

*F.T.C. v. Phoebe Putney Health System Inc.*, 2011 WL 2550729 (M.D.Ga. 2011).

The Middle District of Georgia recently applied the state action doctrine and Noerr-Pennington immunity to deny preliminary injunctive relief to the FTC and State of Georgia, who sought to block a transaction under Section 7 of the Clayton Act. The FTC and the state of Georgia brought suit to preliminarily enjoin the Hospital Authority of Albany-Dougherty County (the “Authority”), HCA, Inc. (“HCA”), Palmyra Park Hospital, Inc. (“Palmyra”), Phoebe Putney Health System, Inc. (“PPHS”), Phoebe Putney Memorial Hospital, Inc. (“PPMH”), and Phoebe North, Inc. (“PNI”) (collectively referred to as “Phoebe Putney”) from completing a transaction whereby the Phoebe Putney Health System would acquire effective control of Palmyra Park Hospital, then operated by HCA, through what was alleged to be a straw man purchase by the Hospital Authority of Albany-Dougherty County (the “Authority”). The FTC and Georgia alleged that the transaction was structured to evade antitrust enforcement, and would result in a monopoly in the provision of general acute care services in a six county area.

Plaintiffs alleged that Phoebe Putney and the Authority had structured the transaction to evade antitrust enforcement by the FTC through the sale of Palmyra to the Authority, a public agency, with separate agreements that would provide PPHS management and operational control over Palmyra’s assets, additionally memorialized by 40 year lease of Palmyra by the Authority to a PPHS entity. The FTC and the state of Georgia therefore characterized the transaction is a "de facto merger" creating a monopoly, wherein the public authority was acting solely as a "straw man" without considering the anticompetitive effects of the transaction as structured. These purported anticompetitive effects, according to the FTC's complaint, would create a virtual monopoly for inpatient general acute care services in Albany, Georgia.

All defendants moved to dismiss, asserting, among other grounds, state action immunity and Noerr Pennington immunity. Defendants relied on the language of the enabling act creating the Authority, which permitted it to acquire other hospitals as part of its authority to operate, control, and maintain public hospital facilities. Once the state action doctrine is established, Defendants argued, the individual motives underlying the transaction—specifically, Phoebe Putney’s financial interests in acquiring Palmyra—become irrelevant.

The FTC asserted that the transaction was not entitled to state action immunity because the Authority was not sufficiently involved, as private parties, negotiated, structured, and executed the subject transaction without independent oversight of the Authority. These allegations were based upon the fact that HCA's demand for a substantial cash transaction made what would have otherwise been a direct purchase difficult, due to the inability to get a fairness opinion. Thereafter, the transaction was negotiated and presented to the Authority to approve and act as the purchaser, with PPHS guaranteeing the purchase price and performance, and thereafter entering into separate management and asset control agreements which permitted it to operate Palmyra. The FTC therefore characterized the transaction is an improper attempt to apply “a cloak of

state involvement to a de facto merger to monopoly,” in language somewhat analogous to the laws regarding hybrid restraints.

In ruling that the Authority enjoyed protection under the state action immunity doctrine, the Court held that

The power to produce anticompetitive effects rests with hospital authorities like the Hospital Authority of Albany–Dougherty County, which has the authority to structure hospital management and operation in a number of ways. Simply put, the state therefore has put the ultimate say-so for the provision and management of healthcare in the hands of the healthcare authorities, even if private actors whose conduct brings about anticompetitive conduct have some role in that decisionmaking process.

With respect to the private defendants—Phoebe Putney and HCA/Palmyra—the Court held that state action immunity shielded them as well, as the challenged action at issue was directed by the Authority, and not by Phoebe Putney. These actions were authorized by the Enabling Act and any anticompetitive results were foreseeable and need not have been specifically considered by the Authority. In response to the specific assertions that private parties negotiated the agreement and used the Authority as a purported "straw man", the Court reasoned that such conduct constitutes “private encouragement of, private involvement in, or agency action on behalf of a local government” that is permitted under the *Noerr-Pennington* doctrine such that the private actors may enjoy the state’s antitrust immunity.