

Litigators of the Week: The Kirkland Team Who Helped UnitedHealth Beat Back DOJ's Antitrust Challenge to a Health-Tech Deal

By Ross Todd
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Jonathan Kanter, the head of DOJ's Antitrust Division, told a Senate committee this week that the department "will litigate more merger trials this year than in any fiscal year on record."

Will that mean they lose more merger trials than in any other year?

This week, in what The Wall Street Journal called "an early blow to stepped-up antitrust enforcement by the Biden administration," U.S. District Judge Carl Nichols in Washington, D.C., turned back the DOJ's challenge to a \$13 billion deal UnitedHealth Group Inc. entered to acquire health technology company Change Healthcare Inc. The judge wrote the government "made several allegations that, if proven, would raise serious questions about whether the proposed merger violates Section 7 of the Clayton Act." But after weighing the evidence presented at a bench trial in August, he found the government hadn't made good on that "if proven" part.

This week's Litigators of the Week are the leaders of UnitedHealth's defense team: **Craig Primis**, **Matt Reilly** and **Winn Allen** of **Kirkland & Ellis**.

Litigation Daily: Who was your client and how did this matter come to the firm?

Matt Reilly: Our client was UnitedHealth Group, which is made up of both UnitedHealthcare (a commercial health-insurance company) and Optum (a healthcare-services company). We joined this matter during the investigation phase, about four months before the DOJ filed suit. It came to us thanks to the trust and confidence of **Chris Zaetta**, Optum's Chief



(L-R) **Craig Primis**, **Matt Reilly** and **Winn Allen** of **Kirkland & Ellis**.

Legal Officer, and (after he joined the company) **Rupert Bondy**, the Chief Legal Officer of UnitedHealth Group. Chris and Rupert knew this case had a likelihood of being litigated in light of the current regulatory environment, and they wanted to be fully prepared to take the case to trial.

Who was on your team and how did you divide the work?

Craig Primis: We were lucky to work with a great cross-firm team on this one. On the UHG side, we had a strong partnership with **Hogan Lovells**, who has significant experience in this space. For Change, we had a fantastic relationship with **Dave Gelfand** at **Cleary Gottlieb** and **Sara Razi** at **Simpson Thacher**, both of whom are tremendous lawyers and were great partners throughout the entire process. Within Kirkland, we leveraged a cross-functional team of antitrust specialists (such as **Rich Cunningham** and **Jeff Ayer**) with generalist litigators (such as partners **Alexia Brancato** and **T.J. McCarrick**). In terms of dividing the work, Kirkland took the overall lead on the litigation, but we closely collaborated with all the other firms, and of course Dave and Sara handled all the witnesses from Change.

For those of us who aren't conversant in insurance: What are claims editing and electronic data interchanges—and what was the government saying would happen in the market surrounding those innovations via this deal?

Winn Allen: Claims editing is essentially a software product used by insurers to analyze a healthcare claim, determine whether the claim complies with the insurer's coverage policies, and ultimately help speed the process of deciding whether a claim should be paid or rejected. Both Change and Optum currently offer claims-editing products, and the government alleged that the merger would create a monopoly in the market for first-pass claims editing solutions. As the court recognized, though, that concern was solved by the divestiture: UHG has agreed to divest Change's claims editing business to a well-positioned buyer, thus preserving competition in the market.

Think of electronic data interchanges (or EDI) as the pipes that connect healthcare providers with insurers. Those pipes are used to transmit claims, remittances, and other information back and forth. The EDI market is extremely competitive. The government alleged that, by acquiring Change's EDI clearinghouse, UHG would gain access to its rivals' claims data, analyze that data, pass competitive intelligence to its insurance subsidiary (UnitedHealthcare), which in turn would cause rival insurers to innovate less. That theory ran into a number of hurdles at trial, including that Optum has a long history of protecting competitor data, has no incentive to misuse that data, and the absence of any evidence showing that competitors would be less likely to innovate.

What were your trial themes and how did you try to drive them home with the judge?

Primis: First, this transaction is pro-competitive. The goal of this combination is to eliminate administrative waste in the healthcare system, reduce costs, and improve care. Second, the divestiture is extraordinarily strong and resolves any horizontal concerns. And third, antitrust theory and speculation cannot trump real-

world facts: The record evidence about how Optum runs its business and the lack of industry opposition are more important than the hypothetical scenarios advanced by the government's expert witnesses.

Kirkland trial strategy 101 is to derive your themes early and emphasize them at every step in the process. That's what we did here: We developed our themes very quickly after we were retained, and we used every opportunity—every motion, hearing, deposition, expert report, etc.—to emphasize those themes and drive them home. That resulted in a cohesive, consistent trial record built on credibility and common-sense truths.

How much of your case revolved around UHG's structure and the arms-length relationship between UnitedHealthcare and Optum?

Allen: Most of the trial focused on this issue. There were two key realities about UHG's business that were critical to understand. First, Optum's business has always been fiercely multi-payer: Optum for years has provided services to rival insurers that compete with UnitedHealthcare, and in the course of doing so, Optum has not misused competitor data or surreptitiously provided that data to UnitedHealthcare to try to gain a competitive advantage. The company has a long history of protecting that information, including robust corporate policies and firewalls and an institutional culture that protects customer data.

Second, UHG, as an enterprise, has no incentive to engage in the type of anticompetitive conduct that the complaint alleged. UHG is most successful as an enterprise when Optum maximizes its business with third parties, including third-party insurers that compete directly with UnitedHealthcare. If Optum misused customer data, it would lose that business and UHG would suffer as an enterprise, not to mention the legal, contractual, and reputational consequences that could stem from such misuse. The government's theory, in other words, simply didn't line up with how UHG approaches its business in the real world.

And how much had to do with the divestiture part of the deal?

Reilly: As soon as we got involved with this matter, we understood the divestiture would be a key part of the case, and we invested significant time and resources in identifying an asset package and a buyer that we were confident would meet approval. Given that work, we were able to let the facts do all the talking at trial: Change's claims editing business is being divested to an experienced buyer (TPG) that has significant resources and a stated intention to invest substantially and compete aggressively in the marketplace. In addition, the scope of the divestiture is exceptionally strong, including a team of around 375 people with deep experience with the product.

Here the government was claiming both horizontal and vertical theories of harm. What sorts of complications did that provide for you when putting on your defense at trial?

Primis: The horizontal and vertical issues were discrete enough that we were able to effectively delineate our trial presentation between the two. The trial schedule worked out so that we could isolate individual trial days and devote those entirely to divestiture-related issues, which I think helped both the court and the parties. The government tried to use third-party witnesses to make the case that combining the two claims-editing businesses would be anti-competitive, but because we never intended to combine the two businesses, we were able to use those witnesses to show that customers had no real objection to the divestiture and that rivals didn't support the vertical theories.

What's important in this decision for your M&A colleagues?

Reilly: It's no great secret that antitrust regulators have announced their intention to settle less and litigate more in the coming years. You have to approach any deal with the understanding that your chances of ending up in court opposite an antitrust regulator are higher than ever. For any deal that raises horizontal issues or vertical theories that are of interest to the teams at DOJ

or the FTC, you need to structure the deal from day one with an eye toward possible litigation. While the regulators have a lot of advantages in these cases, they are winnable, especially if you plan for litigation from the start.

What message do you hope government antitrust enforcers take away from it?

Allen: We don't have any particular message for anti-trust enforcers; we take these cases as we find them. DOJ litigated this case professionally, and we appreciated the tone and tenor of the relationship we had with them.

What will you remember most about this matter?

Reilly: The friendships and partnerships we forged with the in-house team at UHG. You cannot imagine a better group of people to work with. You can only be successful in something like this if you are fortunate enough to have clients who are fully engaged and supportive of the trial team. The UHG team took that to an entirely new level with the dedication they had to this matter. That included Chris and Rupert, as well as **Bill Otteson** and **Libby Soderberg** at Optum.

Primis: Seeing our younger lawyers take full advantage of the opportunities cases like this present. Younger partners and associates on our team prepped senior executives up to the CEO for their trial testimony, they handled witnesses in court, and they drafted incredible briefs on tight deadlines. Those opportunities come along only so often, and we made a concerted effort to spread them around to help develop our next generation of talent.

Allen: The dedication of the entire trial team. This case went from complaint to trial in under six months. That was only possible because of the tireless work of an exceptional group of lawyers and a dedicated, hard-working in-house team at UHG. The hours were long, but the opportunity to work on meaningful, impactful litigation is what makes this job so rewarding. This was also an exceptionally fun group of people to try a case with: We got our work done, but we had plenty of fun along the way.