

MERGER ANTITRUST LAW

LAW-1469
Georgetown University Law Center
Fall 2023

Tuesdays and Thursdays, 11:10 am – 1:10 pm
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READING GUIDANCE

Class 25 (November 28): UnitedHealth/Change (Unit 17)

On Tuesday, we will examine the DOJ's challenge to UnitedHealth Group's \$13 billion acquisition of Change. The complaint, which was filed in the District of Columbia, advanced three theories of anticompetitive harm:

1. *Horizontal*. The combination of Change's ClaimsXten and UHG's Claims Edit System would tend to create a monopoly in the sale of first-pass claims editing solutions in the United States.
2. *Vertical 1*. UHG's control over Change's EDI clearinghouse¹—a key input for UHG competitors—would give UHG the ability and incentive to use rivals' competitively sensitive information (CSI) for its own benefit.
3. *Vertical 2*. 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 case is interesting for the court's detailed treatment of the fix to resolve the horizontal claim and its analysis of the vertical claims, especially its analysis of the UHG's incentives to keep its rivals CSI confidential and not misuse it.

Since it is the end of the semester and you are undoubtedly pressed for time, I will not ask you to read all the materials. At a minimum, read the district court's opinion (pp. 99-156) carefully. You may also find interesting the merging parties' post-trial brief, where they defend the "fix" in detail. On October 3, 2022, after the district court dismissed the complaint on the merits and refused to enter an injunction pending an appeal, the parties closed the transaction. Over a month later, on November 18, the DOJ filed its notice of appeal.² Nothing significant happened in the case until mid-February, when the clerk's office set the briefing schedule with the FTC's brief being due on March 29, 2023. A little over a week before its brief was due, the FTC joined the parties in moving for voluntary dismissal of the appeal.

As you will see when you read the opinion, the district court paid careful attention to the testimony of the business people and largely credited it over what the court found to be the more "theoretical" concerns raised by the DOJ's testifying economists about the transaction. The trial court's willingness to credit the business representatives' testimony over the economists in the

¹ EDI clearinghouses enable the electronic transmission of claims, remittances, and other information between and among healthcare payers and healthcare providers. The information transmitted through an EDI clearinghouse may be very competitively sensitive.

² See Fed. R. App. P. 4 ("The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is: . . . (ii) a United States agency;").

case has been a feature of several recent cases. The excerpts from the T-Mobile/Sprint and Sabre/Farelogix opinions are especially instructive (pp. 167-79). They are short, and you should read them with care.

You should feel free to skim or skip any of the other materials in the required reading.

Email me if you have any questions. I hope you enjoy/enjoyed the Thanksgiving break.

P.S. Do not forget that we have an optional review session on Friday, December 1, from 3:30 pm to 5:30 pm in McD 208. It will be recorded and available on Panopto if you cannot make it.