

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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READING GUIDANCE

Class 24 (November 18): UnitedHealth/Change (Unit 12)

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 examination of UHG's incentives to keep its rivals' confidential information confidential and not misuse it.

As the end of the semester approaches and you are undoubtedly pressed for time, I will not require 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 occurred in the case until mid-February, when the clerk's office established the briefing schedule, with the FTC's brief 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. The court largely credited this testimony 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 that of the economists in the case has been a recurring feature of several recent cases. 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;").

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.

A Postscript: Illumina/GRAIL

The Fifth Circuit’s 2023 decision in *Illumina/GRAIL*³ offers a counterpoint to *UnitedHealth/Change* on the question of how courts and agencies should evaluate fixes offered to resolve anticompetitive concerns. In 2021, Illumina, the only supplier of next-generation sequencing (NGS) technology used to develop multi-cancer early-detection (MCED) blood tests, reacquired GRAIL, a company that Illumina had founded in 2015 to develop MCED tests and later spun off, for approximately \$8 billion.⁴ Because every MCED developer depended on Illumina’s NGS platform, the FTC alleged that reacquiring GRAIL would give Illumina both the ability and incentive to disadvantage rival test developers by raising their costs, delaying access, or withholding technical support, impeding rival innovation and consolidating future market power in the recombined company.

Illumina’s principal defense was its so-called “Open Offer”: a preclosing, irrevocable commitment to supply NGS inputs to all U.S. oncology customers (including MCED rivals) on the same terms and prices available to GRAIL. The offer ran through 2033 and was designed to ensure that Illumina could not foreclose or discriminate against competing test developers. The FTC treated the Open Offer as a remedy—something to be evaluated only after a finding of liability—and, even when considering it as rebuttal evidence, required Illumina to prove that the offer would eliminate the merger’s potential effects and fully restore premerger competition as the DOJ had urged in *UnitedHealthcare/Change*. Applying this stringent “total negation” standard, the Commission rejected the Open Offer and ordered Illumina to divest GRAIL.

On review, the Fifth Circuit adopted an analytically different approach. The court of appeals held that binding commitments, such as the Open Offer, must be evaluated as part of the liability analysis under Step 2 of the *Baker Hughes* burden-shifting framework, rather than being reserved for a later remedy stage. Illumina’s burden at that stage was one of production, not persuasion: it needed to adduce sufficient evidence that, if credited, would support a finding that, in light of the Open Offer, it was no longer probable that the acquisition would substantially lessen competition, not that it would replicate the exact premerger market. The Commission’s insistence that Illumina “eliminate all risk” of competitive harm, the court concluded, “reads the word ‘substantially’ out of Section 7.” While the Fifth Circuit upheld the Commission’s prima facie analysis, it vacated the divestiture order and remanded for reconsideration of the Open Offer and related efficiencies under the correct legal standard. Consistent with *Baker Hughes*, the court emphasized that the burden of persuasion on the ultimate question—whether the

³ *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir.), *vacating and remanding In re Illumina, Inc.*, No. 9401, 2023 WL 2946883 (F.T.C. Mar. 31, 2023).

⁴ During Illumina’s work on prenatal testing, the company unexpectedly detected cancer signals in pregnant women, inspiring the ambition to develop a comprehensive, multi-cancer early detection tool. Illumina created GRAIL to pursue this development. In 2016, Illumina formally spun GRAIL out as an independent company to enable it to seek outside investment and focus on developing its liquid biopsy tests, especially its Galleri multi-cancer early detection product.

acquisition, taking the fix into account, is likely to substantially lessen competition—remains with Complaint Counsel.⁵

Illumina/GRAIL stands in contrast to *UnitedHealth/Change*. Judge Nichols in *UnitedHealth* effectively treated the merger and divestiture as a single “transaction,” finding no violation once the fix was incorporated. The Fifth Circuit reached a similar substantive endpoint on the legal standard—rejecting any requirement that a fix restore premerger conditions—but insisted that such fixes be analyzed as rebuttal evidence within the liability inquiry itself. Together, the two opinions frame the emerging debate over how, and when, courts should “litigate the fix” in modern merger cases.

One other important point should be made about the Fifth Circuit’s opinion. In explaining why the Commission erred in its treatment of the Open Offer, the court drew a distinction between commitments that are unconditionally tied to closing of the transaction—so that they automatically govern the parties’ conduct if the merger is permitted to close—and commitments that operate only as contingent remedies if the merger is allowed to proceed subject to those conditions. *Illumina*’s Open Offer was a binding, unilateral obligation adopted before any liability finding, which would automatically govern *Illumina*’s conduct upon closing. Its effectiveness did not depend on the FTC or a court accepting it as an adequate fix, but only on *Illumina* completing the acquisition of *GRAIL*. Structural “fixes” fall into the same category if they involve a binding divestiture agreement with an identified buyer that would close automatically upon consummation of the main transaction, as in *UnitedHealth/Change*. By contrast, the divestiture proposals in cases such as *Aetna* and *Sysco* were expressly conditional: they would take effect only if the enforcer or the court allowed the merger to proceed subject to those proposed cures, and thus presupposed a favorable liability or clearance decision. In the Fifth Circuit’s view, such contingent commitments properly belong in a remedial inquiry, not in the baseline assessment of the merger’s likely competitive effects.

This distinction has important consequences for how fixes are reviewed. Fixes in the first category—unconditional commitments embedded in the parties’ own agreements and triggered by closing—must be evaluated as part of the liability analysis under *Baker Hughes*, with the government retaining the ultimate burden of persuasion and appellate courts reviewing legal

⁵ The court of appeals was pointed in exactly what *Illumina* must do in Step 2:

To be sure, *Illumina*’s burden was only one of production, not persuasion; the burden of persuasion remained with Complaint Counsel at all times. But to satisfy its burden of production, *Illumina* was required to do more than simply put forward the terms of the Open Offer; it needed to “affirmatively show[]” why the Open Offer undermined Complaint Counsel’s prima facie showing to such an extent that there was no longer a probability that the *Illumina-Grail* merger would “substantially lessen competition.”

88 F.4th at 1058 (emphasis in original; citations omitted). In other words, *Illumina*’s Step 2 burden of production required more than reciting the contractual language of the Open Offer. *Illumina* also had to introduce evidence from which the factfinder could conclude, if that evidence were credited, that the Open Offer would operate in practice so as to undercut the Commission’s prima facie showing that a substantial lessening of competition was reasonably probable. Properly understood, this does not shift the ultimate burden of persuasion away from Complaint Counsel or create a heightened production standard. Rather, it clarifies the subject of *Illumina*’s production burden: *Illumina* must produce evidence both of the fix and of its expected operation on the competitive concerns identified at Step 1. The panel’s “affirmatively show” language has been invoked by the FTC as if it implied a burden of persuasion on respondents, but the better reading, consistent with the court’s express reaffirmation of *Baker Hughes*, is that the ultimate burden of persuasion on the likelihood of a substantial lessening of competition remains with the government.

errors in that evaluation de novo. Fixes in the second category—contingent packages that become operative only if the merger is approved subject to those conditions—are treated, if at all, within the agency’s or court’s remedial discretion after a violation is found, where the enforcer may demand stronger assurance that the remedy fully cures the harm and reviewing courts generally accord greater deference to the choice and sufficiency of the remedy.

After the Fifth Circuit handed down its decision in December 2023, Illumina announced it would divest GRAIL and chose not to pursue further appeals against the FTC’s order. This was a clear shift in corporate strategy. A significant change in management had occurred while the case was pending on appeal. Activist investor Carl Icahn had led a proxy contest that resulted in the removal of board chair John Thompson and the resignation of CEO Francis deSouza. Jacob Thaysen was appointed as the new CEO in September 2023, and the new leadership team indicated a willingness to divest GRAIL and focus Illumina’s efforts on its core business instead of continuing with protracted litigation. Upon reviewing the Fifth Circuit’s opinion, Illumina formally stated it would not pursue further appeals in the U.S. or Europe and would proceed with the divestiture of GRAIL through a third-party sale or capital markets transaction. Illumina completed the divestiture of GRAIL in June 2024, spinning off GRAIL as an independent public company trading under the symbol “GRAL” on the Nasdaq. Illumina retained a minority stake of about 14.5% in the new, independent GRAIL. Following the successful spin-off, the FTC dismissed its administrative complaint against Illumina in August 2024.⁶

As always, if you have any questions, please send me an email.

P.S. Please note that we have an optional review session scheduled for Tuesday, December 2, from 3:30 pm to 5:30 pm. I will let you know when I get a room. The session will be recorded and available on Panopto if you are unable to attend.

⁶ [Order Dismissing Complaint, Illumina](#), No. 9401 (F.T.C. July 30, 2024).