

Phoebe Putney - The Supreme Court Grants Certiorari to Determine the Boundaries of State Action Antitrust Immunity

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On June 25, 2012, the U.S. Supreme Court granted the Federal Trade Commission's request to hear arguments in *FTC v. Phoebe Putney Health System, Inc.*, a highly anticipated hospital merger case which likely will clarify the circumstances in which state regulation can create immunity from federal antitrust law. The FTC's request for *certiorari* was joined by the Antitrust Division of the Department of Justice. The dispute turns on the reach of the Supreme Court's "state action" antitrust immunity doctrine, which insulates certain state-sponsored commercial conduct from federal antitrust liability. State action immunity applies when a policy displacing competition with regulation or monopoly is "clearly articulated" and "actively supervised" by the state.^[1] The doctrine applies to private actors if they are actively supervised by the state and comply with a clearly articulated state policy to displace competition. In *Phoebe Putney*, courts in both the U.S. District Court for the Middle District of Georgia and the U.S. Eleventh Circuit Court of Appeals held that the merger of two private hospitals, Phoebe Putney Memorial Hospital and Palmyra Park Hospital, was immune from antitrust scrutiny even though all parties agreed that the merger created a monopoly.^[2] Jon Leibowitz, the FTC's Chairman, has called the Eleventh Circuit's opinion "disturbingly, jarringly wrong."^[3] The FTC's challenge to the merger and its request for Supreme Court review reflects its renewed commitment to promote competition in health care markets.

In 1941, the Georgia State Legislature enacted the Hospital Authorities Law, a statute which created a hospital authority for each major city and county in Georgia. The legislature invested hospital authorities with general corporate powers to purchase or lease health care facilities and operate hospital networks. The Hospital Authority of Albany-Dougherty County subsequently acquired Phoebe Putney Memorial Hospital, which it leased to its subsidiary Phoebe Putney Health System (the System), a private corporation. The Hospital Authority does not supervise the operations of Memorial hospital. Phoebe Putney Memorial's only significant competitor was Palmyra Park Hospital. In 2010, the Hospital Authority, using funds provided by Phoebe Putney Health System, acted as a nominal purchaser of Palmyra Park Hospital, which it then leased back to the System for a term of 40 years. The Hospital Authority did not actively participate in negotiating the transaction, although it did approve the deal at a board meeting.

The FTC sought to enjoin the merger in the District Court for the Middle District of Georgia. However, the District Court dismissed the FTC's action invoking the state action doctrine. Both the District Court and the Eleventh Circuit held that, by granting hospital authorities the power to acquire health care facilities, the Georgia legislature had articulated a clear intent to displace competition in hospital services because it was reasonably foreseeable that such hospital acquisitions could result in a monopoly or other anticompetitive effects.[\[4\]](#)

The FTC's petition for *certiorari* argues that *Phoebe Putney* is "out of line" with Supreme Court precedent, as well as decisions from the Fifth, Sixth, Ninth, and Tenth Circuit Courts of Appeals. These courts have held that the mere grant of general corporate powers does not constitute active supervision for the purposes of the state action doctrine.

Underscoring the importance of this case, Chairman Leibowitz said "if this decision is permitted to stand, it will undermine the very basis of the state action doctrine [and] drive up health care costs in Albany, Georgia, and create a roadmap for doing so elsewhere."[\[5\]](#) Given that most states have laws similar to Georgia's Hospital Authorities Law, the Court's interpretation of clear articulation and active supervision has the potential to substantially alter the circumstances in which hospital mergers can gain immunity from antitrust scrutiny.

The case will be heard next term and will decide the following two questions: (1) Whether the Georgia legislature "clearly articulated" a state policy to displace competition in the market for hospital services, and (2) if the policy is clearly articulated, whether the Hospital Authority "actively supervised" the merger, given that it did not participate in negotiating the merger and has no means of overseeing the hospital's operations. Due to *Phoebe Putney's* significance, Proskauer will provide updates at key milestones as the case proceeds through the Supreme Court.

[\[1\]](#) *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

[\[2\]](#) See generally *FTC v. Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d 1356 (M.D. Ga. 2011), *aff'd*, 663 F.3d 1369 (11th Cir. 2011), *cert. granted*, 2012 U.S. LEXIS 4852 (Jun. 25, 2012).

[\[3\]](#) Jon Leibowitz, Chairman, Fed. Trade Comm'n, Remarks at Antitrust Health care Conference of American Bar Association/American Health Lawyers Association: "Are Health Care Costs Sinking Us? What the FTC Is Doing to Keep Patients Afloat" (May 3, 2012).

[\[4\]](#) *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1377 (11th Cir. 2011); *FTC v. Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d 1356, 1377 (M.D. Ga. 2011).

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Related Professionals

- **John R. Ingrassia**

Partner

- **Colin Kass**

Partner