US high court scales back major antitrust exemption

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.

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.*, 2013 DJDAR 2221. This decision scaled back the antitrust exemption that certain state and local entities can invoke to avoid antitrust liability - known as "state-action immunity."

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.

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The case arose out of a plan by the Hospital Authority of Albany-Douglas County in Georgia, which owned and operated the Phoebe Putney hospital, to acquire Palmyra Park Hospital, its only competitor in a six-county geographic market. Indeed, the two hospitals accounted for over 85 percent of the acute care in the six-county area. The FTC sought to enjoin the acquisition, claiming that it would substantially lessen competition in the acute-care hospital-service market in southwestern Georgia. The merging hospitals defended their merger by asserting state-action immunity. The trial court accepted that defense, and the 11th Circuit affirmed.

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

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Thursday, February 28, 2013

California Courts of Appeal
Bevy of high profile lawyers fights over $3 million in disputed attorneys' fees
The roughly $350 million estate that Herbalife founder Mark R. Hughes left his young son Alex has spawned some nasty legal fights from the moment of Hughes's death in 2000, and another battle continued Wednesday.

Litigation
Former Mercury Interactive general counsel settles one of the last SEC backdating cases
On the eve of her trial, the final defendant in a stock options backdating case against Mercury Interactive LLC executives - former general counsel Susan Skaer - reached a settlement with the Securities and Exchange Commission.

Criminal
Prosecutors must identify documents they plan to use in trade secrets theft trial, judge orders
In a victory for defense lawyers, a magistrate judge ordered federal prosecutors Wednesday to identify which documents - out of a huge trove of discovery produced - they plan to use at an upcoming criminal trial.

Corporate Counsel
Jerry Huang
Vice President of Legal Affairs for Vizio Inc. Irvine

Large Firms
Reed Smith attorney decamps to Winston
Susan C. Alker jumped from Reed Smith LLP to the Los Angeles office of Winston & Strawn LLP on Wednesday, part of the firm's effort to grow its corporate practice on the West Coast.

California Courts of Appeal
Appellate court won't reinstate Pfizer verdict
A biomedical research nonprofit has failed in its effort to have a $58 million verdict against Pfizer Inc. reinstated.

Obituaries
David S. Smith, 1917-2013
One of the oldest attorneys still practicing law in California and a founding partner of what's now Richards, Watson & Gershon PC died last week at the age of 95.

Government
Port of LA taps new general counsel
On the heels of a near-shutdown that drew national attention to the nation's busiest seaport,

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; it is enough that "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.

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the Port of Los Angeles announced a new general counsel on Wednesday.

Real Estate
Real Estate Deals
Newmeyer & Dillion LLP inked a $6.9 million, five -year lease at 895 Dove Street in Newport Beach with Glenborough Realty Trust .

Bankruptcy
9th Circuit allows creditors to pursue claims against Guess co-founder
A federal appellate court Wednesday allowed Guess Inc. co-founder Georges Marciano's creditors to pursue claims against the businessman even as he fights a $30 million jury award in a state defamation case.

Government
Proposed legislation takes aim at patent holding companies
A bill that would force holding companies to pay legal costs for patent defendants was re-introduced in Congress on Wednesday.

Judges and Judiciary
San Diego judge to retire
San Diego Superior Court Judge Lisa A. Foster will retire on Feb. 28 following 10 years on the bench.

Energy Law
Federal judge approves major wind project
A San Diego federal judge gave the green light to a major wind project Wednesday.

Corporate
Clearwire takes $80 million from Sprint, complicates Dish bid
Clearwire Corp., currently sadwiched between a bidder's war involving Sprint Nextel Corp. and Dish Network Corp., announced Wednesday its intent to pull $80 million in financing from Sprint.

U.S. Supreme Court
US high court scales back major antitrust exemption
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. By **Jarod M. Bona**

Intellectual Property
AIA's 'first to file' patent system looms on the horizon
The first inventor to file system comes into effect March 16, bringing the U.S. more closely aligned with the rest of the world. By **John Stephens**

Education
Special education in California
You know the feeling - a valued client calls with a problem in an area of the law where you do not practice. That urgency is even greater when the problem concerns a child who suffers from a serious disability. By **Kim Karelis**

Perspective
'Sustainability' claims warrant extra scrutiny by marketers
The FTC released "Green Guides" last year to provide guidance for businesses marketing their products as environmentally friendly or "green." Significantly, however, they did not address claims of "sustainability." By **Albert M. Cohen**

Health Care & Hospital Law

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.