



The Federal Trade Commission Acquiesces to Georgia CON Laws

Jeffrey S. Jacobovitz and Eric D. Olson

After nearly four years of litigation, the Federal Trade Commission (“FTC”) and an Albany, Georgia health system have reached a final consent settlement in a case that reached the United States Supreme Court. The final settlement does not require the divestiture of any of the assets of the health system, and brings to a close a lengthy legal saga that led to a Supreme Court decision and major developments in antitrust law.

In 2011, Phoebe Putney Health System, Inc. (“Phoebe Putney”) announced the acquisition of Palmyra Medical Center (“Palmyra”), which was then owned by HCA, Inc. The proposed transaction would give Phoebe Putney an alleged monopoly over the general acute care services market in Albany, and a 75 to 80% market share in the surrounding area, as Phoebe Putney also owned the only other hospital in town. Phoebe Putney and HCA structured the acquisition of Palmyra using the Hospital Authority of Albany-Dougherty County, which has no budget, staff, or employees, as a conduit. The Hospital Authority would then lease Palmyra to Phoebe Putney for a dollar per year for forty years.

The FTC objected to the proposed transaction as a violation of Section 7 of the Clayton Act, and filed a federal lawsuit seeking to stop the consummation of Phoebe Putney’s acquisition of Palmyra. However, the United States District Court for the Middle District of Georgia dismissed the FTC’s complaint, holding that the Hospital Authority’s involvement in the transaction immunized the transaction from federal antitrust scrutiny under the recognized state-action immunity. The United States Court of Appeals for the Eleventh Circuit agreed, and allowed the parties to consummate the transaction. Although a unanimous 2013 United States Supreme Court decision sided with the FTC’s view that the Hospital Authority’s involvement in the transaction did not invoke state immunity from antitrust scrutiny, the FTC eventually concluded that the transaction could not be unwound due to Georgia’s Certificate-of-Need (“CON”) laws. Palmyra now operates as Phoebe North.

Under the terms of the settlement announced on March 31, 2015, Phoebe Putney and the Hospital Authority are required to give the FTC advance notice of any acquisition of an interest in a hospital or a controlling interest in any other type of health care provider in the Albany area for ten years. Phoebe Putney and the Hospital Authority are also barred from opposing a CON application for a general acute-care hospital in the Albany area for five years. Finally, Phoebe Putney and the Hospital Authority also stipulated that the transaction might substantially limit competition in the Albany area. The FTC and the parties initially reached a similar settlement of this dispute in 2013, but the FTC withdrew from the agreement when the Georgia Department of Community Health (“DCH”) initially indicated that Palmyra, if divested, would not require a new CON. However, the final settlement was reached after a DCH Hearing Officer concluded in October 2014 that CON laws would apply to a divested Palmyra; this finding was supported by DCH’s Commissioner, who would have decided any appeal from the Hearing Officer.

Conclusion

The consent decree entered into by the FTC was a compromise based on its inability to circumvent the Georgia CON laws and the fact that it did not obtain preliminary injunctive relief. The FTC did obtain a victory in the Supreme Court on state action issues and will be able to utilize that precedent in future actions involving hospital mergers.

Authors and Contributors

Jeffrey S. Jacobovitz

Partner, DC Office
202.677.4056
jeffrey.jacobovitz@agg.com

Eric D. Olson

Associate, DC Office
202.677.4905
eric.olson@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a “business sensibility” approach, developing a deep understanding of each client’s industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal’s prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief “not if, but how.” Visit www.agg.com.

Atlanta Office

171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office

1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2015. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.