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A Guide Through the State Action Maze

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Abstract

For those who operate or deal with public hospitals—particularly hospitals in areas with few or more-widely dispersed rivals—the U.S. Supreme Court's decision earlier this year in *FTC v. Phoebe Putney, et al.* sounded a warning to anyone who assumed that public hospitals necessarily enjoy a complete state action defense to antitrust challenges. Not only did it clarify the "foreseeability" standard, but it portends at least three possible changes in how lower courts will analyze assertions of the state action defense to the antitrust laws. This article briefly traces the origins of the state action doctrine, provides contextual background for the *Phoebe Putney* decision, and explains the decision itself. Finally, the article provides a concise framework under which state action issues will be analyzed and identifies those areas where further case law development will be required.

Non-specialists probably spend little time thinking about the state action defense to antitrust claims. Antitrust in general can be an esoteric subject; the details of the field's often-obscure immunities and defenses even more so. For these reasons, the U.S. Supreme Court's decision earlier this year in *FTC v. Phoebe Putney, et al.*[1] may not have appeared at the time to be a must read. But those who operate or deal with public hospitals—particularly hospitals in areas with few or more-widely dispersed rivals—would probably benefit from paying at least a little attention to the subject. As this Member Briefing explains, *Phoebe Putney* sounded a warning to anyone who assumed that public hospitals necessarily enjoy a complete state action defense to antitrust challenges. It also introduced some uncertainty about when that defense applies.

A Short History of State Action Doctrine

Parker v. Brown

Each of the federal antitrust statutes—the Sherman, Clayton, and Federal Trade Commission (FTC) Acts—governs "persons," and neither the language nor the legislative history of these statutes says whether governments are "persons." In 1943, however, the Supreme Court considered in *Parker v. Brown* whether the state of California could be enjoined under the Sherman Act for regulating the pricing of raisins.[2] Although private parties collectively reduced their output pursuant to the marketing program, whether their crop received price protection depended upon review and approval by the state. In reversing the lower court's bench verdict, the Court found that Congress never intended to apply the antitrust laws to the states, observing that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."[3]

Distinguishing the State and its Instrumentalities: Subordinate Governmental Entities and Private Actors

[1] 133 S. Ct. 1003 (2013).
[2] 317 U.S. 341 (1943).
[3] *Id.* at 351.

Of course, the Supreme Court's comment raised the question of just who is the "state" in state action immunity. States acting in their sovereign capacity certainly qualify, and "ipso facto are exempt from the operation of the antitrust laws."[4] State legislatures and supreme courts qualify as well, based on conduct falling within their purview.[5] Other decisions suggest that a governor's orders qualify for the same immunity.[6]

Less clear is whether the conduct of subordinate governmental entities or private parties operating under a state mandate qualifies as an act of a state. In 1980, the Supreme Court addressed state action for private parties acting under color of state authority in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*.[7] There, the Court upheld an injunction prohibiting state officials from enforcing a statute requiring wine producers to establish resale price schedules. In doing so, the Court articulated its now-famous two-prong approach: state action applies first where the conduct is "clearly articulated and affirmatively expressed as state policy." Second, "the policy must be actively supervised by the state itself."[8]

Clear Articulation

In explaining the clear-articulation prong, the Supreme Court in *Midcal* required that the challenged conduct be undertaken "pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation."[9] The Court explained in a later case that private conduct permitted, but not necessarily compelled, by the state satisfies *Midcal*'s clear-articulation inquiry.[10] In another decision handed down the same day, *Town of Hallie v. City of Eau Claire*,[11] the Court considered just how clear a policy

[4] *Hoover v. Ronwin*, 466 U.S. 558, 559 (1984).
[5] *Hoover*, 466 U.S. at 567-68 (state legislatures); *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-60 (1977) (state Supreme Court).
[6] *Deak-Perera Hawaii, Inc. v. Dept. Transp.*, 745 F.2d 1281, 1282 (9th Cir. 1984); *Astoria Entertainment, Inc. v. Edmunds*, 159 F. Supp. 303, 324 (E.D. La. 2001).
[7] 445 U.S. 97 (1980).
[8] *Id.* at 105.
[9] *Midcal*, 445 U.S. at 105.
[10] *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 (1985).
[11] 471 U.S. 34 (1985).

to displace competition must be. There, the city of Eau Claire, WI, had allegedly monopolized local markets for sewage collection and transportation services by tying those services to its monopoly provision of sewage treatment services. The Court did not require that the state policy specifically mention the anticompetitive conduct in order to "clearly articulate[]" the displacement of competition.[12] Instead, the Court ruled, the city could assert the defense so long as the challenged conduct was "a foreseeable result of empowering the City to refuse to serve unannexed areas."[13] Because a reduction in competition would logically result from the state's authority to regulate, the Court affirmed the trial court's dismissal of the claims.

A few years later, the Supreme Court reiterated this foreseeability standard. In *City of Columbia v. Omni Outdoor Advertising*,[14] the Court examined a city ordinance restricting billboard advertising and found that the state action doctrine protected the city from antitrust liability. The Court reasoned that zoning regulation would foreseeably reduce competition for billboard advertising because "the very purpose of zoning regulation is to displace unfettered business freedom."[15] What qualifies as a foreseeable anticompetitive result was among the issues before the Supreme Court in *Phoebe Putney*.

Active State Supervision

The active-supervision requirement ensures that the anticompetitive conduct results from "deliberate state intervention, not simply [an] agreement among private parties"[16] who later claim to operate under color of state authority. These cases typically arise

[12] *Id.* at 39 (quoting *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).
[13] *Id.* at 41.
[14] 499 U.S. 365 (1991).
[15] *Id.* at 373.
[16] *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992).

when a state delegates rulemaking authority to a private body or quasi-public agency largely controlled by private actors.[17]

What constitutes active supervision of these quasi-public entities by the state, though, remains unclear. The "power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy" qualifies as active supervision, but pro forma review—the proverbial rubber stamp—does not.[18] But the courts have not defined where rubber-stamping ends and discretionary power begins. Attempting to fill this gap, the FTC has identified a number of considerations:

- How the factual record leading to the agency decision was developed;
- Whether the agency issued a written decision on the merits;
- Whether there was a specific assessment of how the conduct comports with the standard developed by the state legislature;
- Whether the agency collected data before the decision;
- Whether the agency conducted economic studies;
- Whether the agency reviewed the profit levels achieved by the private parties; and
- Whether in the past the state had disapproved conduct that failed to meet the state's standards.[19]

Taken as a whole, these criteria suggest that the state's retention of an ultimate right to approve the action of private parties may not suffice as active supervision. Evidence that the state went behind the private actors' deliberations, and in some degree engaged in its own independent analysis, seems required.

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[17] *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987) (NY State Liquor Authority); *Patrick v. Burget*, 486 U.S. 94 (1988) (hospital peer review committee); *Ticor Title Ins. Co.*, 504 U.S. 621 (state title insurance rating bureaus). *See also* note 70, below.
[18] *Patrick*, 486 U.S. at 101.
[19] *Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 414-30 (2005).

FTC v. Phoebe Putney

Background

Albany, GA, is the county seat of Dougherty County, and lies about 180 miles southwest of Atlanta. Dougherty County's largest employer is Phoebe Putney Memorial Hospital. A local judge founded the hospital in 1911 with a $25,000 gift and two conditions: that the new facility be named for his mother, and that it provide health care without regard to the patient's race. Phoebe Putney was the only hospital in town until 1973, when Hospital Corporation of America (HCA) built Palmyra Park Hospital two miles away. Phoebe Putney's management has described Phoebe Putney as "the dominant provider of care for 140,000 residents" in its six-county primary service area, "consistently capturing a market share of more than 70 percent."[20] Its services now include cardiac care, physical and sports medicine, women and children's services, a regional perinatal center, and comprehensive surgical, diagnostics, and therapeutic services. Its cancer center, "one of the busiest in the Southeast," offers a Duke University-affiliated bone marrow transplant program that alone in Georgia accepts Medicaid.[21]

The Hospital Authority of Albany/Dougherty County (Hospital Authority, or Authority) owns the hospital's physical plant and other assets. Established by Georgia's Hospital Authorities Law,[22] the Hospital Authority can build, acquire, and operate "hospitals and other public health facilities," or lease them for operation by others.[23] The Hospital Authority must operate its facilities on a nonprofit basis, and can set rates to cover only operating expenses and reasonable reserves.[24] The Hospital Authority operated Phoebe Putney itself until 1990, when it transferred the hospital's "assets, management

[20] Phoebe Putney Health System, July 18, 2005 U.S. Senate Finance Committee Response at 5.
[21] Phoebe Putney Memorial Hospital Community Needs Implementation Strategy 2013-15 at 1, *available at* www.phoebeputney.com/media/file/Needs_Assess/ImplementationStrategies.pdf.
[22] O.C.G.A. §§ 31-7-70 *et seq.*
[23] *Id.* § 31-7-75.
[24] *Id*.

and governance" for operation by a private, nonprofit organization, Phoebe Putney Memorial Hospital Inc. (PPMH).[25]

Phoebe Putney's service rates have inspired some controversy over the years. A local Coalition for Competitive and Affordable and Healthcare has claimed that major employers' health care costs in the area exceed their companies' national averages by $1,400 per employee.[26] GeorgiaWatch, a nonpartisan consumer advocacy group, finds other evidence of above-market pricing.[27] Phoebe Putney, on the other hand, has described its rates as "competitive and in-line with our comparable market," and its revenues as "typically right in the middle of the pack."[28] A 2007 study commissioned by local governmental agencies tends to agree.[29]

In the summer of 2010, PPMH's president began discussions with HCA to purchase Palmyra Park, the rival hospital. Discussions between PPMH and HCA continued into late 2010, with PPMH's board approving the final terms of the deal in early December. Only then did PPMH's executives present the approved deal to the Hospital Authority's board at a December 21, 2010 meeting. The Hospital Authority board approved the deal at the same December 21 meeting without any changes.[30] According to the FTC, the acquisition would give Phoebe Putney an 86% market share.[31]

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[25] "An Independent Analysis of Phoebe Putney's Finances & Operations" (Independent Analysis), *available at* www.phoebeputney.com/PhoebeContentPage.aspx?nd=1453.
[26] Coalition of Affordable and Competitive Healthcare brochure, 2004; GeorgiaWatch, "A Crisis of Affordable Health Care in Georgia: Phoebe Putney Health System" (GeorgiaWatch study) at 7-8, *available at* www.georgiawatch.org/documents/PhoebePutney.pdf.
[27] GeorgiaWatch study at 5-6.
[28] "Independent Analysis"; *see also* Phoebe Putney Memorial Hospital, "A Report to the Hospital Authority of Albany/Dougherty County" (August 17, 2006).
[29] Milliman, "Albany, GA Healthcare Cost Study" (December 5, 2007).
[30] Although two Hospital Authority Board members had participated in a 30-minute briefing the previous October, the board "was not presented with the proposed transaction until [the] December 21, 2010" meeting. 793 F. Supp. 2d at 1360.
[31] Amended Complaint, *FTC v. Phoebe Putney Health System et al.*, ¶53, *available at* www.ftc.gov/os/caselist/1110067/130409phoebecmpt.pdf. Before the acquisition, the FTC described Phoebe Putney as having a 74.9% market share, and Palmyra Park as having 11.2%. *Id.*, ¶55.

The FTC Sues to Enjoin the Acquisition

In an administrative proceeding filed on April 19, 2011, the FTC challenged the acquisition as anticompetitive, and two days later sought an injunction in the local U.S. district court to halt the transaction while the FTC challenged the acquisition in an administrative proceeding.[32] A few days later, the district court granted the FTC a temporary restraining order (TRO). Phoebe Putney and Palmyra Park then moved to dismiss the FTC's district court action and vacate the TRO as barred by the state action doctrine, citing state statutes that authorized local Hospital Authorities to acquire hospitals within a single city or county and lease them to others to operate on a nonprofit basis "to promote the public health needs of the community . . . ."[33]

The district court found the Hospital Authority's general ability to acquire hospitals under these statutes sufficient grounds to invoke the state action doctrine, and on that basis dissolved the TRO and dismissed the FTC's complaint with prejudice.[34] Applying *Town of Hallie*, the court focused on "whether the suppression of competition in the manner alleged in the Complaint is a reasonably foreseeable result of the conduct authorized and the powers granted to the Authority" under Georgia law.[35] Answering this question, the district court said, depended on whether "the Georgia legislature reasonably foresaw a private entity taking managerial and operational control of its only former competitor through a management agreement and lease granted to it by a hospital authority."[36] Under Eleventh Circuit precedent, the Georgia lawmakers "foresaw" and authorized anticompetitive conduct if it was "*reasonably anticipated* rather than inevitable, ordinary, or routine."[37] The Hospital Authority's statutory authority and the conditions specific to Dougherty County—at the time, home to a single hospital and a Hospital Authority with a "lack of funds and resources"—"increased the likelihood that it

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[32] *In re Phoebe Putney Health System*, FTC Docket No. 9348, *available at* www.ftc.gov/os/adjpro/d9348/110420phoebecmpt.pdf; *FTC v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356, 1359 (M.D. Ga. 2011).
[33] 793 F. Supp. 2d at 1361-62, 1376 (citing O.C.G.A. § 31-7-71(4)).
[34] *Id*. at 1381.
[35] *Id*. at 1371.
[36] *Id*.
[37] *Id*. at 1372 (emphasis in original).

may enter into a lease for the operation of one of its acquired hospitals by another hospital or hospital network with which the acquired hospital once competed."[38] This "increased likelihood" of reduced competition implied a state policy to displace competition, which protects the Authority from antitrust liability. Moreover, the allegedly leading role in negotiating the acquisition played by PPMH, the private lessee—and the Hospital Authority's allegedly perfunctory role—did not jeopardize the Hospital Authority's state action defense, so long as the Hospital Authority "has the ultimate say-so" under the statutory regime.[39] Because "any actions taken by the private actors to prompt or engender" the state's protected conduct "must also be immune," the state action doctrine also protects PPMH and Palmyra.[40]

Phoebe Putney Wins, and the FTC Appeals

On appeal, the Eleventh Circuit upheld the district court's decision.[41] Like the district court, the appeals court framed the issue as whether "anticompetitive consequences were a foreseeable result of the statute authorizing the Authority's conduct."[42] It noted the Hospital Authority's "powers of impressive breadth," including to acquire and operate hospitals, establish rates, sue and be sued, acquire property by "right of eminent domain," receive tax-derived subsidies from local governments, and "exercise any or all powers now or hereafter possessed by private corporations performing similar functions."[43] Like the district court, the Eleventh Circuit inferred a state policy to displace competition based on the kinds of acquisitions likely to occur in the marketplace. Unlike the district court, however, the appeals court broadened its market analysis beyond the specific market in which Phoebe Putney operated to the entire state. "It defies imagination," the court observed, "to suppose the legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing

[38] *Id*. at 1377.
[39] *Id*. at 1379.
[40] *Id*. at 1379-81.
[41] *FTC v. Phoebe Putney Health System, Inc., et al.*, 663 F.3d 1369, 1378 (11th Cir. 2011).
[42] *Id*. at 1376.
[43] *Id*. at 1377-78.

acquisitions by the authorities could have no serious anticompetitive consequences."[44] Because "the legislature must have anticipated that such acquisitions would produce anticompetitive effects," the state action doctrine protects the Hospital Authority's purchase of Palmyra Park.[45] The appeals court handled the FTC's argument about the Hospital Authority's allegedly superficial role in approving the acquisition in the same way as the district court, this time even relegating its treatment to a footnote.[46]

The Supreme Court Speaks

Foreshadowing its reversal of the Eleventh Circuit's decision, the Supreme Court posed the primary issue in different language: instead of whether a restraint on competition was a "foreseeable result" of the Hospital Authority's actions, the Court considered whether "the Georgia Legislature . . . clearly articulated and affirmatively expressed a state policy to displace competition in the market for hospital services."[47] Where the court of appeals saw "powers of impressive breadth," the Supreme Court saw "general powers routinely conferred by state law upon private corporations."[48] This "state-law authority to act is insufficient" to invoke a state action defense, according to the Supreme Court; the Hospital Authority must in addition "show that it has been delegated authority to act or regulate anticompetitively."[49] The Eleventh Circuit, according to the Court, had "applied the concept of 'foreseeability' from our clear-articulation test too loosely."[50]

In criticizing the Eleventh Circuit for applying the clear-articulation test "too loosely," the Supreme Court appeared to mean three things: first, that the intermediate court had applied an incorrect standard; second, that it had inferred too much from evidence

[44] *Id*. at 1377.
[45] *Id*.
[46] *Id*. at 1376 n.12.
[47] 133 S. Ct. at 1009.
[48] *Id.* at 1011.
[49] *Id*. at 1012.
[50] *Id*. at 1012.

about the market in which Phoebe Putney operates; and third, that it had inferred too much from evidence about Phoebe Putney's role as a public hospital in that market.

The Supreme Court began by stating that the connection between the state action and any ensuing anticompetitive actions cannot just be possible, or maybe even likely. That evidence would suggest "'mere *neutrality* respecting the municipal actions challenged as anticompetitive.'"[51] Instead, the evidence must suggest that the state affirmatively "'contemplated' [the] anticompetitive actions."[52] Evidence that the anticompetitive actions were "logical" or "inherent" consequences of the delegation appears to be enough to suggest this affirmative official contemplation. Evidence that a state gave a subunit "'simple permission to play in a market'" does not.[53]

Despite using the term itself, the Court seems to question in *Phoebe Putney* whether "foreseeability" remains a helpful concept for the clear-articulation test. In *Town of Hallie* the Supreme Court perhaps sowed the seeds of confusion when it first asked whether the anticompetitive conduct (an attempt to monopolize sewage collection and transportation markets) was "a *foreseeable* result" of the state-granted authority to treat sewage, but then asked whether "anticompetitive effects *logically would result* from this broad authority to regulate."[54] Whether a grant of state authority foreseeably leads to anticompetitive behavior can depend on how a state agency exercises that authority: it might choose to behave anticompetitively, or it might not. Both could be foreseeable. That same grant of authority, however, may not logically result in anticompetitive behavior, if nothing in the grant compels, or at least encourages, that result. The Court's earlier opinion in *Town of Hallie* thus implied two different, possibly conflicting, standards for clear articulation. One can read *Phoebe Putney* as trying to fix that problem by requiring a logical, inherent, or actively contemplated anti-competitive result rather than merely a foreseeable one.

[51] *Id*. at 1012 (emphasis in original).
[52] *Id*. at 1012.
[53] *Id*. at 1013 (quoting *Kay Elec. Cooperative v. Newkirk*, 647 F.2d 1039 (10th Cir. 2011)).
[54] 471 U.S. at 42 (emphasis supplied).

Second, the Court expressed mixed sentiments about the lower courts' ability to infer a state's anticipation of anticompetitive behavior from "facts about a market." On the one hand, it accepted only "arguendo" the "premise" on which the Eleventh Circuit had relied: "that facts about a market could make the anticompetitive use of general corporate powers 'foreseeable.'"[55] Elsewhere, however, the Supreme Court focused not just on market conditions at the time of the allegedly anticompetitive behavior (whenever that occurred), but on market conditions at a single particular time: 1941, when the Georgia statute first authorized hospital authorities.[56] At that point, the Court observed, the new law "was, after all, the source of power for newly formed hospital authorities to acquire a hospital in the first place"—a transaction unlikely to reduce competition.[57] Additionally, the Georgia statutory regime that "imposes limits on entry" by requiring a state-issued certificate of need says little, according to the Court, about whether a public hospital may with impunity reduce competition by consolidating "existing hospitals that are engaged in active competition."[58]

Third, the Court rejected an inference of non-competition from Phoebe Putney's "unique powers and responsibilities to fulfill the State's objective of providing all residents with access to adequate and affordable health and hospital care."[59] Accepting that "Georgia's hospital authorities differ materially from private corporations that offer hospital services," the Court ruled that a public mandate to provide affordable health care "does not logically suggest that the State intended that hospital authorities pursue that end through mergers that create monopolies."[60] Phoebe Putney may be charged with operating on a nonprofit basis, the Court observed, but "more modest aims" than displacing competition could explain that requirement: for example, the possible

[55] 133 S. Ct. at 1014.
[56] *FTC v. Phoebe Putney Health System*, 663 F.3d at 1372.
[57] 133 S. Ct. at 1014.
[58] *Id*. at 1016.
[59] *Id*. at 1014.
[60] *Id*. at 1015.

incompatibility of "profit generation" and "providing care for the indigent sick."[61] Even if this were a closer case, the Court concluded, "'state action immunity is disfavored,'" and erring on the side of finding an immunity would "attach significant unintended consequences to States' frequent delegations of corporate authority to local bodies."[62]

Taken as a whole, *Phoebe Putney* portends at least three possible changes in how lower courts will analyze assertions of the state action defense to the antitrust laws. First, state agencies seeking this defense must allege not just that the state's delegation of authority could lead to anticompetitive behavior (i.e., that such a result was foreseeable), but that the delegation logically makes that result more likely than any other. Second, courts will have less interest in inferring a state's intent to limit competition from how the particular market allegedly works—a close textual reading of the statutes involved may be more important. Third, a public-interest mandate, such as Phoebe Putney's charge to provide affordable health care in Albany and Dougherty County, implies no incompatibility with competition. The next section addresses some of the questions left unanswered by *Phoebe Putney*.

So How Does State Action Now Apply?

In combination with earlier cases, *Phoebe Putney* solidifies a three-step analysis for applying the state action doctrine.

Step 1. The first question is "who?": who is the party engaging in the anticompetitive conduct? The answer can make an enormous difference. If the party whose conduct at issue is the state itself—e.g., the legislature, supreme court, governor, and possibly a state agency wholly within the governor's control—the analysis ends because the conduct is *ipso facto* immune.[63] On the other hand, when the anticompetitive conduct is

[61] *Id*. at 1015-16.
[62] *Id*. at 1016 (citing *Ticor Title Ins. v. FTC*, 504 U.S. 621, 636 (1992)).
[63] *Supra* notes 5 and 6.

undertaken by a quasi-governmental or private entity, as was the case in *Phoebe Putney*, any antitrust immunity may depend on the answers to other questions.

Step 2. The second question is "why?": why was the conduct by the state agency or private party undertaken? The state action doctrine requires that the conduct be pursued under a clearly articulated state policy to displace competition. Some state health care statutes appear to meet this test. Alabama's Health Care Authorities Act, for example, provides that the Hospital Authorities will "exercise all powers granted hereunder . . . *notwithstanding that as a consequence of such exercise of such powers it engages in activities that may be deemed 'anticompetitive'* within the contemplation of the antitrust laws of the state or of the United States."[64] Similarly, a New York law authorizing the development of accountable care organizations provides that "To the extent that it is necessary to accomplish the purposes of this article, competition may be supplanted and the state may provide state action immunity under state and federal antitrust laws to payors and health care providers."[65]

Other statutes, like Georgia's, are not so explicit. After *Phoebe Putney*, we now understand that delegation by the state legislature of "home rule" authority or "general corporate powers" does not imply a policy to displace competition. That policy must flow instead as "the inherent, logical or ordinary result of the exercise of authority delegated by the state legislature."[66]

How the lower courts will apply that test remains to be seen. Evidence that the displacement of competition inevitably results from the grant of state authority would seem to suggest strongly a state policy to displace competition, so a statute that permitted the public hospital to acquire, say, "any and all other facilities" in the surrounding area could well pass muster. But what if the statute permits the Authority to

[64] Ala. Code § 22-21-318 (emphasis supplied).
[65] N.Y. Pub. Health Law § 29-E.
[66] *Phoebe Putney*, 133 S. Ct. at 1012.

acquire a "competing facility" at its "sole discretion"? In *Phoebe Putney* the Court said that a state policy to displace competition must follow as "the inherent, logical or ordinary result" of the authority delegated. Particularly in its use of "ordinary" the Court appeared to signal that state action might protect a delegation of authority that only likely—but maybe not necessarily—would result in decreased competition. How likely is likely enough remains an open question.

Step 3. The third question revisits the "who" question. Recall that the first "who" question asked whether the behavior at issue was that of the state or some other state-related entity, usually a subunit of the state or a private party acting under color of state authority. Courts usually don't need to decide at the outset which of these state-related persons acted because the clear-articulation test applies to all of them. For this reason the Supreme Court in *Phoebe Putney* did not reach this issue at all, since it decided that the absence of any clear articulation mooted this question.

Although *Phoebe Putney* didn't reach it, this issue is a crucial one. When a purely public entity—for example, a state agency controlled entirely by the governor or legislature—acts under a state policy to displace competition, it does so, compared to quasi-public entities, with "less of an incentive to pursue [its] own self-interest under the guise of implementing state policies."[67] For this reason truly public entities need not also demonstrate their active supervision by the state, but private entities acting under color of state authority do. *Phoebe Putney* left unaddressed two questions related to this critical issue: (1) are Hospital Authorities purely or only partially public entities?; and (2) if the former, can private parties (e.g., the company operating the facilities) co-opt the Authority so much that the active-supervision requirement remains?

A recent case provides a roadmap for how courts are likely to analyze the first issue: whether hospital authorities are quasi-public entities whose actions the state must

[67] *Id.* at 1011.

actively supervise. In *North Carolina State Board of Dental Examiners v. FTC*,[68] the FTC had found that the North Carolina Dental Board (Dental Board), the state agency that licensed and governed dentistry within the state, engaged in anticompetitive conduct by preventing non-dentists from providing teeth whitening services. The Dental Board asserted that it was a state agency implementing a legislative policy to restrict competition for dental services, that as a state agency it was not required to demonstrate active state supervision over its actions, and that its conduct was therefore immune from antitrust challenge. The FTC disagreed, as did the Fourth Circuit, citing evidence that the Dental Board largely comprised peer-elected practicing dentists who competed with the non-dentists whose teeth-whitening services they sought to prohibit. On these bases the Fourth Circuit deemed the Dental Board a private party operating under state authority, and required it to demonstrate active state supervision.[69] *NC Board of Dental Examiners* is the latest in a series of cases involving professional licensing boards that have reached this result.[70]

NC Board of Dental Examiners and its predecessors suggest that, had the Supreme Court in *Phoebe Putney* reached this question, it would have deemed the Hospital Authority a purely public entity. Georgia's hospital authorities are created by statute, implement the important public function of rendering health care available to indigent citizens, exercise eminent domain, and may receive tax revenue. Their members are appointed by public officials, not elected by those the Authorities regulate. Perhaps for these reasons the FTC did not challenge the Hospital Authority's status as a public entity.[71]

[68] 717 F.3d 359 (4th Cir. 2013).
[69] *Id.* at 375.
[70] *Washington State Elect. Contractors Ass'n v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991) (apprenticeship council); *FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Board of Registration in Pharmacy). *But see Earles v. State Bd. Of Certified Pub. Accountants*, 139 F.3d 1033, 1040-41 (5th Cir. 1998) (state board of accountants); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460-61 (9th Cir. 1989) (state bar association).
[71] *Phoebe Putney Health System, Inc. et al.*, 793 F. Supp. 2d 1356, 1371 (M.D. Ga. 2011).

The FTC did raise the second question: did PPMH, the private entity leasing the hospital, so co-opt the Hospital Authority's role in acquiring Palmyra Park that PPMH needed to demonstrate the Hospital Authority's active supervision in order to use the state action defense? The FTC argued that PPMH controlled the hospital's "revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance."[72] According to the FTC, PPMH's extensive control, and the Hospital Authority's minimal involvement in both the hospital's operations and the acquisition itself, meant that the acquisition involved a private entity, PPMH, acting on the Authority's behalf. PPMH's private-party status therefore required it to demonstrate that the Hospital Authority had actively supervised the acquisition. Because no evidence supported that active supervision, the FTC argued, the state action doctrine did not protect the transaction.

Although the district and circuit courts rejected this argument,[73] unfortunately the Supreme Court provided no guidance on this issue. The Supreme Court reversed the lower courts' decisions on the earlier clear-articulation test, and for that reason declined to address the FTC's active-supervision argument.[74]

Conclusion

As with so many Supreme Court cases, *Phoebe Putney* answers some questions and raises others. Here is what we may know because of the decision:

- Hospital Authorities that enjoy wide-ranging and general corporate powers under their states' legislative regimes probably cannot successfully assert a state action defense without more specific language.

[72] Petitioner's Appellate Brief at 45.
[73] The district court did so for two reasons. First, binding authority "forbid[s] the Court's inquiry" into why the Hospital Authority approved the acquisition as it did. Second, "the state . . . has put the ultimate say-so for the provision ad management of healthcare in the hands of the healthcare authorities." The *Noerr-Pennington* doctrine protects any effort by private actors to influence that "ultimate say-so." 793 F. Supp. 2d at 1378-79. The circuit court adopted the district court's reasoning on the first point. 663 F.3d at 1376 n.12.
[74] 133 S. Ct. at 1009.

- The strongest arguments for a state action defense will identify statutory language that logically or ordinarily would lead to the kind of restraint on competition that forms the basis for any claim against the Hospital Authority.
- The more the state agency has outsourced performance of its statutorily delegated duties, the greater risk it runs that a court will require the agency to have actively supervised any behavior accused of being anticompetitive.
- Although the Local Governments Antitrust Act (LGAA)[75] prohibits the award of monetary damages against state agencies in antitrust lawsuits, injunctive relief that affects the operation of publicly owned facilities provides reason enough to be concerned about potential antitrust liability. So does the prospect of distraction from having to litigate those claims in the first place. And finally, the LGAA's protections do not extend to private companies operating public facilities. Those private companies' liability for monetary damages could imperil the public mission that they are charged to carry out.

Overall, *Phoebe Putney* serves as a reminder that defenses and immunities to the antitrust laws are narrow. Public agencies cannot rely on a broadly defined public mission to avoid them. Nor can they outsource all or part of that mission with absolute impunity. As with so many other risks, active supervision can forestall a host of problems.

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[75] 15 U.S.C. § 34 *et seq*.

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