

## CLIENT ALERT

### Brotherly Love: Philadelphia Federal Court Allows Jefferson-Einstein Hospital Union to Move Forward Over Government Objections

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Yesterday, a federal court rejected the Federal Trade Commission's and Pennsylvania Attorney General's efforts to halt the merger of two Philadelphia-area healthcare systems pending the FTC's administrative trial, which was slated to start in March 2021. In a 62-page decision denying the government's motion for a preliminary injunction and allowing the proposed merger between Thomas Jefferson University and the Albert Einstein Healthcare Network to move forward, Judge Gerald Pappert of the U.S. District Court for the Eastern District of Pennsylvania held that the government had not satisfied its burden to prove the relevant geographic markets alleged in the complaint. This is the FTC's first loss in a hospital-merger case since 2016, when the FTC lost a pair of hospital-merger challenges in district court, both of which were ultimately reversed in the FTC's favor.

According to Judge Pappert's decision, to obtain a preliminary injunction under the antitrust laws, the government was required to define, and meet its burden to prove, a relevant geographic market in order to evaluate the potential competitive effects of the merger. Following a six-day hearing featuring 22 witnesses, several hours of oral argument, and voluminous documentary evidence obtained through extensive discovery, Judge Pappert held that the government did not meet its burden.

Judge Pappert held that the government's approach to defining the alleged geographic markets—relying on its “economic expert's algorithm” and insurer testimony—did not produce results that corresponded to the “commercial reality” of the healthcare landscape in Philadelphia. The judge found that testimony from the government's economic expert was not sufficient to satisfy the government's burden and that the testimony from two of the area's major insurers on this issue was “neither unanimous, unequivocal nor supported by the record as a whole.” Primarily, the court was not convinced by the government's evidence that insurers would have no choice but to accept the merged Jefferson/Einstein's price increases, when there were numerous alternative hospitals and inpatient rehabilitation centers in the greater Philadelphia area.

The court's decision reflects the significant challenge that the government often faces when seeking to prove local geographic markets in urban areas, and appears to reflect a demanding standard for the government's insurer-witness testimony to be more substantial, more consistent across insurers, and more commercially grounded.

The case may not be over. Healthcare providers and payers should continue to watch this case to see whether the FTC appeals this decision, as it appealed a 2016 district court order denying the FTC's request to block the proposed merger of Penn State Hershey Medical Center and PinnacleHealth System. In that case, the Third Circuit—which would hear an appeal of this case—reversed the lower court and entered a preliminary injunction without remand.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Alexis J. Gilman**

Partner – Washington, D.C.

Phone: +1 202.624.2570

Email: [agilman@crowell.com](mailto:agilman@crowell.com)

**Alexis Victoria DeBernardis**

Counsel – Washington, D.C.

Phone: +1 202.624.2631

Email: [adebernardis@crowell.com](mailto:adebernardis@crowell.com)

**Akhil Sheth**

Associate – Orange County

Phone: +1 949.798.1363

Email: [asheth@crowell.com](mailto:asheth@crowell.com)