2d Cir. 2008) (Sotomayor, J., conc.). *Salvino* was a joint venture case in which the majority found a lack of conspiracy on the same reasoning as the 7th Circuit opinion in *American Needle*. While Sotomayor would have ruled for defendants, her barn-burner of a concurrence schooled the majority pretty harshly for mistaking a garden variety horizontal conspiracy case, raising at most an ancillary restraints issue, for something else. She sounded, in other words, kind of like Justice Stevens, and seemed possibly like someone who could fill his shoes in antitrust cases. And there is reason to think the Court sees her as among its antitrust experts-after all, *Phoebe* was unanimous, meaning that Chief Justice Roberts assigned her to write it.

Now one reason maybe not to get excited just yet is that, admittedly, the *Phoebe* opinion is narrowly written, really addressing only the precise meaning of *Town of Hallie*'s "reasonable foreseeability" test for "clear articulation." But remember once again, this opinion is *unanimous.* And despite the fact that most Justices are more willing to limit antitrust substance than antitrust scope, some of the Court's most recent state action cases seemed to make state action immunity relatively easy—notably in *City of Columbia* in 1991 and *Town of Hallie* and *Southern Motor Carriers*, both decided in 1985. So if there is anything about the opinion that seems tepid or less than Thurman Arnold-esque, we should remember that it may have been necessary to secure votes.

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