



## Alerts

### Antitrust Update: Federal Trade Commission Continues to Challenge Hospital Mergers

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*Health Law Alert*

As mergers amongst health care providers gain popularity, scrutiny of them — and, in some cases, injunctions against the mergers — by the federal government has risen as well. This is highlighted by a recent case in Georgia. In Dougherty County, Georgia there are only two hospitals — Phoebe Putney Memorial Hospital (Memorial) and Palmyra Park Hospital (Palmyra) — both located in the city of Albany. The Hospital Authority of Albany-Dougherty County (Authority), a government agency, owns Memorial and formed two private not-for-profit corporations to manage it — Phoebe Putney Health System, Inc. (PPHS) and Phoebe Putney Memorial Hospital, Inc. (PPMH). The Authority decided to purchase Palmyra and planned to lease it to PPHS. Before the transaction was completed, in April 2011 the Federal Trade Commission (FTC) filed an administrative complaint against PPHS, PPMH and the Authority and sought a temporary restraining order (TRO) and preliminary injunction to prevent the consummation of the transaction.

In defending against the FTC's initial request for a TRO and preliminary injunction, PPHS, PPMH and the Authority invoked the state action doctrine defense, which exempts conduct from federal antitrust laws if the conduct essentially is compelled by state law. The trial and appellate courts upheld the defense and the transaction was consummated in December 2011. On appeal, the U.S. Supreme Court rejected the state action defense based on the facts, reversed the prior rulings and ordered the matter back to the trial court.

The FTC renewed its quest for a TRO and preliminary injunction to prevent the parties from further consolidation of their operations. The trial court granted the TRO on May 15, 2013. In its order, the court prohibited the hospitals from taking any additional steps to consolidate their operations and from making any price changes to existing contracts (although not from entering into new contracts).

The TRO will remain in effect until the trial court decides the FTC's pending motion for a preliminary injunction, which is scheduled to be heard on June 14, 2013. The court likely will enter a preliminary injunction and continue the existing prohibitions pending a ruling on the merits at the trial, which is scheduled to begin before an administrative law judge on August 5, 2013.

Health care providers should be aware that the FTC is reviewing all mergers and other types of consolidation. Transactions that will result in decreasing the number of providers in the same city or in a small geographic area are subject

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to even closer scrutiny. The FTC generally has not challenged transactions when the acquiring provider previously was not operating in the acquired provider's geographic market.

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