



June 2016

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### PENNSYLVANIA FEDERAL COURT REJECTS FTC'S BID TO BLOCK HOSPITAL MERGER

On May 9, 2016, a federal district court for the Middle District of Pennsylvania rejected a request from the Federal Trade Commission (FTC) for a preliminary injunction to enjoin the pending merger (Merger) between Penn State Hershey Medical Center (Hershey) and PinnacleHealth System (collectively, the Hospitals). This decision represents an unexpected setback for the FTC in its antitrust oversight role after a series of successful health care merger challenges.

The FTC, along with the Pennsylvania attorney general, filed an administrative complaint in opposition to the Merger in December 2015, alleging in part that the Merger would substantially lessen competition, in violation of Section 7 of the Clayton Act. The FTC subsequently filed a motion for a preliminary injunction to block the Merger, which was the subject of this decision. To prevail on a motion for a preliminary injunction, the FTC was obligated to show that blocking the Merger would be in the public interest after considering the likelihood of its ultimate success on the merits and weighing the equities involved in the case.

To determine the FTC's likelihood of success on the merits, the court was required to analyze Section 7 of the Clayton Act. Such an analysis requires a determination of the "relevant market" for the commercial activity in question (here, inpatient hospital services). The FTC proposed a relevant geographic market comprising four counties in and around Harrisburg, Pennsylvania. The FTC argued in part that the Merger would enable the Hospitals to act as monopolists in the Harrisburg market by virtue of their negotiating power with commercial payors. In its decision, the court determined that the FTC's proposed geographic market was "unrealistically narrow" and failed to "assume the commercial realities faced by consumers in the region." In particular, the court found that the FTC failed to account for the manner in which the Hospitals' patients travel to receive inpatient hospital services. The court noted that in 2014, 43.5 percent of Hershey's patients traveled from outside the FTC's proposed market to receive services at Hershey. Additionally, in response to the FTC's arguments concerning potential monopolistic power with commercial payors, the Hospitals pointed to five-year and ten-year rate freezes in effect with two major commercial payors in the region. The court determined that predicting the Hospitals' behavior beyond that five-year cap would be "imprudent," given the "rapidly-changing arena of healthcare and health insurance."

Because the FTC failed to establish the relevant market, the court concluded that the FTC couldn't establish a *prima facie* Clayton Act case and that it failed to demonstrate a likelihood of success on

the merits. Consequently, the court denied the FTC's request for injunctive relief. However, despite its finding concerning the FTC's likelihood of success on the merits, the court continued to also balance the equities present in the Merger, the second prong of its preliminary injunction review.

The court discussed a number of equitable considerations that underlie hospital mergers, as part of its analysis of whether the FTC's alleged anticompetitive effects of the Merger outweighed the Hospitals' procompetitive arguments. The court concluded that the efficiencies delivered by the Merger "provide beneficial effects to the public, such that equitable considerations weigh in favor of denying the injunction." Since the passage of the Affordable Care Act in 2010, health care organizations have repeatedly argued that health care reform efforts incentivize consolidation among providers to enable more efficient delivery of care. This court's endorsement of the so-called "efficiencies defense" in support of the Merger is contrary to previous court holdings in recent health care merger cases (see for example, [here](#)). Therefore, the court's decision in this case may portend an increased willingness on the part of courts to consider health care organizations' efficiencies arguments in support of consolidating transactions.

Following the court's rejection of its preliminary injunction request, the FTC petitioned the United States Court of Appeals for the Third Circuit for review of the decision. The Third Circuit has subsequently agreed to temporarily extend a stay that prevents the Merger from proceeding until the Third Circuit hears an expedited appeal filed by the FTC and Pennsylvania. As a result, it is still uncertain whether the Hospitals will be able to proceed with the Merger, but it appears that, regardless of the outcome, the Merger is likely to have a significant impact on health care consolidation. As a result, Robinson+Cole's [Health Law Group](#) will continue to closely follow and report on this case.

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## **SUPREME COURT SIDESTEPS IMPORTANT "STANDING" ISSUE IN SPOKEO CASE**

On May 16, 2016, the United States Supreme Court (Court) issued its [decision](#) in *Spokeo v. Thomas Robins*, a closely followed case with implications for all companies that receive or maintain consumer data. In *Spokeo*, the Court was asked to determine whether violation of a statutory right constitutes a sufficient "injury-in-fact" to confer "standing" to bring suit in federal court under Article III of the Constitution.

To have jurisdiction to file suit in federal court, a plaintiff must demonstrate standing, in part by showing that the plaintiff has suffered an injury-in-fact. In cases involving data breaches, a question has arisen as to whether the mere fact that personal data may have been exposed in a breach qualifies as an injury-in-fact sufficient to confer standing. *Spokeo* thus posed an issue of significant importance to health care entities and other companies that receive, maintain, or are otherwise responsible for consumer data.

In a 6-2 decision authored by Justice Alito, the Court avoided directly answering this question by finding that the Ninth Circuit's analysis of the injury-in-fact requirement for standing was incomplete. Specifically, the Court determined that the Ninth Circuit's analysis overlooked the requirement that an injury-in-fact must be concrete (as well as particularized). In reaching this conclusion, the Court noted that a concrete injury must actually exist (that is, a de facto injury) to confer standing, although the injury need not necessarily be tangible. The Court continued, however, to caution that the Court's holding did not mean that "the *risk* of real harm cannot satisfy the requirement of concreteness" (emphasis added).

Following the *Spokeo* decision, it is not yet certain whether the Court will accept suits—including class-action suits—alleging statutory violations related to data breaches or similar violations of statutory rights. Robinson+Cole's [Health Law](#) and [Data Privacy + Security](#) Groups will continue to monitor the *Spokeo* case and will report on any further developments.

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