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Federal Court Denies Antitrust Division's Challenge to UnitedHealth Acquisition of Change Healthcare

Earlier this week, the U.S. District Court for the District of Columbia denied the Department of Justice's motion to enjoin UnitedHealth Group Inc.'s proposed acquisition of Change Healthcare Inc., a deal announced in January 2021.

Change operates a clearinghouse exchanging claims data between health insurers and healthcare providers, and also provides claims editing software and services to insurers. UnitedHealth is the largest health insurer in the United States and offers a competing claims editing solution.

In February 2022, the Antitrust Division challenged the proposed acquisition, alleging the transaction would (1) eliminate horizontal competition between Change and UnitedHealth for the sale and provision of claims editing solutions, (2) give UnitedHealth access to and the incentive to misuse other insurers' claims data, stifling competition and limiting innovation in the sale of health insurance to national accounts and large group employers, and (3) give UnitedHealth the ability and incentive to withhold or delay new Change innovations from competing health insurers. In January, soon before the Division filed its complaint, UnitedHealth announced its intent to divest Change's claims editing business, and, prior to trial, UnitedHealth entered into a definitive agreement to sell the business to TPG Capital. Although the divestiture eliminated the horizontal overlap between the parties, the Antitrust Division argued that the divested business would nonethless be weaker and less competitive than it is today.

Judge Nichols' practical, thorough opinion squarely rejected each of the Division's claims of competitive harm. With respect to the Division's horizontal claim, the Court concluded that the Division failed to show that the proposed merger is likely to substantially lessen competition in the relevant market because the trial evidence shows that competition for claims editing — *accounting for the divestiture* — will match, and perhaps even exceed, current levels.

The Court further rejected the Division's data misuse concerns as too speculative, noting that the potential competitive harm alleged is dependent on UnitedHealth "uproot[ing] its entire business strategy and corporate culture; intentionally violat[ing] or repeal[ing] longstanding firewall policies; flout[ing] existing contractual commitments; and sacrific[ing] significant financial and

reputational interests," and citing a dearth of "real-world evidence that United's rivals are likely to innovate less out of fear that United will poach their data." The Court similarly dismissed the concern that UnitedHealth will have the ability and incentive to withhold or delay future Change innovations, noting that (1) the products that UnitedHealth allegedly would be incented to withhold are merely conceptual, not actual products, and (2) withholding such innovations would be inconsistent with UnitedHealth's past practices.

Although the Division may appeal, and could even seek to enjoin the consummation of the deal pending appeal, the Court's decision demonstrates the challenges that the U.S. antitrust agencies face as they pursue their stated goal of more aggressive enforcement, particularly with respect to non-horizontal theories of competitive harm. For merging parties, the case and decision demonstrate both the challenges of the current regulatory environment for M&A — greater potential for prolonged regulatory delay (in this case nearly two years) and increased litigation risks — and that resolute transacting parties willing to test the agencies' non-traditional theories of harm may prevail in the courts.

The decision is especially notable in view of the agencies' recent statements, including remarks made by Deputy Assistant Attorney General Andrew Forman of the Antitrust Division earlier this week, which reference a heightened bar for accepting parties' divestiture and other settlement proposals. In this case, the parties successfully "litigated the fix," persuading Judge Nichols that the proposed divestiture — which the Antitrust Division had rejected as inadquate — sufficiently addressed the competition concerns of an otherwise unlawful combination. The decision is a reminder that the federal courts may have the last word on merger remedies.

Given the current regulatory environment, it is more important than ever that parties get legal advice on antitrust analysis, risk and strategy at the very outset of any possible transaction. Thoughtful and well-executed regulatory strategies will shorten investigations and maximize the chances of a deal's successful closing.

Ilene Knable Gotts
Nelson O. Fitts
Damian G. Didden
Christina C. Ma