

# Third Circuit Hears Oral Arguments in High-Stakes Hackensack Meridian Appeal

All eyes are on Hackensack Meridian Health's proposed acquisition of Englewood Healthcare Foundation as the 3rd Circuit Court of Appeals heard oral arguments in the FTC challenge last week. As healthcare entities continue to actively pursue mergers and affiliations during –and in part driven by– the coronavirus pandemic, the outcome of this New Jersey merger may have significant implications for both federal and state antitrust enforcement across the country. In this post, The Source brings you up to speed with the latest developments leading up to the high-stakes appeal and gives a sneak peek at some of the legal arguments made in front of the 3rd Circuit panel during oral arguments.

As a quick refresher, Hackensack Meridian and Englewood announced their plans to merge in October 2019. Hackensack Meridian Health is the largest healthcare system in New Jersey and Englewood Hospital is the third-largest provider of inpatient general acute care services (GAC) in Bergen County. In December 2020, the FTC filed an administrative complaint, along with a lawsuit in New Jersey district court seeking a preliminary injunction against the merger, alleging the proposed acquisition would reduce competition for GAC services in Bergen County and give Hackensack great bargaining leverage to demand higher prices from insurers, which will in turn lead to higher premiums and out-of-pocket costs and decrease the quality of care and access for patients. The district court agreed with the FTC and issued a preliminary injunction in August 2021. For detailed analysis of the FTC challenge and district court ruling, see [previous coverage](#) in Litigation and Enforcement Highlights on the Source Blog.

The preliminary injunction ruling was an encouraging win for FTC's enforcement efforts, particularly after its recent loss in the [Jefferson-Albert Einstein](#) merger challenge in Philadelphia. In most cases, a preliminary injunction in the district court would seal the fate of the deal, leading the entities to abandon the transaction. Despite the setback, however, the hospitals filed an appeal of the injunction with the 3rd Circuit Court of Appeals shortly after the district court opinion was released. [In the appeal](#), Hackensack and Englewood contend that the district court erred in the geographic market definition, the likelihood of price increases, and the evaluation of the procompetitive benefits of the acquisition. Specifically, the hospitals argue that the geographic market based on county lines is an arbitrary political boundary and does not reflect commercial realities of the market. Additionally, the hospitals claim that the district court erroneously used patients' willingness to pay as the standard, which has no bearing on insurers' willingness to pay.

In the [FTC's reply brief](#) to the appellant's brief, the government reiterates that Hackensack and Englewood are direct competitors within five miles of each other and that "common ownership would eliminate that direct competition, reducing their incentive to improve quality and giving the combined hospitals the ability to demand higher prices from insurers in rate negotiations." Additionally, the agency asserts that regardless of the market share analysis, the deal would create too much concentration and there is direct evidence the merger would have anticompetitive effects in Bergen County. In terms of the hospitals' claims of procompetitive benefits, the FTC points out the benefits could be achieved without the merger and questioned whether any potential cost savings would be passed on to insurance companies and consumers.

In support of the FTC, multiple stakeholders, including The Source, [filed amicus briefs](#) to the 3rd Circuit. Amici ranged

from [state attorneys general](#) to a long list of [healthcare antitrust experts and economists](#).

#### *Amicus Brief from the Coalition of State AGs*

Led by California Attorney General Rob Bonta and Pennsylvania Attorney General Josh Shapiro, a coalition of 25 attorneys general urged the 3rd Circuit to uphold the preliminary injunction in their amicus brief. [Bonta noted](#) that “In California, we’ve seen firsthand the effects of a large non-profit healthcare system’s anticompetitive practices,” referring to the Sutter Health antitrust case that just concluded in August with the [court approval of the final settlement](#), which targeted market power and resulting monopoly behavior of the Northern California hospital giant.

Because many state AGs only have merger review authority of nonprofit hospital transactions, federal authority can help fill in the gap and review transactions including for-profit deals. As a result, the decision in this case is significant in preserving overall competition in the provider market. [In their brief](#), the coalition argues that the states have seen a wave of hospital consolidation that resulted in large healthcare systems with market power and ability to raise prices. Moreover, “mergers increasing the bargaining power of large healthcare systems result in higher prices without any substantial improvements in quality for consumers” and the hospitals’ purported benefits do not outweigh the likely anticompetitive effects of the proposed merger.

#### *Amicus Brief from The Source and Petris Center*

In the amicus brief jointly [filed by The Source and the Petris Center](#) at UC Berkeley, professors of law and economics, economists, and health policy researchers make five main arguments in support of the district court’s ruling. This brief asserts, first and foremost, that potential harms from hospital consolidation are well documented by an extensive and

largely undisputed literature that demonstrate anticompetitive consolidation enables merging hospitals to gain market power which translates to immediate price effects. In terms of the antitrust analysis, the amici claim that the district court undertook the appropriate geographic market analysis with the hypothetical monopolist test in determining the relevant market definition. Furthermore, the brief argues that the court was correct in placing a high burden on the hospitals' claims of procompetitive effects, as ample case precedents have required "extraordinary efficiencies" to justify mergers that would result in high post-merger concentration. As a result, the court properly evaluated potential anticompetitive effects on quality and innovation as the preponderance of economic evidence shows that hospital consolidation more likely decreases quality than increases it. Finally, in a rebuttal to the appellant hospitals, the amici emphasize that the approval given by the New Jersey AG and Department of Health should not be afforded significant weight because that review process focuses on charitable trust goals and does not purport to conduct an in-depth competitive analysis under antitrust merger law.

### *Oral Arguments Heard on December 7*

During oral arguments, the 3rd Circuit panel indeed questioned why the New Jersey AG did not join the FTC antitrust challenge as did, for example, the Pennsylvania AG in FTC challenges in that state, and what the state's approval of the proposed merger meant for the FTC case. Counsel for the FTC responded that the New Jersey AG also did not oppose the challenge and that the state authority required only a public interest analysis with respect to charitable assets and not in terms of antitrust and competition, which is the duty of the FTC under the Clayton Act.

In response to the hospitals' argument that the patient-based geographic market definition consisting of only Bergen County patients improperly ignores patients from other neighboring

areas, the FTC pointed out that the patient-based analysis is from the insurer's perspective, and regardless of a patient-based or hospital-based market definition analysis, Bergen County passes the hypothetical monopolist test as the relevant geographic market, showing the merger is presumptively illegal. Additionally, the FTC asserts there is ample direct evidence that the merger would have anticompetitive effects in Bergen County. Specifically, as the 3rd Circuit panel acknowledged, there is insurer testimony that the merger would give the merged entities more leverage in negotiations against the insurance companies. Moreover, insurers see Hackensack as Englewood's closest competitors, as do the hospitals themselves.

In terms of procompetitive benefits that the hospitals claim will benefit patients, such as improvement in quality of care and a \$400 million investment in Englewood, the FTC said there was insufficient evidence that they will be passed to the insurers or consumers. The 3rd Circuit panel then asked what types of benefits would overcome the anticompetitive harms caused by a merger, the FTC responded plainly that there is nothing to point to because no court of appeals has found that any benefits or efficiencies have outweighed a presumptively merger.

As seen from the amicus briefs filed in this case by various stakeholders, the outcome of this appeal may have strong implications for both federal and state enforcement efforts affecting healthcare providers markets around the country. The FTC's in-house [administrative trial](#) on the merits will begin 30 days after the 3rd Circuit rules on the appeal of the preliminary injunction. Stay tuned for the decision and more developments in the new year!