Class 26 slides

Unit 17: UnitedHealth/Change

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

November 29, 2023

UnitedHealth Group®

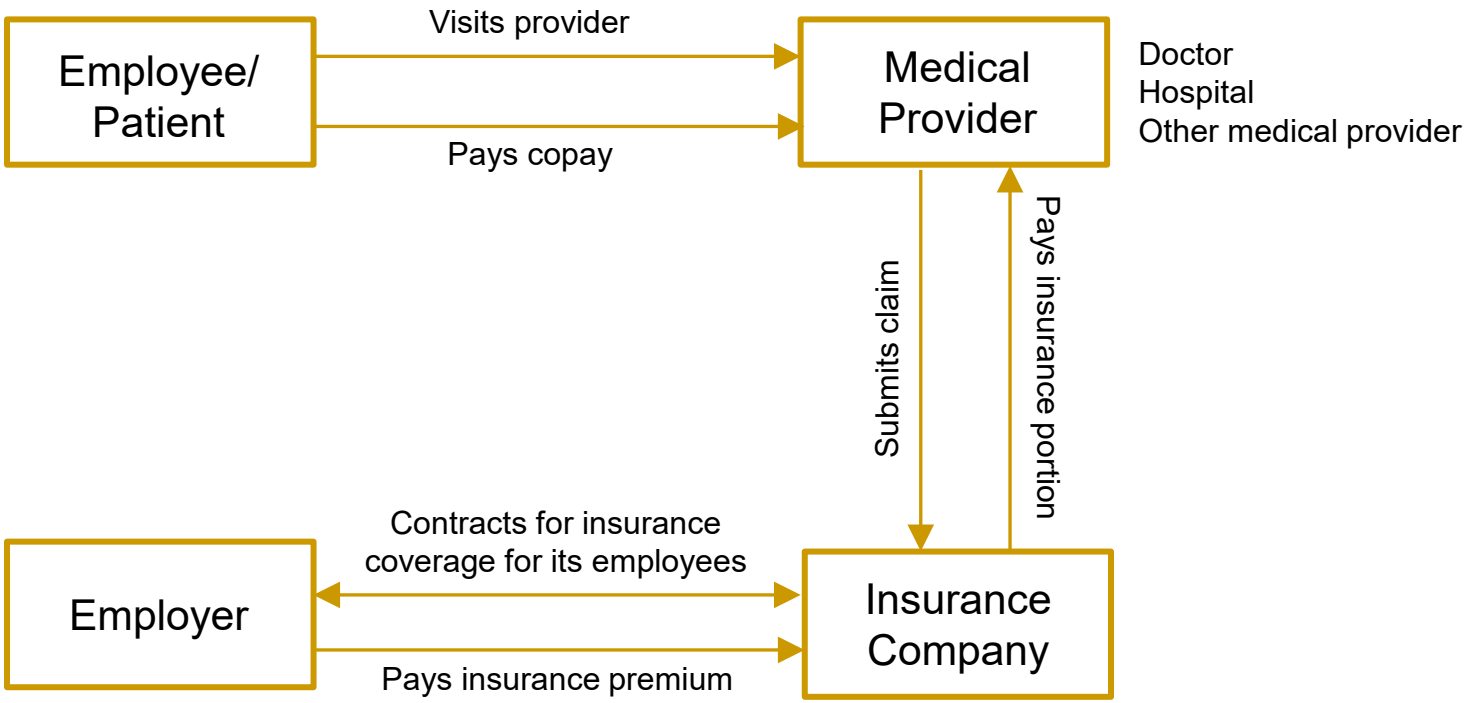
CHANGE HEALTHCARE

Professor Dale Collins
Merger Antitrust Law
Georgetown University Law Center

The Health Insurance Process

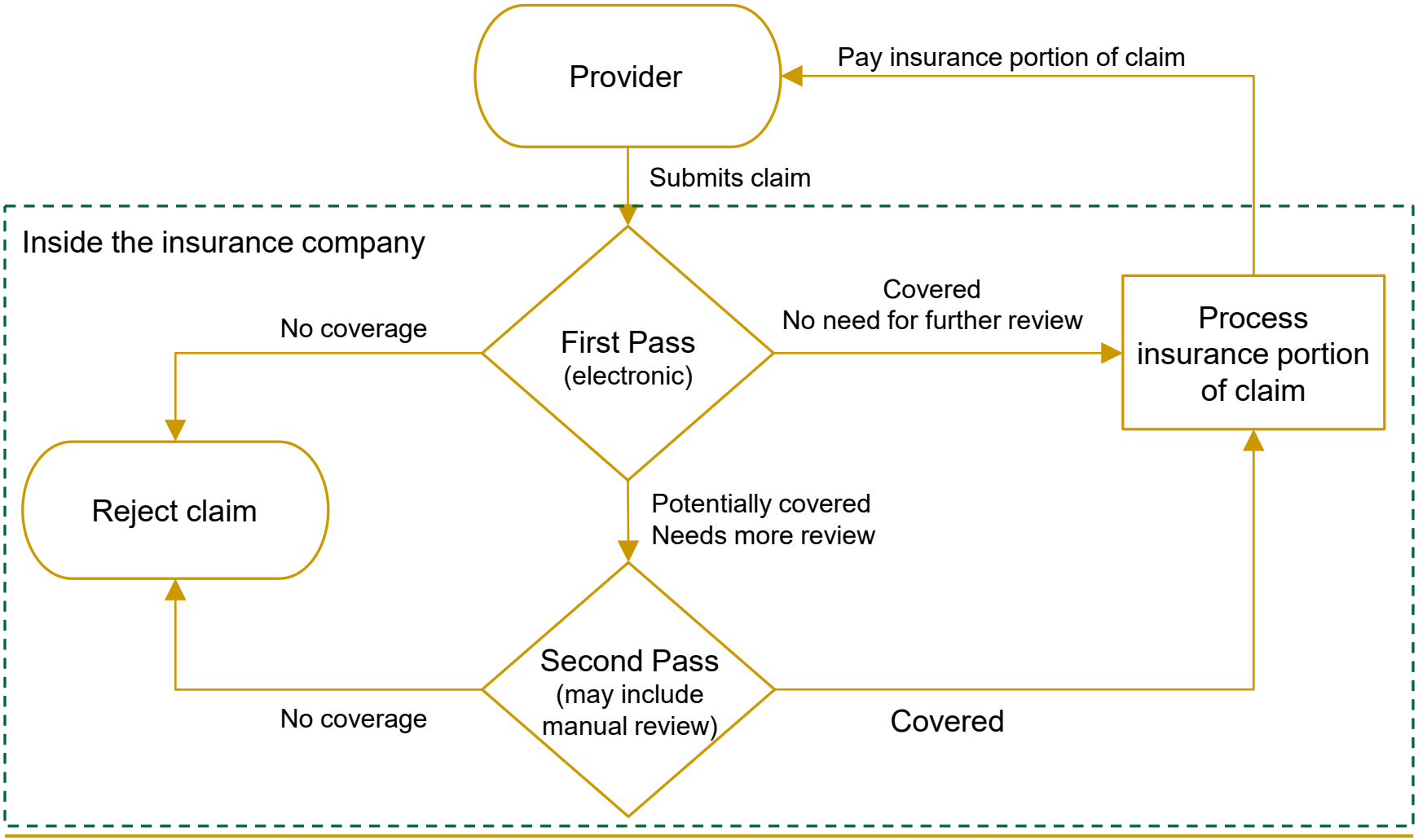
The health insurance payment process

- Overview



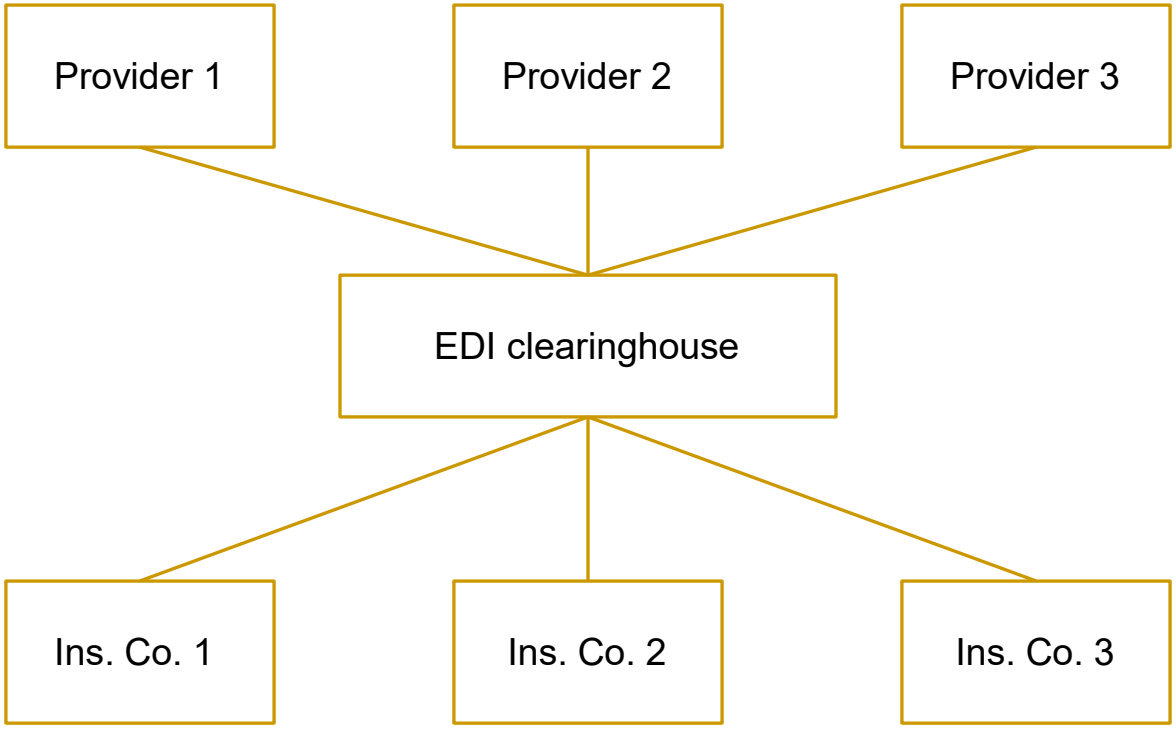
The health insurance payment process

- The “first pass/second pass” claims editing (review) process



The health insurance payment process

- EDI clearinghouses
  - Enable the electronic transmission of claims, remittances, and other information between and among payers and providers



The Deal

The deal

- UnitedHealth Group (UHG) to buy Change Healthcare
  - Merger Agreement signed January 5, 2021 (and announced January 6, 2021)
  - Purchase price: $13 billion
    - $7.84 billion in cash to be paid to Change shareholders
    - Assumption of Change's $5 billion in debt
  - 41% premium over Change's closing price on January 5
  - Drop-dead date
    - Originally January 5, 2022, with an extension to April 5, 2022, if the antitrust conditions have not been satisfied
    - Extended on April 4, 2022, to December 31, 2022
      - Added an antitrust reverse termination fee of $650 million in connection with the extension

The parties

- UnitedHealth Group (UHG)
  - UnitedHealthcare
    - Nation's largest commercial insurer—covers 50 million people
  - Optum
    - *OptumHealth*: Offers care delivery and management
    - *OptunRx*: Offers pharmacy services
    - *OptumInsight*: Offers healthcare software solutions and services
      - Claims Edit System: Claims editing solution

The parties

- Change Healthcare
  - Software and Analytics
    - Includes ClaimsXten: Market leader in first-pass claims editing
      - 70% market share
      - 99% customer retention
  - Network Solutions
    - Products
      - Facilitates financial, administrative, and clinical transactions
      - B2B and C2B payments
      - Aggregation and analytical data services
    - Provided through Change's EDI clearinghouse
      - Largest EDI clearinghouse in the United States
  - Technology Enabled Services
    - Provides revenue cycle management, value-based care, pharmacy benefits administration, and healthcare consulting

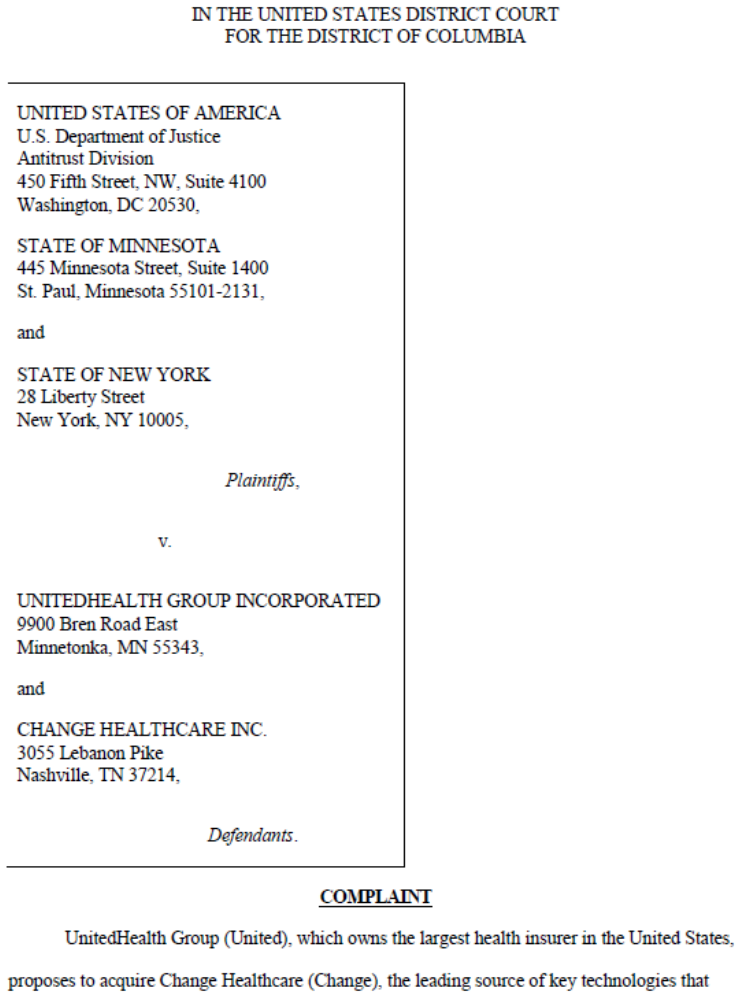
Deal rationale

Benefits of Combination with Change Healthcare

- By combining our products and expertise with those of Change Healthcare, we can increase efficiency and reduce friction in health care, producing a better experience and lower costs.
- Simply put, with this new combination, Optum will help improve the quality of health care delivery, automate claims transactions, and accelerate payment between provider and payer. We will accomplish this through aligning clinical decision making, improving claims accuracy, and simplifying payment.
- The combination of capabilities can improve healthcare by:
  - Helping health care providers and payers better serve patients by more effectively connecting and simplifying key clinical, administrative and payment processes.
  - Promoting better patient outcomes.
  - Reducing the high costs and inefficiencies that plague the health system by improving decision-making processes and putting the right data in the right hands at the right time.
  - Decreasing claims denials. Today, 90% of claim denials are avoidable and create extra work on the back end for everyone involved. By combining with Change Healthcare, we aim to create a system that can help reduce this figure.
- The combination will help us to substantially reduce the estimated $267 billion the U.S. health care industry wastes annually on simply ensuring that health care providers submit valid and properly documented claims and that insurers pay the correct amount for the services provided.
- With the distinct and complementary capabilities and skills of Change Healthcare, Optum will advance anew and more modern foundation to support the next generation health system.

The complaint

- The complaint
  - Filed February 22, 2022
    - After investigating the proposed transaction for more than a year
  - Joined by New York and Minnesota
  - *Venue*: District of Columbia
  - *Relief*: Permanent injunction blocking the transaction



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
U.S. Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 4100
Washington, DC 20530,

STATE OF MINNESOTA
445 Minnesota Street, Suite 1400
St. Paul, Minnesota 55101-2131,

and

STATE OF NEW YORK
28 Liberty Street
New York, NY 10005,

Plaintiffs,

v.

UNITEDHEALTH GROUP INCORPORATED
9900 Bren Road East
Minnetonka, MN 55343,

and

CHANGE HEALTHCARE INC.
3055 Lebanon Pike
Nashville, TN 37214,

Defendants.

COMPLAINT

UnitedHealth Group (United), which owns the largest health insurer in the United States, proposes to acquire Change Healthcare (Change), the leading source of key technologies that

Claims

1. Horizontal
   - Tend to create a monopoly in the sale of first-pass claims editing solutions in the United States by uniting Optum's Claims Edit System with Change's ClaimsXten

Optum's Claims Editing System	+	Change's ClaimsXten

2. Vertical 1—Anticompetitive information conduit
   - UHG's control over Change's EDI clearinghouse—a key input for UHG competitors—would give UHG the ability and incentive to use rivals' CSI for its own benefit
   - In turn, would lessen competition in the markets for national accounts and large group commercial health insurance
3. Vertical 2—Input foreclosure/RRC
   - UHG's control over Change's EDI clearinghouse would give UHG the ability and incentive to withhold innovations and raise rivals' costs in the markets for national accounts and large group health insurance

The trial

- Judge Carl J. Nichols
  - Former partner, Boies, Schiller & Flexner LLP
  - Nominated by President Donald Trump
  - Sworn in: June 25, 2019
- Trial
  - Parties stipulated to a TRO—proceeded to trial on the merits
    - Court consolidated proceedings under Rule 65(a)(2)
  - Trial began on August 1, 2022 (12 days)—5 months after the complaint was filed
    - Over two dozen fact witnesses/1000 exhibits
    - Two expert witnesses from each side
  - Decision: Permanent injunction denied on Sept. 19, 2022
    - Seven months after the complaint was filed
  - Deal closed on October 3, 2022

Experts: DOJ

- Benjamin R. Handel
  - Associate Professor of Economics, Berkeley
  - Consulting Expert, Cornerstone Research
  - Ph.D. Economics, Northwestern University (2010)
  - ASHEcon Medal (top health economist under 40)

- Gautam Gowrisankaran
  - Professor of Economics, Columbia University
  - Senior Advisor, Cornerstone Research
  - Ph.D., Economics, Yale University (1995)
  - Experienced testifying expert

Experts: Merging parties

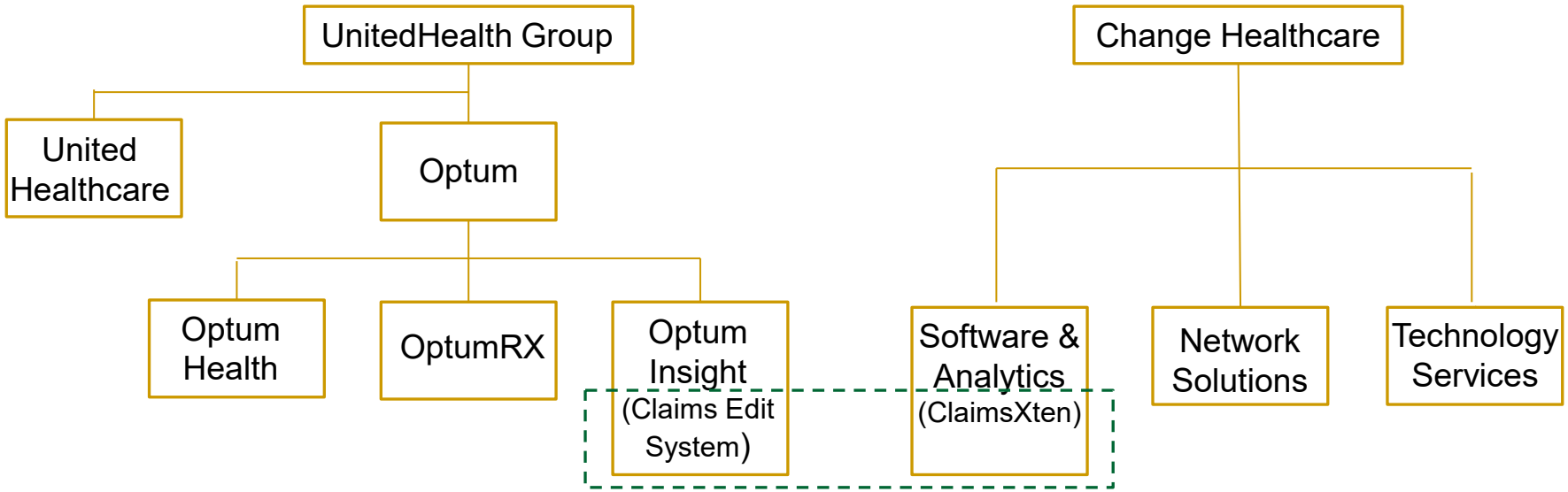
- Catherine E. Tucker
  - Sloan Distinguished Professor of Management Science and Professor of Marketing, MIT Sloan School of Management
  - Academic affiliate with Analysis Group
  - Ph.D., economics, Stanford University (2005)
  - Experienced testifying expert

- Kevin M. Murphy
  - George J. Stigler Distinguished Service Professor of Economics, University of Chicago Booth School of Business
  - John Bates Clark Medal/MacArthur Fellow
  - Ph.D., economics, University of Chicago (1986)
  - Academic affiliate with Charles River Associates
  - Expert witness in numerous antitrust cases

Horizontal overlap in first-pass claims editing

- The gravamen of the complaint
  - Relevant market: First-pass claims editing solutions in the United States
  - Merger to monopoly
    - Change's ClaimsXten (70%) + Optum's Claims Edit System (25%)
    - Delta: 3577
    - Postmerger HHI: 8831
  - Unilateral effects: Eliminate "intense competition" between the two systems

Merging parties do not dispute



Horizontal overlap in first-pass claims editing

- The merging parties' response: Litigate the fix
  - On April 22, 2022, UHG agreed to sell Change's ClaimsXten business to TPG Capital for $2.2 billion
    - Includes all of Change's four claims editing products, which comprise Change's entire primary and secondary claims editing businesses
    - Divestiture contingent on the closing of the UHG/Change transaction and would take place immediately after that closing

CLAIMSXTEN

Horizontal overlap in first-pass claims editing

- A preliminary question: The burden of proof
  - DOJ's position
    - Once the DOJ has proved a prima facie case against the transaction as originally structured, the burden shift to the merging parties to show that the divestiture "will replace the competitive intensity lost as a result of the acquisition"
    - At times suggests that the merging parties bear the burden of persuasion
  - Merging parties' position
    - Since UHG will never acquire ClaimsXten, the government must prove its prima facie case against the restructured transaction, not the original transaction
    - In any event, the DOJ bears the ultimate burden of persuasion under Step 3 of *Baker Hughes*

Horizontal overlap in first-pass claims editing

- A preliminary question: The burden of proof
  - Court
    - DOJ's position does find some support in D.C. case law
    - BUT contradicts the language of Section 7 and *Baker Hughes*
      - Section 7 requires that the transaction "*substantially* . . .lessen competition," which is different hat the burden the DOJ urges, which would require the merging parties to show that the fix completely replaces the competition lost as a result of the transaction
      - Step 3 of *Baker Hughes* places the ultimate burden of persuasion on the plaintiff
      - The DOJ's version would permit the government to prove its case using the *PNB* presumption and evidence about a transaction that will never happen if the merging parties fail to meet their burden in Step 2 (what it is)
        - The DOJ would never have to show that the restructured transaction was anticompetitive
    - Although the merging parties' position is the better one, the same result obtains in this case under the DOJ's proposed standard

So the court proceeded to analyze the transaction under the DOJ's proposed standard

Horizontal overlap in first-pass claims editing

Court*: Using the DOJ's proposed standard of proof*

1. The DOJ's prima facie case on the original transaction
   - *Relevant market*: The sale of first-pass claims editing solutions in the United States
   - Market shares and participants
     - Change's ClaimsXten: 70%
     - Optum's Claims Edit System: 25%
   - The *PNB* presumption—Easily triggered
     - Combined share: 95%
     - Delta: 3577; postmerger HHI: 8831
   - Explicit theory of anticompetitive harm: Unilateral effects

Parties do not contest

Courts finds that the DOJ has satisfied its burden to make out its prima facie case

Horizontal overlap in first-pass claims editing

Court*: Using the DOJ's proposed standard of proof*

2. Assessing the "fix": Five factors—
   a. Likelihood of divestiture: "Virtual certainty"
   b. Experience of TPG (the divestiture buyer)
   c. Scope of divestiture
   d. Independence of TPG
   e. Adequacy of the purchase price

Horizontal overlap in first-pass claims editing

Court: *Using the DOJ's proposed standard of proof*

2. Assessing the "fix": Five factors—
   a. Likelihood of divestiture: "Virtual certainty"
      - The parties have a definitive purchase and sell agreement
      - All conditions precedent have been satisfied, except for those to be satisfied at closing or by the resolution of this lawsuit
      - The DOJ does not contest
   b. Experience of TPG (the divestiture buyer)
      - One of the world's leading PE firms, with over $100 in assets under management
      - Investment strategy: "We make money from growing the businesses that we invest in"
      - Has significant experience and success with "carve-out" investments
      - Has significant experience in the healthcare industry
        - Has deployed over $24 billion in total equity in the healthcare space
        - Holds healthcare businesses on average for eight years before exiting
      - Intends to invest substantially in the ClaimsXten business
        - Change 2022 budget for ClaimsXten R&D: $14 million
        - TPG plans to increase this to $17 million in 2023, $26 million in 2024, $28 million in 2025, and $30 million in 2026
      - No reason to believe that TPG will not be an adequate divestiture buyer because it is a PE firm

Horizontal overlap in first-pass claims editing

Court*: Using the DOJ's proposed standard of proof*

2. Assessing the "fix": Five factors (con't)—
   c. Scope of divestiture
      - Credits TPG: ClaimsXten is a ""a highly separable asset" capable of succeeding on its own was based on extensive due diligence, including conversations with ClaimsXten customers who explained that the product "was sold very independently to the market"
      - ClaimsXten was sold as a standalone product before Change acquired it in 2017
      - Will include a large team of individuals with extensive experience managing ClaimsXten (including the person who will be CEO of ClaimsXten)
      - 375 people will transfer, including—
        - 70-member clinical content team
        - 60-person software and engineering team
        - 200-person customer-success team
   d. Independence of TPG
      - Independent buyer/independent competitor
      - Testimony that TPG will compete vigorously with UHG in first-pass claims editing solutions
        - No evidence to the contrary

Horizontal overlap in first-pass claims editing

Court*: Using the DOJ's proposed standard of proof*

2. Assessing the "fix": Five factors (con't)—
   e. Adequacy of the purchase price
      - To ensure that the divestiture buyer has enough "skin in the game" to provide it with a sufficient incentive to survive in the business and compete vigorously
      - No evidence to doubt adequacy of the purchase price ($2.2 billion)

Horizontal overlap in first-pass claims editing

Court*: Using the DOJ's proposed standard of proof*

3. Court's conclusion
   - *Under the DOJ's proposed standard*: Rebuts DOJ's prima facie case

     > Indeed, the trial evidence shows—and the Court concludes—that competition in the post-divestiture market for first-pass claims editing will match, and perhaps even exceed, its current levels.

   - *Under the proper standard*: Evidence prevents DOJ from making a prima facie case
   - *Order*: UHG ordered to divest ClaimsXten as proposed
     - *Note:* A court order of divestiture exempts the transaction from the reporting and waiting period requirements of the HSR Act[1]
     - *Query*: If the court rejected the DOJ's claim and found for the defendants, what is the court's jurisdiction to issue the divestiture order?
       - One possibility: The All Writs Act:

         > The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.[2]

[1] HSR Rule 802.70, 16 C.F.R. 802.70.
[2] 28 U.S.C. § 1651(a).

Vertical anticompetitive information conduit

- DOJ's theory: Four steps—
  1. The acquisition will give Optum access to rivals' claims CSI data
  2. Optum will have the incentive to share competitive insights from the CSI data with UHC
  3. Knowing this, UHC's rivals will innovate less because of the fear that UHC will free ride off their claims-related innovations
  4. Less innovation → harm to competition in the relevant insurance markets

Note: This theory depends on how rivals would react *to the possibility that UHG would access and use their CSI to their competitive disadvantage*

NOT how in fact UHG postmerger would use their CSI to competitively disadvantage them

Vertical anticompetitive information conduit

- The evidence
  - On sharing data
    - Evidence not to share or use rival CSI
      - Optum currently has access to rival CSI through its Claims Edit System, which it does share with UHC
        - Contrary to UHG's entire business strategy and corporate culture
        - Would intentionally violate or repeal longstanding firewall policies
        - Would flout existing contractual commitments
        - Would sacrifice significant financial and reputational interests
    - Rival insurance companies testified that—
      - Optum's has strong incentives to comply with the firewalls and protect customers' data, and
      - They trust Optum not to share their data with UHC after the merger
    - The Government offered no conflicting testimony at trial
  - On innovation by rival health insurance companies
    - DOJ failed to adduce evidence that any UHC rival would innovate less out of fear that UHC would access and use their CSI
      - All payer witnesses testified to the contrary

Vertical anticompetitive information conduit

- Court's conclusion: The DOJ failed to make out a prima facie case
  1. Finding:

> [T]he evidence at trial established, and the Court finds, that United will have strong legal, reputational, and financial incentives to protect rival payers' CSI after the proposed merger.[1]

  2. The DOJ failed to present evidence to show—
     - How much incremental rival CSI would UHG obtain as a result of the acquisition that it would not have through its Claim Edit System, *and*
     - That this incremental information would reverse UHG's premerger profit-maximizing incentive to protect its rivals' CSI and not share it with UHC
  3. The DOJ's allegation that rivals would innovate less was—
     - Based on the speculation of its expert witnesses without supporting real-world evidence
     - Contrary to the testimony of all payers at trial

[1] United States v. UnitedHealth Grp. Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867, at *23 (D.D.C. Sept. 21, 2022).

Vertical anticompetitive information conduit

- Court's conclusion: The DOJ failed to make out a prima facie case
  3. Even if payers would innovate less, the DOJ failed to show that the reduced pace of innovation would *substantially* lessen competition:

> The Government rests on the axiomatic truth that payers who are innovating less are also competing less. But it made no attempt to show that the lessening of innovation and competition would be substantial. In fact, the Government's own expert admitted that rival insurers would still innovate after the proposed merger. But establishing that the proposed merger would "lessen innovation" (and thus competition) and that insurers would have "less of an incentive to innovate" (and thus compete) does not establish that the proposed merger would *substantially* lessen competition. The Government failed to offer evidence demonstrating that that standard is met here. But the Court need not rest its holding on this point, as the Government failed to establish other steps in its theory.[1]

Although dictum, this focus of a "substantial" lessening of competition is a significant precedent

[1] United States v. UnitedHealth Grp. Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867, at *6 (D.D.C. Sept. 21, 2022).

Vertical anticompetitive information conduit

- Conclusion: The DOJ failed to make out a prima facie case
  4. Central weakness in the government's case
     - The DOJ presented opinion evidence by economic experts without any real-world support
     - The merging parties presented contrary evidence by knowledgeable and experienced party and rival representatives who worked in the business

> The evidence at trial highlighted weaknesses in each of these steps. But the central problem with this vertical claim is that it rests on speculation rather than real-world evidence that events are likely to unfold as the Government predicts. Governing law requires the Court to "mak[e] a prediction about the future," and that prediction must be informed by "record evidence" and a "fact-specific showing" as to the proposed merger's likely effect on competition. Under this standard, "antitrust theory and speculation cannot trump facts."[1]

[1] United States v. UnitedHealth Grp. Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867, at *6 (D.D.C. Sept. 21, 2022) (quoting United States v. AT&T, Inc., 310 F. Supp. 3d 161, 190 (D.D.C. 2018) (internal citations omitted), *aff'd*, 916 F.3d 1029 (D.C. Cir. 2019)).

Vertical foreclosure

- DOJ's theory: Three steps—
  1. Optum and Change are the only two firms developing an "integrated platform" for payers
  2. If UHG acquires Change, it would control the development of the only integrated platform
  3. UHG would then foreclose access by UHC rivals by withholding or delaying sales of the integrated platform
- The evidence
  - The "integrated platforms" in question are only concepts, not products
  - Optum has never withheld a product from UHC's rivals
    - Optum currently markets all its payment integrity products to UHC's biggest rivals
  - Optum has never sold one version of a product to UHC and a degraded version to other customers
    - Although Optum has piloted some products with UHG to test them before making them commercially available

Vertical foreclosure

- DOJ's expert testimony
  - Dr. Gowrisankaran's "vertical math" shows that UHG could increase its profits by foregoing sales of its integrated platform (once developed) to rivals
    - The profit losses from not selling the platform to UHC rivals would be more than offset by—
    - The profits gains from insurance sales that would shift from UHC's rivals to UHC's (presumably) better priced commercial insurance products
  - BUT

> Dr. Gowrisankaran's testimony, however, is at odds with the unrebutted testimony of various United executives, who stated consistently their view that it is not in United's interests for Optum to abandon its multi-payer strategy. . . . The Court concludes that this testimony [by Andrew Witty, the CEO of UHG]—and the similar testimony of a number of other United executives—is far more probative of post-merger behavior than Dr. Gowrisankaran's independent weighing of costs and benefits.[1]

The DOJ failed to make out a prima facie case

[1] United States v. UnitedHealth Grp. Inc., No. 1:22-CV-0481 (CJN), 2022 WL 4365867, at *27 (D.D.C. Sept. 21, 2022).

Current status

- Final Judgment entered on September 19, 2022
  - Denying DOJ's request for a blocking injunction
  - Ordering UHG to divest ClaimsXten to TPG Capital as proposed
  - Entering final judgment for the defendants
- Parties closed the transaction on October 3, 2022
  - The DOJ did not request a stay pending appeal
- The DOJ filed its notice of appeal on November 18, 2022
  - Normally, the time to appeal is 30 days after the filing of the final judgment
  - 28 U.S.C. § 2701(b) provides a 60-day period when one of the parties is a U.S. agency
  - DOJ files NOA on the last day permitted by Section 2701(b)
- Parties filed a Joint Stipulation of Dismissal of the appeal on March 20, 2023
  - Essentially no docket activity for four months