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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It is the end of the semester, and I know that you are pressed for time. As much as I would like you to read the reading materials, a careful read of this guidance and the class notes will suffice.

READING GUIDANCE

Class 25 (November 19): UnitedHealth/Change and Illumina/GRAIL (Unit 13)

On Thursday, we will examine the DOJ's challenge to the $13 billion acquisition of Change Healthcare (Change) by UnitedHealth Group (UHG) (slides 2-11). The complaint, which the DOJ and the States of Minnesota and New York filed in the District of Columbia (slide 12), advanced three theories of anticompetitive harm (slides 13-14):

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 clearinghouse[1]—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 commercial health insurance.

The case is interesting for the court's detailed treatment of the fix to resolve the horizontal claim (slides 18-29) and its analysis of the vertical claims (slides 30-37), especially its examination of UHG's incentives to keep its rivals' confidential information confidential and not misuse it. UHG reinforced its existing firewall policies with contractual commitments to Change's clearinghouse customers to maintain firewall protections and to make innovations developed using Change's data available to the market. Keep these commitments in mind when we turn to *Illumina/GRAIL*, the second case study for this class.

On September 19, 2022, the district court entered judgment for the defendants, denied the government's request for a permanent injunction, and ordered UHG to divest ClaimsXten to TPG Capital as proposed (slides 15, 29). The parties closed the transaction on October 3, 2022, and TPG completed its acquisition of ClaimsXten shortly afterward.[2] Over a month later, on

[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. Change's clearinghouse handles an estimated one in three U.S. healthcare transactions. Its importance became evident in February 2024, when a ransomware attack on Change disrupted claims and prescription processing nationwide and exposed data on an estimated 192.7 million people.

[2] TPG paid about $2.2 billion for ClaimsXten. In April 2023, it rebranded the business as Lyric, which continues to sell the ClaimsXten claims editing products.

November 18, the DOJ filed its notice of appeal.[3] Nothing significant occurred in the case until mid-February, when the clerk's office established the briefing schedule, with the government's opening brief due on March 29, 2023. On March 20, nine days before the brief was due, the DOJ and the two states joined the defendants in a stipulation voluntarily dismissing the appeal (slides 38-39).[4]

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 the concerns raised by the DOJ's testifying economists, twice invoking the principle that "antitrust theory and speculation cannot trump facts" (pp. 131, 150; slides 16-17, 34, 37). 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 (slide 40). 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.

Illumina/GRAIL

The Fifth Circuit's 2023 decision in *Illumina/GRAIL*[5] 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 (slides 42-50).[6] 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 (slides 54-55). The FTC challenged the acquisition in an administrative complaint and also sued in federal court for a preliminary injunction, but it dismissed the federal action after the European Commission accepted a referral under Article 22 of the EU Merger Regulation—a controversial assertion of jurisdiction, since GRAIL had no EU sales—because EU law then barred Illumina from closing while the European review was pending. Illumina closed anyway in August 2021, while both the FTC and the European proceedings were pending, and held GRAIL as a separate subsidiary. The EU General

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[3] *See* Fed. R. App. P. 4(a)(1)(B)(i) ("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: (i) the United States; . . . .").

[4] The DOJ's next challenge to a UHG acquisition ended differently. In November 2024, the DOJ and four states sued to block UHG's $3.3 billion acquisition of Amedisys, a home health and hospice provider. In August 2025, the parties settled on terms requiring the divestiture of at least 164 home health and hospice locations, and the court later approved the settlement. *See* United States v. UnitedHealth Grp. Inc., No. 1:24-cv-03267 (D. Md. filed Nov. 12, 2024).

[5] 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).

[6] 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. GRAIL was incorporated as a separate entity in January 2016, and in February 2017 Illumina gave up control, spinning GRAIL off with a 12% retained stake to enable it to seek outside investment and focus on developing its liquid biopsy tests, especially its Galleri multi-cancer early detection product.

Court upheld the European Commission's jurisdiction in July 2022, and the European Commission later fined Illumina for closing before clearance (slides 51-52).

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. A majority of MCED developers accepted the Open Offer or equivalent agreements during the litigation, although some rivals argued that behavioral commitments were inferior to structural relief and questioned whether the offer could be monitored and enforced (slides 56-58). The administrative law judge dismissed the complaint in September 2022. He found that rival MCED tests were too far from commercialization to assess Illumina's incentive to foreclose them and that Complaint Counsel had not shown that the Open Offer would fail to protect rivals that did emerge—in effect requiring the government to account for the fix in its prima facie case (slides 59-63). The Commission reversed. It held that the merger did not have to increase both Illumina's ability and its incentive to foreclose rivals, found that the merger gave Illumina, which already had the ability, the incentive to do so, and treated the *Brown Shoe* vertical factors as an independent basis for its prima facie case (slides 64-68). The Commission 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 *UnitedHealth/Change*. Applying this stringent "total negation" standard, the Commission rejected the Open Offer and ordered Illumina to divest GRAIL. It found the offer inadequate because it did not adequately address degraded service, support, or access to innovation, preferential treatment of GRAIL, or the strategic timing of new product releases; because violations would be difficult to detect and enforce; and because the offer would expire before the MCED market fully developed (slides 69-70).

On review, the Fifth Circuit adopted a different analytical 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 (slides 75-76). 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 court held that Illumina did not have to show that the Open Offer would entirely negate the merger's anticompetitive effects. Quoting Judge Nichols in *UnitedHealth*, the court explained that such a standard "would effectively erase the word 'substantially' from Section 7." While the Fifth Circuit upheld the Commission's prima facie analysis (slide 71), it vacated the divestiture order and remanded for reconsideration of the Open Offer under the correct legal standard. It also held that substantial evidence supported the Commission's rejection of Illumina's claimed efficiencies under the requirement that a cognizable efficiency be (1) merger specific, (2) verifiable in its existence and magnitude, and (3) likely to be passed through, at least in part, to consumers. Illumina, for example, never put forward a model for calculating the benefit of eliminating double marginalization (slide 77). Consistent with *Baker Hughes*, the court emphasized that the burden of persuasion on the ultimate question—whether the acquisition, taking the fix into

account, is likely to substantially lessen competition—remains with Complaint Counsel (slide 78).[7]

The Fifth Circuit's affirmance of the Commission's prima facie case is as significant as its treatment of the fix. The court upheld a relevant market for the research, development, and commercialization of MCED tests even though GRAIL's Galleri was the only test then on the market. Requiring hard metrics of substitutability where only one product had been commercialized, the court explained, would prevent research-and-development markets from ever being recognized and would frustrate Section 7's purpose of arresting anticompetitive tendencies in their incipiency (slide 72). On ability and incentive, the court rejected Illumina's argument that the merger had to increase its ability to foreclose rivals: Illumina was already the monopoly supplier of NGS platforms, and requiring such a showing would effectively exempt from Section 7 transactions involving monopoly input suppliers. Increasing Illumina's stake in GRAIL from 12% to 100% significantly increased its incentive to foreclose GRAIL's rivals. The court rejected Illumina's argument that there were no sales to divert because Galleri was the only test on the market, and it agreed with the Commission that the risk of reputational harm was not as great as Illumina claimed, because Illumina could foreclose rivals in subtle ways that would not arouse its other customers' suspicion (slide 73). The court also upheld the Commission's separate finding of a likely violation under the *Brown Shoe* vertical factors, noting that there is no precise formula for applying them and that at least four factors supported the Commission's conclusion (slide 74). In these respects, the Fifth Circuit largely validated the Commission's aggressive approach to vertical mergers, including its use of research-and-development markets, the *Brown Shoe* factors, and the protection of nascent competition (slide 79).[8]

Illumina/GRAIL builds on *UnitedHealth/Change* more than it departs from it. Judge Nichols in *UnitedHealth* effectively treated the merger and divestiture as a single "transaction," so that the

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[7] 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.

[8] The court also rejected Illumina's constitutional challenges to the FTC proceeding: that Congress unconstitutionally delegated legislative power by letting the FTC choose between administrative and federal-court proceedings; that the FTC exercised executive power while insulated from presidential removal; that combining prosecutorial and adjudicative functions in the FTC violated due process; and that subjecting the merger to the FTC's administrative process rather than a federal-court action violated equal protection. The court found these challenges foreclosed by precedent or otherwise without merit (slide 78).

government had to prove that the merger, as modified by the fix, was likely to substantially lessen competition. He found, however, that the evidence led to the same result under the government's approach, which treats the fix as rebuttal evidence that must replace the competitive intensity lost in the merger, and he analyzed the divestiture under that approach (slides 20-23). In doing so, he considered five factors: the likelihood that the divestiture would occur, the experience of the divestiture buyer (TPG), the scope of the divestiture package, the buyer's independence from the merged firm, and the adequacy of the purchase price (slides 24-28). The Fifth Circuit reached the same 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 debate over how, and when, courts should "litigate the fix" in modern merger cases (slide 40).

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 (slide 75). On this reasoning, structural "fixes" should 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 Fifth Circuit read the divestiture proposals in *Aetna* and *Sysco* as 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. The court did not say where such contingent proposals belong, however, and the line between the two categories may be thinner than it appears. TPG's purchase of ClaimsXten was itself contingent on the closing of UHG's acquisition of Change, and the court in *Sysco*, which you read in Unit 8, evaluated the proposed divestiture as rebuttal evidence before enjoining the merger.

In my view, 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 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.

Since the Fifth Circuit's decision, other courts have continued to litigate fixes under its framework. In *Tempur Sealy*, in the Unit 12 materials, the court relied on Illumina, holding that a fix need not restore the premerger status quo but need only prevent substantial harm to competition. In *Kroger/Albertsons*, the court cited the same standard but found the proposed divestiture inadequate. In November 2025, the court in *GTCR/Surmodics* accepted a divestiture

that the FTC had rejected.[9] The Fifth Circuit also relied on the district court's treatment in *Microsoft/Activision* of agreements made before trial, a case we will take up in Class 26 (slide 80).[10]

After the Fifth Circuit handed down its decision in December 2023, Illumina announced it would divest GRAIL and chose not to seek further review of the Fifth Circuit's decision. This was a clear shift in corporate strategy. A significant management change 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 CEO in September 2023, and the new leadership team indicated a willingness to divest GRAIL and focus Illumina's efforts on its core business rather than continue protracted litigation. Illumina had committed to divest GRAIL if it lost either in the Fifth Circuit or in its jurisdictional appeal before the EU Court of Justice, and the European Commission had ordered a divestiture in October 2023. Illumina said it would carry out the divestiture through a third-party sale or capital markets transaction, consistent with the Commission's order. 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.[11] Illumina's European appeal continued, however. On September 3, 2024, more than two months after the spin-off, the EU Court of Justice held that the European Commission had lacked jurisdiction to review the acquisition. The Commission then withdrew its decisions in the matter, including the €432 million fine it had imposed on Illumina for closing the acquisition before clearance (slides 51-53).

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 1, 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.

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[9] *See* FTC v. Tempur Sealy Int'l, Inc., 768 F. Supp. 3d 787, 857-60 (S.D. Tex. 2025); FTC v. Kroger Co., No. 3:24-cv-00347-AN, 2024 WL 5053016 (D. Or. Dec. 10, 2024); FTC v. GTCR BC Holdings, LLC, No. 1:25-cv-02391 (N.D. Ill. Nov. 10, 2025) (oral ruling).

[10] FTC v. Microsoft Corp., 681 F. Supp. 3d 1069 (N.D. Cal. 2023), *aff'd*, 136 F.4th 954 (9th Cir. 2025). The Ninth Circuit found it unnecessary to decide whether the agreements were proposed remedies.

[11] Order Dismissing Complaint, Illumina, No. 9401 (F.T.C. Aug. 15, 2024).