**FTC v. Phoebe Putney: State Action Clear Articulation Clarified**

I. Introduction

On February 19, 2013, the Supreme Court held that general corporation powers given to state hospital authorities are not specific enough to invoke the state action immunity defense in a hospital merger in a unanimous decision written by Justice Sotomayor.¹ This article discusses the facts of the merger that raised the dispute; the relevant standard of review of state action immunity; the decision of the Supreme Court; and the real world implications of the case.

II. A Complex Acquisition

In 1941 the State of Georgia felt the need to create a hospital authority program to promote affordable health access for their citizens. They enacted legislation that allows municipalities to create a hospital authority in their jurisdiction if they feel it would improve healthcare accessibility.² The hospital authority (the Authority) created in Dougherty County felt the need to create a separate non-profit corporation to run their largest hospital’s, Phoebe Putney Memorial Hospital (Phoebe), day to day operations. Phoebe Putney Health System, Inc. (PPHS) and its subsidiary Phoebe Putney Memorial Hospital (PPMH) were the resulting non-profit corporations. This action was allowed by the general operational powers given to the hospital authorities by the statute.³

In December of 2010, PPHS entered into negotiations with Palmyra Park Hospital (Palmyra) regarding a possible acquisition. Phoebe controlled 75% of the healthcare provider market in Dougherty County. Palmyra was their largest competitor and holds 11% of the market. The two hospitals eventually agreed to merge. The deal called for an $195 million purchase fee, a $35 million payout in the event of a rescission or break-up, and a $19 million

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² See FTC v. Phoebe Putney Health System, Inc., 663 F.3d 1369, 1372 (U.S. App. 11th 2011)
³ Id at 1373.
payout if the Authority did not approve it. The two hospitals negotiated the deal, but the structure of the deal called for the Authority to be the purchaser of the hospital.\(^4\) PPHS would only be acting as a guarantor of the purchase price despite their heavy involvement in the deal making process. After the Authority purchased Palmyra, they would then lease the hospital to PPHS at $1 a month for 40 years. This deal was approved by the Authority.\(^5\)

The FTC challenged the acquisition as a violation of §7 of the Clayton Act and §5 the Federal Trade Commission Act.\(^6\) The defendants contended that because the Authority is the purchaser, the deal was protected by state action immunity.\(^7\)

### III. State Action Immunity

State Action immunity was developed by the Supreme Court in *Parker v. Brown*. The Court held that nothing in the Sherman Act suggests that it was created to regulate state action.\(^8\) This was decided in relation to a state program that authorized raisin producers in California to create a committee and control the state’s raisin production and distribution, lessening competition while maintaining California’s agricultural wealth.\(^9\) Supreme Court decisions after *Parker* led to a two part test showing whether the state action doctrine is appropriate in any given situation: (1) the alleged anti-competitive activity must be clearly articulated by the state’s policy, and (2) the policy must be actively supervised by the state itself.\(^10\)

\(^4\) *FTC v. Phoebe Putney Health System, Inc.*, 793 F.Supp.2d 1356, 1360 (M.D.Ga.)
\(^5\) *Phoebe Putney Health System, Inc.*, 663 F.3d at 1373.
\(^6\) *Id.* at 1362.
\(^7\) *Id.* at 1361.
\(^8\) *Parker*, 317 U.S. 341, 351 (1943).
\(^9\) *Id.* at 436.
\(^10\) See *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104-5 (1980); Citing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding fee schedules by the state bar association were not immune from antitrust regulation because the fee schedules were only prompted by state policy and not compelled by it); Citing Cantor v. Detroit Edison Co., 928 U.S. 579 (1976) (holding antitrust immunity is not present where a state agency passively accepts a public utility’s tariff); Citing Bates v. State Bar of Arizona, 433 U.S. 350, 362 (1997) (upholding a advertising practices of a lawyer because Arizona had a clear articulation regarding the behavior and the lawyer was subject to re-examination by the state in enforcement proceedings)
In *Parker*, it was held that disputed actions taken by substate government entities did not require active state supervision to apply state action immunity. 11 The Authority may only invoke state action immunity if their actions were pursuant to a clearly articulated state policy that allows for competition to be displaced by the policy.12 In order to satisfy the clear articulation test, the relevant State must “reasonably foresee” the anticompetitive results of the policy, meaning the actions taken must logically result from the authority granted.13 The private defendants claim that they were acting as agents of the Authority and therefore claim the same substate government entity status as the Authority.14

IV. 11th Circuit Appellate Decision Granting State Action Immunity for the Defendants

The United States Court of Appeal for the Eleventh Circuit affirmed the district court’s decision to grant the defendants state action immunity from antitrust liability. The Court held that state action immunity is applicable to political subdivisions if the “state has clearly articulated a state policy authorizing anticompetitive conduct.” This standard is met if the anticompetitive conduct is “a ‘foreseeable result’ of the legislation”.15 The Court held the powers created by the statute to acquire and lease healthcare facilities imply the State’s consideration of potential anti-competitive effects. The acquisition was deemed to be authorized by a “clearly articulated” state policy to displace competition and is therefore protected by state action immunity.16

13 Id. at 42.
15 *Phoebe Putney Health System, Inc.*, 663 F.3d at 1375.
16 Id. at 1377-8.
V. Supreme Court Reverses the Appellate Court’s Decision

The court overturned the decision of the Eleventh Circuit and held the powers given to the Authority do not satisfy the “clear articulation” standard and therefore state action immunity cannot be applied.\textsuperscript{17} The Court also granted certiorari to answer the question: whether the limited scope of the Authority’s involvement in the negotiation impacts the application of state action immunity, but because the first question was answered in the negative the Court reversed the appellate court’s decision without addressing this question.\textsuperscript{18}

The power granted to the Authority to acquire, lease and operate healthcare facilities are at the center of the analysis.\textsuperscript{19} The Court held that the grant of these general powers does not suggest that the legislature contemplated anti-competitive results as a product of hospital consolidation.\textsuperscript{20} The fact that the state-law made an action possible is not dispositive of the resulting effects being clearly articulated or that the action was even “reasonably foreseeable”.\textsuperscript{21}

This principal was set out in \textit{Community Communications Co. v. Boulder}. Colorado granted powers to municipalities allowing them to govern local affairs, in turn the City of Boulder passed a moratorium on the expansion of a cable provider. It was held that even though the city was granted the power to create the ordinance, that general grant of power was not tailored to the extent of allowing the implementation of anticompetitive ordinances.

In this case, the Authority was granted general corporate powers, however that does not authorize it to utilize their general corporate powers in an anti-competitive manner; as learned in \textit{Boulder}. Broad powers such as these, offer no proof of consideration by the law makers of

\textsuperscript{17} See FTC v. Phoebe Putney Health System, Inc, No. 11-1160, 2013 WL 598434, slip op. at 1 (U.S. Feb. 19, 2013)
\textsuperscript{18} Id. at 6.
\textsuperscript{19} Id. at 2.
\textsuperscript{20} Id. at 9
\textsuperscript{21} See Id.
anticompetitive actions. The anticompetitive action does not need to be explicitly allowed, but it should be a result of an “inherent, logical or ordinary result” of the powers granted.\(^22\)

Here, there was merely permission for the Authority to enter the healthcare market place. It is possible for an organization with general corporate powers to lessen competition, but it is not a necessary result of interacting in the healthcare market.\(^23\) The Court remarked that antitrust concerns would only be relevant in relation to hospital acquisitions in areas large enough to support more than one hospital, but small enough that a hospital merger would affect competition significantly. This perfect storm of circumstance was present in Dougherty County. Considering the breadth and scope of the law and the narrow circumstances required to breed anticompetitive effects, there is not enough of a threat to infer that the State took the anticompetitive nature of certain hospital mergers into account when creating the law.\(^24\)

Justice Sotomayor relied on the engrained American values of free enterprise and economic competition to limit the use of state action immunity to situations where it is clear that the act in question was authorized by the State.\(^25\) The defendants argued that the general corporate powers given to the Authority granted discretion in making business decisions that resulted in affordable and adequate healthcare.\(^26\) This assumption was based on the limits constraining the Authority, such as its non-profit status; a mandate that lessees do not receive more than a reasonable rate of return; and a requirement of a certificate of need before a medical facility can expand.\(^27\) They argued that the presence and preciseness of these limits imply that the Authority can do whatever it deems necessary as long as it falls within those limits.\(^28\) The

\(^{22}\) Id. at 10-11.
\(^{23}\) See Id. at 13.
\(^{24}\) Id. at 14.
\(^{25}\) Id. at 7.
\(^{26}\) See Id. at 15-16.
\(^{27}\) Id. at 16.
\(^{28}\) See Id.
Court did not view these limits as a license for the Authority to use their general corporate powers in an anticompetitive manner. This grant of power was not explicitly stated or absolutely necessary to carry out their duties, and conflicted with the national policy favoring competition.29

The Court concluded that Georgia did not clearly articulate a policy allowing hospital authorities to lessen competition thorough acquiring medical facilities. The case was remanded to the lower courts to be decided on the substance of the alleged antitrust violations.30

VI. The Unanswered Question: What effect does the Authorities limited role in the negotiations have on implementing state action immunity?

The Authority is not able to use state action immunity as a defense because there was no clearly articulated state policy displacing competition; and therefore the question of how their minimal participation in negotiating the terms of the acquisition in question affects their ability to use the defense, is inapplicable.31 Both parties were prepared to argue this issue if the state action immunity analysis was answered in favor of the respondents.

According to the FTC, the Authority’s lack of participation in the negotiation would have made the analysis equivalent to applying the state action immunity to private parties, therefore requiring active supervision by the court.32 The FTC states that PPHS and Palmyra were acting without the proper supervision of the Authority.33 They also state PPHS and PPMH are independent entities that have profit motivations apart from those of the Authority.34

29 Id.
30 Id. at 19.
31 Id. at 6.
33 Id. at 76-7.
34 See Id. at 78-80
The FTC goes on to argue the lack of involvement by the Authority during the negotiation process did not represent any type of supervision, even though the Authority is the actual purchaser.\textsuperscript{35} They assert the Authority would have no control over the hospital after the lease is executed to PPHS. The petitioners admit that the Authority has remedies under the state law to deal with noncompliance on the part of PPHS, but the potential of certain remedies is not up to the standard of active supervision.\textsuperscript{36}

On the other hand, the respondents claim that the only actions in question here are the purchase and subsequent lease by the Authority, which is considered a public entity. Even if the actions of PPHS were considered relevant, they are said to be an agent of the Authority and should be considered public. Notwithstanding, in the event that “active supervision” was required, the entities proceeded in a manner that would meet that requirement.\textsuperscript{37} No matter the imposed standard, they argue the limited involvement of the Authority during the negotiation would not be an issue.

The first two arguments by the respondents rely on FTC claims that the Authority does not need to be actively supervised by the state of Georgia for purposes of state action immunity.\textsuperscript{38} The respondents claim the transactions, the purchase of Palmyra and the lease to PPHS, fall within the duties of the Authority.\textsuperscript{39} Questioning the decisions of a state entity, like the Authority, and infringing on state sovereignty is the type of action that the state action doctrine created in \textit{Parker} was designed to discourage. On the same note, because the PPHS and PPMH were created by the Authority, as authorized under Georgia law, and the Authority owns

\textsuperscript{35} Id. at 83.
\textsuperscript{36} Id. at 85.
\textsuperscript{37} Brief for Respondents at 78, FTC v. Phoebe Putney Health System, Inc., No. 11-1160 (U.S. Feb. 19 2013), 2013 WL 598434
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 79.
revisionary rights to Phoebe, the two non-profits are agents of the Authority. The respondents argue that PPHS acts according to the Authority’s public mission and perform the duties of the Authority as prescribed by the same statute that authorized their creation.40 This interpretation leads to the conclusion that the influential involvement of PPHS in the negotiation should not result in a requirement of active supervision of the entities.

However, if the court deemed active supervision necessary, the respondents claim the standard would be satisfied. The respondents claim that PPHS was directed to negotiate with Palmyra on behalf of the Authority. After the terms were agreed upon, the Authority convened and approved the resolution unanimously. The deal was preliminarily challenged by the FTC, and the Authority reviewed the transaction again. Similarly, they decided it was in line with their proscribed duties of providing “quality healthcare at a reasonable cost”. Based on these facts, the respondents feel that “active supervision” was present.41

A decision on this question would have given the state action immunity clause more clarity as how to analyze the liability of organizations with overlapping roles in the public and private sectors. For now, courts must rely on the facts of the individual cases before them to decide the classification of the specific entities in question.

VII. Application of the Ruling

The real world implications of the Phoebe Putney decision will be felt nationwide. Justice Elena Kagan remarked that the powers given to the Authority by Georgia is a very common practice among states, because organizations such as the Authority need broad powers

40 See Id. at 81-4.
41 Id. at 85-87.
in order to navigate and accomplish their goals in the real world.\textsuperscript{42} This was noted in the opinion as well, when Justice Sotomayor cited the amici brief submitted by 20 states.\textsuperscript{43} In light of this decision, government organizations with general corporate powers need to start thinking like actual corporations when considering actions that can be deemed anti-competitive.

This decision serves as guidance to state lawmakers as well. If they feel that they need to create a program that requires or may require anti-competitive efforts to reach a statewide goal, those considerations need to be clearly stated in the legislation.


\textsuperscript{43} Supra, note 77.