

PUBLICATION

More Turns in the FTC's Antitrust Enforcement Action Against Phoebe Putney Hospital, Inc. [Ober|Kaler]

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The FTC's long-running campaign against Phoebe Putney Health System, Inc.'s acquisition of Palmyra Park Hospital, Inc., continues.

In an unusual sequence of events, the Commission first conditionally accepted a Consent Agreement that would have resolved the FTC's concerns with a conduct rather than a structural remedy, believing at the time that divestiture was not available, only to later withdraw its conditional acceptance due to an initial staff interpretation from the Georgia Department of Community Health that cast doubt on the prohibitive impact of Georgia's CON regulations. Most recently, however, the FTC received a contrary determination from an administrative hearing officer at the Georgia Department of Community Health, once again casting doubt on the viability of a structural remedy.

The FTC initially filed its complaint in April 2011, alleging that the proposed acquisition of Palmyra Park Hospital by Phoebe Putney would significantly reduce competition in the market for acute-care hospital services sold to commercial health plans in a six-county area surrounding Albany, Georgia, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. According to the government's analysis, the combined entity would possess a market share of roughly 85 percent, and enable the combined entity to raise prices harming patients and their employers. The FTC obtained temporary and preliminary relief before the U.S. District Court for the Middle District of Georgia enjoining the transaction pending trial.

Without addressing the merits of the transaction, the parties filed a motion to dismiss arguing that the transaction was exempt from federal antitrust review by virtue of the "state action" doctrine because Phoebe Putney was owned by the Hospital Authority of Albany-Dougherty County, and organized pursuant to Georgia's Hospital Authorities Law. The federal district court agreed with the parties, and the Eleventh Circuit Court of Appeals, despite noting that "on the facts alleged, the joint operation . . . would substantially lessen competition or tend to create, if not create, a monopoly," upheld the decision. *FTC v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369, 1395 (11th Cir. 2011). Shortly thereafter, the parties completed the transaction.

The matter made its way up to the Supreme Court, which unanimously reversed the decision of the Eleventh Circuit, ruling that the merger was not exempt from antitrust scrutiny, and remanded the matter back to the district court for further proceedings. *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1033, 1011 (2013). Subsequently, Phoebe Putney and the FTC entered into a Consent Agreement resolving the litigation.

Although the FTC's preferred remedy in these situations is structural relief (e.g., divestiture), in this case the FTC was convinced that Georgia's CON statute would make divestiture impossible. As explained in the FTC's *Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment*:

The circumstances in this matter are highly unusual and the Commission's discontinuation of litigation and settlement of this case on the proposed terms are acceptable to the Commission only under the unique circumstances presented here. In particular, as described further below, the Commission believes that, assuming a finding of liability following a full merits trial and appeals, the legal and practical challenges

presented by Georgia's certificate of need ("CON") laws and regulations would very likely prevent a divestiture of hospital assets from being effectuated to restore competition. The Commission has declined to seek price cap or other non-structural relief, as such remedies are typically insufficient to replicate pre-merger competition, often involve monitoring costs, are unlikely to address significant harms from lost quality competition, and may even dampen incentives to maintain and improve healthcare quality.

As a result, the FTC agreed to a conduct remedy that, among other things: 1) prohibited Phoebe Putney from acquiring any additional general acute care hospitals or physician group practices in the six-county area surrounding Albany, Georgia without prior approval; and 2) prohibited Phoebe Putney from objecting to any CON application.

The Commission conditionally accepted the Agreement, and published the Consent Agreement for public comment. However, based on public comments, and an initial determination from the staff of Georgia's Department of Community Health, the FTC determined that Georgia's CON laws would not prohibit divestiture, and subsequently voted to withdraw its acceptance of the Consent Agreement and remanded the matter back for adjudication before an Administrative Law Judge under Part 3 of the Commission Rules of Practice, 16 C.F.R. § 3.1 *et seq.*

But the saga continues, and we may not have seen the last of the Consent Agreement containing the conduct remedy. To the dismay of the FTC, an administrative hearing officer at Georgia's Department of Community Health has now reversed the staff's initial determination and concluded that a CON would in fact be required for a third party to purchase one of the divested hospitals. The FTC has yet to comment on this turn of events, but it seems reasonable to assume, absent some additional, as-of-yet-unknown factors, that the initial Consent Agreement will once again be offered as a solution to the current litigation.