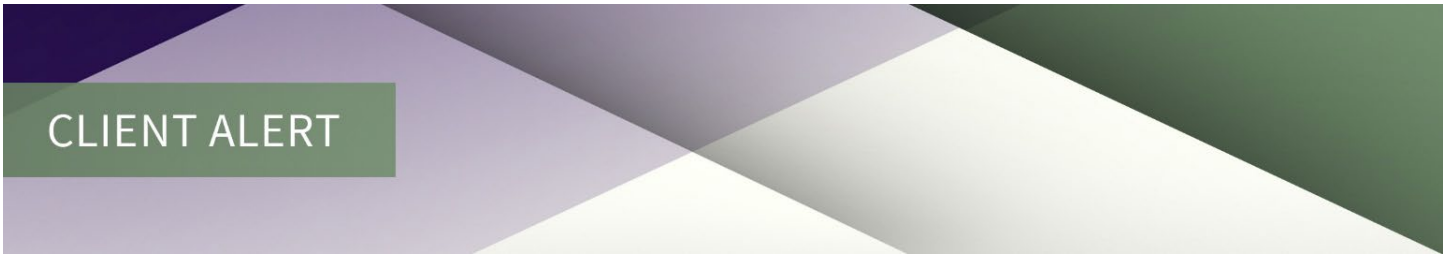

DOJ Appeals Loss to UHG/Change: "Litigating the Fix" and the Prima Facie Case Are Up for Appellate Clarification

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AUTHORS

William H. Rooney | Wesley R. Powell | Jeffrey B. Korn | Agathe M. Richard
E. Claire Brunner

On September 19, 2022, U.S. District Judge Carl Nichols declined to block the proposed acquisition of Change Healthcare, Inc. ("Change") by UnitedHealth Group ("UHG") in a suit brought by the U.S. Department of Justice (the "Government") under Section 7 of the Clayton Act. The Government has appealed, so we may receive clarification of important legal issues raised by the decision of the district court.

The Government advanced both horizontal and vertical theories of harm against the merger. The horizontal theory related to UHG's "fix" that had been rejected by the Government. Following the parties' Hart-Scott-Rodino ("HSR") notifications, UHG proposed the divestiture of Change's horizontally overlapping first-pass claims editing business (ClaimsXten) to private equity firm TPG Capital ("TPG"). The Government rejected that divestiture as inadequate, so the parties proposed the same divestiture to the court. That raised the important legal issue of the standard by which a court assesses the adequacy of a divestiture that was not included in the HSR notification and was rejected by the reviewing agency as insufficient to preserve competition.

For the vertical theory, the Government argued that the proposed merger would provide UHG with the "ability and incentive" to obtain the competitively sensitive information ("CSI") of rival insurers from Change's Electronic Data Interchange ("EDI") clearinghouse. The Government further alleged that, if UHG were to obtain such CSI, rival insurers

would reduce innovation in the relevant markets (the sale of commercial health insurance to national accounts and large group employers), and UHG would withhold innovations from rivals that would otherwise have been provided.

The district court rejected both the horizontal and vertical theories of harm. Although briefing on the Government's appeal has not yet begun, the standard for "litigating the fix" and whether a prima facie case requires factual evidence of probability, in addition to the acquiring company's "ability and incentive" to lessen competition, are likely to be presented for appellate decision.

Legal Standard for Defendant "Fixes"

In assessing the adequacy of the divestiture to TPG, the court considered whether the "transaction" at issue was the transaction that the parties notified to the Government, which included ClaimsXten, or the transaction that the defendants presented for review by the court (which did not include the business to be divested). The court thus framed the question as "*[w]ho* bears the burden of proving the competitive implications of the divestiture, *when* must that party satisfy its burden, and *what* exactly must that party prove?"[1]

The Government argued that it can meet its prima facie burden by demonstrating the statistical market shares of the combined entity in first-pass claims editing *before the divestiture*.[2] The burden would then shift to the defendants to prove that the divestiture "will replace the merging firm's competitive intensity" and "maintain the premerger level of competition."[3] The court summarized, "As the Government would have it, UHG must prove that the divestiture will maintain the *same* level of competition that existed in the pre-merger market."[4]

The defendants argued that the transaction that is being challenged does not include ClaimsXten and that the Government retains the burden of demonstrating that the transaction without the divested assets substantially lessens competition in the relevant market. "UHG contends that the Government is at war with a post-merger world that will never come to be."[5]

The court agreed "with UHG that the Government's proposed standard (at least the strongest version)—which admittedly finds support in this District's case law—contradicts the text of Section 7 and the *Baker Hughes* framework."[6] Further, the court stated:

1 Slip op. at 17 (emphasis in original).

2 Slip op. at 16–17.

3 Slip op. at 17–18.

4 Slip op. at 18–19 (emphasis in original).

5 Slip op. at 17.

6 Slip op. at 18.

> [T]he relevant transaction here is the proposed acquisition agreement *including* the proposed divestiture. … [T]reating the acquisition and the divestiture as separate transactions that must be analyzed in separate steps allows the government to meet its *prima facie* burden based on a fictional transaction and fictional market shares. And here, without the benefit of the market-share presumption, the Government cannot meet its *prima facie* burden of proving that the combined effect of the proposed merger and the divestiture is likely to substantially lessen competition.[7]

Nonetheless, the court found that "the evidence demonstrates that the divestiture will restore the competitive intensity lost because of the acquisition. For purposes of the remaining analysis, then, the Court proceeds under the Government's proposed standard."[8]

The Government will likely contest that factual finding on appeal and argue that, if its legal standard had been adopted and properly applied, the divestiture would not have restored competition *ex ante*. The court of appeals may thus provide important guidance on the legal standard that governs the judicial assessment of defendant-proposed divestitures that were not part of the HSR notification and were rejected by the Government during the HSR review.

Whether "Ability and Incentive," Without Proof of Probability, Are Adequate to Establish a Prima Facie Case

The Government's vertical claim pivoted on UHG's alleged "ability and incentive" to obtain the CSI of rivals through the acquired EDI clearinghouse of Change and thereby to reduce rivals' incentive to innovate. In addition, the Government asserted that UHG would also acquire the ability and incentive to withhold its own innovations from rivals that its subsidiary, Optum, would otherwise offer:

> First, the Government argues that United's control over Change's EDI clearinghouse would give United the ability and incentive to use rivals' CSI for its own benefit. Second, the Government argues that United's control over Change's EDI clearinghouse would give United the ability and incentive to foreclose rivals' access to key inputs on competitive terms by withholding innovations, thereby raising those rivals' costs. The effect of these actions, says the Government, would be to substantially lessen competition in the markets for national accounts and large group commercial health insurance.[9]

The court rejected the Government's vertical case primarily because of a lack of evidence of the *probability* that UHG would *in fact* engage in the conduct that the Government attributed to UHG by its "ability and incentive" analysis:

7 Slip op. at 20 n.5.

8 Slip op. at 20.

9 Slip op. at 32.

> [T]he 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. *AT&T*, 310 F. Supp. 3d at 190–92 (quotations omitted). Under this standard, "antitrust theory and speculation cannot trump facts." *Id.* at 190 (quotations omitted).

The antitrust agencies regularly rely on the merging parties' "ability and incentive" to lessen competition. The court rejected that reliance as constituting only "theory and speculation" and required "record evidence" that such conduct was probable and that its probable effect would be to lessen competition substantially. Such evidence was found wanting:

> Each step of the Government's argument must be true for its theory to work, yet each step suffers from serious flaws. The most serious flaws, however, are the failures to prove (1) that United is likely to misuse the data in the ways the Government contends and (2) that rival payers will innovate less as a result.[10]

As to the Government's second theory, the court again found a lack of evidence: "[T]he evidence did not establish that Optum will likely withhold Transparent Network or Real-Time Settlement (if either becomes a product) from external payers. The evidence established, and the Court finds, that Optum has never withheld a product from external payers—in fact, it currently markets all of its payment integrity products to [UnitedHealthcare's] biggest rivals."[11]

In short, the UHG case raises at least two key questions that the Government is likely to argue warrant reversal of the district court opinion: the proper legal standard for litigating a defendant-proposed "fix" and whether factual evidence of probability, in addition to a "showing" of an ability and incentive to lessen competition, is necessary for the Government to establish a prima facie case.

[10] Slip op. at 53.

[11] Slip op. at 54.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

William H. Rooney
212 728 8259
wrooney@willkie.com

Wesley R. Powell
212 728 8264
wpowell@willkie.com

Jeffrey B. Korn
212 728 8842
jkorn@willkie.com

Agathe M. Richard
212 728 8190
arichard@willkie.com

E. Claire Brunner
202 303 1004
ebrunner@willkie.com