US high court scales back major antitrust exemption

The U.S. Supreme Court has observed that the federal antitrust laws are the "Magna Carta of free enterprise," embodying "fundamental national values of free enterprise and economic competition." It is through market-by-market competition that we prosper.

The antitrust laws support this competition by creating opportunities for both government prosecutors and injured private parties to challenge "anticompetitive" conduct, like price-fixing and abuses of monopoly power, for example. Indeed, the resources and energy devoted to analyzing the competitive value or harm of particular business activity is often staggering.

But certain conduct with great potential for competitive harm has largely escaped federal antitrust scrutiny - state and local government restraints. But that may now change following the Supreme Court's Feb. 19 decision in Federal Trade Commission v. Phoebe Putney Health System, Inc., case on behalf of the National Federation of Independent Business, arguing that state-action immunity from the federal antitrust laws should not apply to state commercial conduct.

In Phoebe Putney, the Supreme Court held that a state's grant of general corporate powers to government entities does not protect them from the antitrust laws. More specifically, to invoke the exemption, the entity must show that the state itself affirmatively contemplated that the entity's conduct would displace competition.

In the case itself, the court unanimously overturned the 11th U.S. Circuit Court of Appeals' ruling, which had rejected on-state-action immunity grounds the Federal Trade Commission's challenge of a Georgia hospital authority's acquisition of its only hospital competitor.

The state-action immunity doctrine

The Supreme Court established in a 1943 decision, Parker v. Brown, 317 U.S. 341, that the federal antitrust laws do not apply to certain state conduct. The court reached its Parker decision through legislative interpretation - that the Sherman Act gave no
hint that it was intended to restrain state action. But the doctrine has since evolved in such a way that the federalism and state sovereignty rationales have displaced the court's initial reliance on statutory interpretation. That is, courts applying the state-action immunity doctrine will not apply the federal antitrust laws to "sovereign" state conduct.

The court decided Phoebe Putney in the context of a complicated test that varies based upon the entity seeking to invoke it. Actions by the state itself, through its legislature, for example, are almost always free from antitrust scrutiny. All other state and local conduct, however, must satisfy some variation of the two-prong test developed in 1980 by the Supreme Court in California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97: First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," and second, the policy must be "actively supervised" by the state itself. The test is designed to determine whether the challenged practice ultimately flows from the state as a sovereign rather than from the local entity or state subdivision, which are not considered "sovereign" under the doctrine. Local government entities need only satisfy the first part of the test to invoke state-action immunity.

The court in Phoebe Putney focused on Midcal's first requirement - whether the alleged restraint is clearly articulated and affirmatively expressed as state policy. Previous decisions had applied a permissive "foreseeability" standard - state action immunity applies if the anticompetitive effect was the "foreseeable result" of what the state authorized. That is, the legislature need not expressly state that it expects the city to engage in anticompetitive activity, as long as it is clear that anticompetitive effects logically would result from broad authority to regulate in a particular area. The court had, however, established a limit for this foreseeability test in Community Communications Company v. Boulder, 455 U.S. 40 (1982), where it held that a state home-rule law, allowing a municipality to govern its local affairs, was not sufficiently specific to satisfy Midcal's clear articulation test. The court in Boulder held that when a state's position is one of mere "neutrality" respecting the municipal actions challenged as anticompetitive, it cannot be said to have "contemplated" those anticompetitive actions.

The Phoebe Putney decision

Following its decision in Boulder, the court in Phoebe Putney held that a state law providing a local entity with corporate powers is not sufficient to pass the "clear articulation test." The court did not formally abandon the "foreseeability" framework for analyzing this test from previous cases, but it applied it with greater vigor. To satisfy the state-action immunity test, the "State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" (Emphasis added).

This is a departure from previous opinions on the subject that stressed that legislatures could not be expected to "catalog all of the anticipated effects" of delegating legislation. The court dealt with this discrepancy by explaining that previous decisions upholding state-action immunity without explicit state intent to displace competition involved "authorizations to act or regulate in ways that were inherently anticompetitive."

The court declined to address the open question of whether there is, indeed, a "market participant" exception to state-action immunity for government proprietary activities, but moved strongly in that direction. Notably, the court explained that when a state grants some entity - whether a private corporation or a public entity - the power to act, it does so against the "backdrop of federal antitrust law."

Phoebe Putney is an important decision that will make it easier to sue certain state and local entities under the antitrust laws. Now, there is effectively a presumption that state and local entities with general corporate powers are subject to the federal antitrust laws. The government entity can only overcome that presumption by proving that the authorizing state law expressly or inherently contemplated anticompetitive conduct.

This decision should support and encourage competition by limiting a major loophole for anticompetitive harm from certain state and local activity.

Jarod M. Bona is an antitrust and competition attorney in DLA Piper's San Diego office. He filed an amicus brief in the FTC v. Phoebe Putney Health System, Inc. case on behalf of the National Federation of Independent Business, arguing that state-action immunity from the federal antitrust laws should not apply to state commercial conduct.
Prescription drug overdoses: Who's to blame?

Over 100 people die every day in the U.S. from drug overdoses, 60 percent of which are caused by prescription drugs. A lack of will by drug addicts, or an underlying problem about how these people acquire prescriptions? By Richard T. Collins

Judicial Profile

James C. Chalfant
Superior Court Judge Los Angeles County (Mosk)

Corporate

New wind projects continuing

Two months after the extension of the PTC, new wind projects - and lawyers - are benefiting from a tax credit that could have easily been blown off the table during the fiscal cliff discussions.