

## Coppersmith Brief

### **Federal District Court Vacates Portion of OCR Guidance on Online Tracking**

[Kristen Rosati](#), Coppersmith Brockelman PLC  
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We have a bit of regulatory relief for the use of digital advertising and online tracking by health care organizations. In response to the lawsuit brought by the American Hospital Association challenging the Office for Civil Rights (OCR) guidance on online tracking,<sup>i</sup> a federal District Court for the Northern District of Texas vacated a portion of the OCR guidance. *See American Hospital Association vs. Xavier Becerra, et al.*<sup>ii</sup>

The court's decision is helpful, but limited. The court vacated the OCR guidance, but only addressed what the court called the "Proscribed Combination": an IP address combined with a visit to an unauthenticated public website (one that does not require credentials to access), even if that website addresses specific health conditions or healthcare providers. The court held that OCR had exceeded its statutory authority by treating the "Proscribed Combination" as protected health information (PHI), because a visit to a public website does not necessarily indicate an intent to obtain care. In what could be characterized as a snarky opinion, the court stated that "HIPAA doesn't mandate clairvoyance" (related to users' intent of accessing a website) and declared that OCR "tried to tweak the [PHI] definition and got caught. With its hand in the cookie jar, [OCR] now backtracks. In doing so, it gaslights covered entities by arguing the [OCR guidance documents] restate what the rule has been all along."

In response to the decision, OCR posted a statement that it is considering next steps.<sup>iii</sup> Because the court only addressed the "Proscribed Combination," OCR may continue to apply its guidance to authenticated pages (which require credentials to access) or to unauthenticated pages where the intent to obtain health care is clear (such as requests to schedule an appointment). We expect OCR to issue a revised guidance. We think it unlikely OCR will appeal the district court's decision to the Fifth Circuit Court of Appeals, given the US Supreme Court's decision last week overruling the *Chevron* case,<sup>iv</sup> which had held that courts must give deference to federal agencies' interpretation of statutes. *See Loper Bright Enterprises v. Raimondo.*<sup>v</sup>

Stay tuned for OCR developments. In the meantime, the Federal Trade Commission and state Attorneys General continuing their online tracking enforcement initiatives, and class actions based on state claims are possible. See our last *Coppersmith Brief*<sup>vi</sup> for more details.

The logo for Coppersmith Brockelman Lawyers is centered at the top of the page. It features the name 'COPPERSMITH' above 'BROCKELMAN' in a large, white, sans-serif font. A thin horizontal line separates the two names. Below 'BROCKELMAN', the word 'LAWYERS' is written in a smaller, white, sans-serif font. The background of the logo is a dark blue, semi-transparent image of a city skyline.

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## About the Author

[Kristen Rosati](#) is considered one of the nation’s leading “Big Data” and HIPAA compliance attorneys. She has deep experience in data governance and strategy, data sharing for research and innovation, and biobanking and genomic privacy. Kristen is a Past President (2013-2014) and Fellow (2021) of the American Health Law Association (AHLA), the nation’s largest health care legal organization. She has received numerous recognitions in Chambers USA, Best Lawyers in America and Super Lawyers, and has been recognized in “Most Outstanding Women in Business,” “Most Influential Women in Arizona Business,” and Arizona’s Top 100 Lawyers.

Kristen has counseled many health care organizations in the evaluation and remediation of online tracking, and in responding to government investigations.

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<sup>i</sup> See [Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates](#) (OCR, March 18, 2024).

<sup>ii</sup> <https://www.aha.org/system/files/media/file/2024/06/opinion-order-in-aha-et-al-v-xavier-becerra-et-al-6-20-2024.pdf>.

<sup>iii</sup> <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/hipaa-online-tracking/index.html>.

<sup>iv</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

<sup>v</sup> [https://www.supremecourt.gov/opinions/23pdf/22-451\\_7m58.pdf](https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf).

<sup>vi</sup> See “OCR ‘Clarifies’ its Guidance on Online Tracking. Not Quite,” at <https://www.cblawyers.com/wp-content/uploads/2024/04/Coppersmith-Briefs-OCR-Clarifies-Guidance-on-Online-Tracking.pdf>.