DOJ's Challenge of the UnitedHealth and Change Healthcare Merger: What Went Wrong and What Does it Mean?

The highly scrutinized merger of UnitedHealth Group and Change Healthcare went through in October 2022 shortly after obtaining court approval despite a legal challenge from federal and state regulators. The deal drew criticisms from industry groups and stakeholders largely amid concerns that it would give UnitedHealth access to sensitive data to gain competitive advantage in the market. The Justice Department-led challenge to the merger was seen as a test of the Biden administration's intensified antitrust enforcement agenda, but the DOJ failed to convince the court to block the allegedly anticompetitive merger. What went wrong and what does it mean? In this post, we examine some of the arguments made at the trial, dissect the resulting court opinion, and discuss what it could mean for similar future merger challenges.

Case Background

UnitedHealth Group (UHG) is a health care conglomerate with ownership of various subsidiaries, including healthcare services unit Optum and the largest health insurer in the country, UnitedHealthcare. In January 2021, UHG proposed to acquire Change Healthcare—a healthcare technology company—through its Optum subsidiary. Change Healthcare provides services and tools related to payment processes and analytics for financing and billing for hospitals and health systems. Various industry stakeholders opposed the deal, citing anticompetitive concerns on multiple fronts due to the horizontal and vertical consolidation of various entities under one ownership—the merger would combine a healthcare IT and data company, healthcare provider services, a pharmacy benefit manager and pharmacy services, and a major health insurer. UHG and Change Healthcare, on the other

hand, claim that the integration would improve care by integrating Change Healthcare's claims data and automated payment processing tool to provide better information to healthcare providers and facilitate more efficient payment processes, which would in turn lower costs and health insurers, providers, and patients.

In February 2022, the Department of Justice (DOJ), along with attorneys general of New York and Minnesota, filed a lawsuit in federal court in the District of Columbia to block the merger, alleging the proposed $13 billion acquisition of Change Healthcare would limit competition and innovation in claims processing technology and would give UGH, a company that already owns the largest health insurer in the country, access to healthcare data of competitor insurers and an unfair advantage in health insurance markets. The lawsuit claimed the lessened competition would in turn result in higher cost and lower quality commercial health insurance for healthcare consumers. Specifically, the complaint alleges the proposed merger would have anticompetitive effects in healthcare markets as follows:

1. Horizontally — by combining direct rivals Change Healthcare and OptumInsight, which both engage in the business of first-pass healthcare claims editing solutions, competition in that market would be eliminated, negatively impacting prices and quality;
2. Vertically — by acquiring healthcare claims clearinghouse Change Healthcare, UHG would possess competitively sensitive data of other health insurers and use this information to the advantage of its own health insurer UnitedHealthcare, harming the competitive process in the sale of commercial health insurance to national accounts and large group employers.

The DOJ alleges that as a result, competition and innovation in the relevant markets would be reduced generally and there are no sufficient procompetitive benefits that would outweigh the harm. A bench trial—i.e., without a jury—took place in August in the District Court for the District of Columbia, at which the parties argued and presented evidence on the two main allegations of anticompetitive harm.

Horizontal Integration Concerns: Near Monopoly of Claims Editing Business

The most apparent and direct competitive harm potentially at issue arises from the combination of the two entities' overlapping first-pass claims editing business, which is a process insurers use to validate patient coverage claims. The proposed merger would combine ClaimsXten (the software division of Change Healthcare) and OptumInsight (part of the Optum subsidiary of UHG), which are direct rivals that used to compete head-to-head. As a result of the merger, the DOJ alleges UHG would hold a near monopoly (94% market share) on the claims clearinghouse market.

To alleviate anticompetitive concerns, UHG proposed a divestiture of Change Healthcare's ClaimXten division to the private equity firm TPG Capital. However, at trial, the DOJ argued that ClaimsXten is just one of seven products part of Change's end-to-end services, and that post-divestiture, it would not be able to effectively compete with OptumInsight's more comprehensive offerings. ClaimsXten countered with executive testimony that they are standalone and profitable individual products, which was further backed by trial testimony from TPG Capital, the private equity firm that will buy the subsidiary.

Vertical Integration Concerns: Potential Misuse of Change Healthcare Data to Benefit UHG's Dominant Insurer UnitedHealthcare

A large part of trial surrounds the DOJ's argument that UHG will gain large amounts of competitive data from Change Healthcare through the acquisition, and that it could enhance UHG's incentives to favor its dominant health insurer, UnitedHealthcare, to the disadvantage of its rivals. As the DOJ's case rests largely on the UHG's incentive to misuse the data, UHG argued that it is simply not feasible to do so and presented the following testimony from UHG and Change Healthcare executives, as well as economic experts, that it would not abuse its data access:

1. Optum is already vertically integrated with its subsidiaries that include PBM Optum Rx, healthcare provider Optum Health, and claims editing software OptumInsight, so UHG already has data on competitors through OptumInsight, but it has never misused that data;
2. Change Healthcare has policies and safeguards to protect customer's confidential data, and UHG instituted firewalls to prevent sharing between

Optum and UnitedHealthcare (beginning May 2022), which they pointed out were used in other deals approved by the DOJ;
3. Any data abuse or misuse would face violation of legal, technical, and contractual limitations such as health privacy laws and fiduciary duties;
4. The misuse of data does not make financial sense, because Optum's ability to grow is dependent on its capacity to sell to everyone else, as it serves all health insurers and not just UnitedHealthcare.
5. Even if UHG wanted to use the data anticompetitively, there are limited ways the data could be used, because pursuant to federal law, health care claims data would de-identify details that would eliminate the info needed to commit abuse.

On balance, UHG executives and expert witnesses paint the picture that trying to boost UnitedHealthcare is not worth the costs of lost business from other clearinghouse customers. UHG CEO Andrew Witty also testified that not only is it not legally or technically practical to misuse the data, but it is simply not worthwhile to damage its own business and reputation. As such, an attorney for UHG concluded that the government's allegation was a "novel and unprecedented legal theory" that rests on a "daisy chain of speculation."[1]

The DOJ was not convinced by the defense at trial. In response to the testimony, the DOJ questioned CEO Andrew Witty on internal audit reports that highlight risks of mismanagement of data and pointed out that nothing prevents employees from talking to each other. Additionally, the government's economic witness testified that the scope and scale of the data Change provides is unprecedented and would give UHG advantages even as they comply with data privacy laws.[2] Furthermore, DOJ reasoned that UHG could easily change its firewall policies to exploit gray areas without violating any existing law or contracts, as every bit of data matters in gaining competitive advantage.

Court Rejects DOJ Legal Arguments and Approves Merger

The court agreed with UHG and found evidence to DOJ's anticompetitive theory to be insufficient. In approving the merger last month, Judge Carl Nichols of the U.S.

District Court for the District of Columbia issued a redacted 58-page opinion that noted "serious flaws" in the government's case.

First, with regards to horizontal consolidation concerns of the claims editing business, the court ordered the proposed divestiture of ClaimsXten to TPG Capital, convinced that it would sufficiently address any concerns of monopoly. While the DOJ claimed that the post-divestiture market should maintain the same level of competition that existed pre-merger, Judge Nichols held that the standard under Section 7 of the Clayton Act is whether a deal would "substantially" threaten competition. In any event, divestiture buyer TPG Capital had given testimony that it plans to substantially invest in research and development to further expand the business of ClaimsXten, which the court held would preserve or even improve competition in the market.

Second, with regards to the vertical anticompetitive harms, Judge Nichols was entirely unconvinced that UHG would take such extreme actions as to uproot its entire business strategy, intentionally violate firewall policies and contractual commitments, and risk its reputation and financial interests, just to give its insurer UnitedHealthcare a competitive advantage in the market. Moreover, the court pointed out the government did not quantify the amount of additional data that UHG would gain access to through the acquisition of which it could allegedly use for its advantage, rendering the claim of anticompetitive harm merely theoretical.

In addition to abuse of data to suppress competition, DOJ had raised concerns that combining Change with Optum could give UHG incentive to withhold new technological products to other insurers besides UnitedHealthcare, thereby preventing competitor insurers from competing and innovating in the insurance market. However, the court noted in the ruling that such products are merely concepts and not actual products. More importantly, competitors including Cigna, Aetna, and Anthem had testified at trial that the merger would not stifle innovation.

In sum, the court opined that the DOJ's theory "rests on speculation rather than real-world evidence that events are likely to unfold as the government predicts." With the court's approval, UHG and Change proceeded to close their merger on October 3, and private equity TPG Capital completed its $2.2 billion acquisition of ClaimsXten

on October 7. While the DOJ is allowed to file an appeal within 60 days of the ruling, it appears unlikely as they now face the even greater challenge of "unscrambling the egg" with the consummated merger.

What Does It All Mean?

Amidst intense antitrust scrutiny from the Biden administration, this loss for the DOJ was no doubt a check on the heightened hope that the new direction would broaden antitrust law and enforcement. In particular, the legal challenge based on concerns of vertical consolidation once again failed. The opinion in this case indicates that courts will not readily accept economic theories without real-world evidence supporting those theories because, as Judge Nichols opined, "antitrust theory and speculation cannot trump facts." This case may be a reminder that longstanding judicial interpretation of antitrust law cannot be changed overnight, and the process could be a painful one. The DOJ's willingness to bring a challenge against this merger indicates the commitment to move the law forward, but even if undeterred by the failure, a string of losses could still be problematic for antitrust enforcement in the short term, allowing the further growth of consolidation in the healthcare market.

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[1] Leah Nylen, *UnitedHealth Deal Gives 'One-Way Look' Into Rivals, DOJ Says*, Bloomberg (Aug. 1, 2022).

[2] Bryan Koenig, *DOJ Data Fears Based On 'Limited Understanding,' Judge Told*, Law360 (Aug. 8, 2022).