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Phoebe Putney, NC Board: Winning Legal Battles, Not Hearts and Minds

Steven J. Cernak (Bona Law PC) · Monday, April 13th, 2015

The FTC has notched two Supreme Court wins in recent years to narrow the state action exemption. But elements of those two cases might best be seen as evidence that the FTC is losing the broader fight: increasing antitrust compliance by convincing non-experts of the wisdom of antitrust's principles.

Here's a quick refresher on the two cases in question:

- In *Phoebe Putney*, the FTC challenged a hospital merger in Georgia. It lost that challenge on state action immunity grounds at the district court and 11th Circuit and the merger closed while awaiting Supreme Court action. In February 2013, the Court agreed with the FTC that the lower courts had misread the "clear articulation" prong of the state action exemption and found the merger was not immune to antitrust challenge. The FTC found the merger anticompetitive and planned to insist on a divestiture; however, Georgia state officials eventually determined that any such divestiture would be subject to the state's certificate of need regulations *and* would not pass those regulations because the area was already "overbedded." As a result, the FTC accepted a remedy that did not include any divestiture.
- Two years later, the Court again narrowed the state action exemption at the behest of the FTC, this time by clarifying when the "active supervision" prong must be met. In *North Carolina Board of Dental Examiners*, the Court held that active supervision of a state agency is required when "a controlling number of decisionmakers are active market participants in the occupation the board regulates." In this case, North Carolina had argued that a state should be allowed to appoint an agency and its members as it saw fit without the actions of that agency being subject to antitrust scrutiny. The state was supported by seven amicus briefs written on behalf of more than forty associations of professionals, including the American Medical Association and the National Governors Association, and twenty-three state attorneys-general. All the briefs agreed with North Carolina's legal position and most explained to the Court the benefits to consumers from the actions of such agencies.

Both cases are clear wins in the FTC's long-running campaign to narrow the state action exemption to the antitrust laws. But that campaign presumably is meant to further the FTC's ultimate goal to reduce the amount of anticompetitive action by any party, whether state agency or private associations. If so, then it seems that goal would be more effectively reached if the FTC could convince *states* that such agencies should be reined in and convince *agencies* to regulate consistent with antitrust's principles.

By that standard, the two cases are failures at worst, missed opportunities at best. In *Phoebe Putney*, the parties, including a state hospital entity, used the lower court decisions to close the anticompetitive transaction. The decision-making state officials decided that the state's hospital regulations did not allow an unscrambling of the merger – and did not express any regret with that outcome. In *NC Board*, a few dozen associations thought the actions of the Board were at least legitimate agency actions, perhaps even beneficial to customers – and attorneys general for nearly half the states, all with antitrust laws of their own to enforce, seemed to agree.

Convincing private parties to follow antitrust laws can be difficult. Convincing the editorial board of the *Wall Street Journal* of the wisdom of those laws might be a bridge too far. But in *NC Board*, why couldn't the FTC convince nearly half the state AG's that antitrust law scrutiny in that case was a good idea?

"Regulatory capture" is not a completely satisfactory response. All of these officials must satisfy a majority of their constituents to keep their jobs – some of them are directly elected by the state's voters. Plenty of these officials have a clear understanding of antitrust laws and have not been hesitant to use them in other circumstances. For instance, Ohio Attorney General Mike DeWine used to lead the Antitrust Subcommittee of the U.S. Senate Judiciary Committee. Michigan's Bill Schuette has recently brought criminal antitrust actions. If these officials risked no constituent backlash from publicly supporting a process that the FTC thought generated such anticompetitive actions, then maybe the constituents need to be better educated.

The argument here is not that the FTC should forego filing such cases; instead, the argument is that the FTC should do more to educate legislators and the public to the potential hazards of such agencies and their actions.

Now, the FTC does testify in state capitols when asked, engage in other competition advocacy and has some great basic advice on its very useful website. But its leaders, especially the Commissioners, could shift their priorities and do more. Maybe fewer trips to Beijing and Brussels and more to Columbus and Lansing. Maybe fewer speeches at ABA and AAI meetings and more at, say, next month's Professional Skaters Association meeting in Minneapolis. And as much as I appreciate expert reports on difficult antitrust topics like the upcoming report on patent assertion entities, maybe the FTC and individual commissioners could join some of my colleagues in educating the public of the potential overreach of state regulatory schemes.

While I'm on my soapbox, one more suggestion: When you do touch down in flyover country, be prepared to listen, discuss and persuade, not just proselytize. Remember the need for "regulatory humility." As one Commissioner has stated, licensing "can ensure that minimally acceptable health and safety requirements are met" and can be "a means for signaling to consumers that certain levels of training have been met." Listen to the local who thinks that this particular agency or one of its actions really does help consumers. Understanding the goals and concerns – and discussing how antitrust principles affect them – could go a long way to preventing anticompetitive state action in the first place. That is and should be the FTC's ultimate goal.

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