Testing the Boundaries of Section 7 and Hart Scott Rodino: UnitedHealth/Amedisys

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On November 12, 2024, the Antitrust Division sued to block the merger of UnitedHealth and Amedisys. The combined entity would have "30 percent or more of the home health or hospice services [markets] in eight states." Complaint ¶7 (only four states sued). The Complaint also includes a cause of action under Section 7A of the Clayton Act, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 USC 18a, that alleges Amedisys violated the HSR Act by failing to provide a statement of noncompliance along with its certification in December 2023 notwithstanding the fact they continued to produce documents and information after that date and did not and have not closed their transaction. This case is basically an attempt to revitalize the now discarded theory from Philadelphia National Bank that simply showing a "large" market share is sufficient to establish a violation of Section 7. And it will likely fail.

A Problem with Market Share

The Complaint alleges that the combined entities would have over 30% of the market, and that they are two of the three largest. ¶¶7, 29.[1] This allegation sounds potentially meaningful until you do the math.

At $2.2 billion and $2.3 billion in revenues, respectively, Amedisys and UnitedHealth would have approximately the same market share, or about 15% each. ¶¶29-30. Since they are the first and third largest competitors in the market, no other competitor would have more than 15%. To find the smallest number of competitors you can have based on those allegations, you divide the 70% remaining by 15%, and you get around 5 competitors of about the same size. If you have more than 5 competitors, the market becomes less concentrated. Worst case scenario, this is a 7-6 merger.[2]

The main problem with the Complaint is that the allegations only go to how much UnitedHealth and Amedisys compete against each other. The Complaint alleges almost nothing about the other competitors. It could very well be that UnitedHealth competes vigorously against the other five competitors as well. It's simply not plausible that, because they compete aggressively against each other, or have a "30% market share," the merger will harm competition because the remaining competition, which is not addressed, could be sufficient. You can have atomistic markets where two competitors compete vigorously against each other for any number of reasons, but any attempted price increase by a merged entity would be defeated by the remaining competition.

And if the geographic market is in fact local, a large national footprint would not be necessary to provide services within that market, making it plausible that small local providers do in fact compete

with the larger providers. If the allegation that "[m]any of Defendants' smaller, local competitors lack the resources to invest in larger workforces and programs, such as local quality improvement coordinators, that create these advantages," ¶39, is true, one would expect the market shares to be much higher and the geographic market much larger. Only larger competitors would be able to service these markets. The small geographic market allegation, ¶58, therefore contradicts the suggestion that large national providers only compete against other large national providers.

DOJ also acknowledges there is presently price competition in the market. "Amedisys, for example, acknowledges that rates with Medicare Advantage plans are 'driven down by price competition.'" ¶42. The vast majority of hospice care is paid for by the United States government. ¶24. It is implausible to allege the government does not have buyer power or could not resist the combined entity's ability to raise price or lower quality in a market with at least 6 participants.

According to the Complaint, UnitedHealth believes "Amedisys does a lot of things that we do not do—if they get a foothold in [the] county, they will likely push us out." ¶33. This allegation suggests the two are not close substitutes and that their products are differentiated reducing the chance the merger would harm competition.

The Complaint also alleges that "entry barriers are high" because "laws and regulations" such as "certificates of need" prevent entry, and the factual evidence of this assertion is "UnitedHealth's and Amedisys's strategies of growth by acquiring other home health and hospice providers reflect the difficulty of entry or expansion in home health and hospice services." ¶76. There is nothing in law or economics that compels a party to enter a market organically. Section 7 only bars mergers that substantially lessen competition. In any event, these assertions are vague, conclusory and unsupported with plausible facts.

A Problem with HSR

The HSR Act forbids companies from consummating transactions before they have filed notification and observed the applicable waiting periods. The Agencies can extend the initial waiting period by issuing a Second Request. When the parties are in "substantial compliance" they certify so to the Agencies which begins a second waiting period. The Agencies must sue under Section 7 to enjoin parties to an anticompetitive transaction. If there is no injunction in place when the second waiting period expires, the parties may consummate their transaction without violating HSR. You don't have to have a reportable transaction under HSR to violate Section 7.

The Complaint alleges that Amedisys certified substantial compliance in December 2023. ¶14. The Complaint also alleges that Amedisys knew that it was not in substantial compliance but submitted the certification anyway and without a statement of noncompliance, and so violated Section 7A.

Section 7A(g)(1) provides that if a person fails to comply with "any provision" of Section 7A they will be liable for the HSR fine. 7A(e)(2)(B) requires a statement of noncompliance if the parties have not substantially complied. So presumably the DOJ is arguing that by failing to provide the statement of noncompliance, Amedisys has failed to comply with a "provision" of Section 7A and is therefore subject to fines.

The HSR Act prohibits the consummation of a reportable transaction before the termination of the applicable waiting period. DOJ is suing to permanently enjoin the consummation of the transaction. ¶102(b). The transaction has therefore not been consummated. Moreover, if parties have failed to produce something required, under Section 7A(g)(2), the DOJ may seek an order from a US District Court ordering compliance, extending the waiting period or other equitable relief.

There is no affirmative duty to make a notification under the HSR Act. It simply provides parties may not consummate reportable transactions until they have notified the agencies and the appropriate waiting periods have expired. If there is no affirmative duty to file, there can be no affirmative duty to submit a notice of substantial compliance or to state the reasons for noncompliance. Parties just cannot consummate the transaction before they do so. And DOJ's only remedy if it was harmed by the premature certification at all is a (g)(2) action to compel production of the statement of noncompliance (or the missing materials). Since Amedisys did not consummate the transaction, Amedisys did not violate the HSR Act by submitting a certification that proved to be inaccurate or failing to state reasons for noncompliance, and is therefore not subject to a fine. The certification is signed under penalty of perjury. Presumably, DOJ would have pursued a perjury charge if it thought the certification was made intentionally knowing they were in fact not in substantial compliance.

Next Steps

The only case cited in the Complaint is United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–64 (1963). There, the Supreme Court reversed a lower court's finding that a merger to 30% of the market did not violate Section 7. PNB is generally viewed as holding a high market share allegation is sufficient to sustain a complaint under Section 7. The Complaint cites this case as "controlling." ¶60. UnitedHealth is really just an attempt to resuscitate a discarded theory that market share alone is sufficient to show anticompetitive effect. Simply put, it is no longer plausible that a merger resulting in a 30% market share, without more, violates Section 7. I don't think the United States Court of Appeals for the Fourth Circuit or the Supreme Court would uphold that as the rule. A motion to dismiss this complaint, particularly in light of the DOJ's reliance on PNB, would be perfectly logical.

One of the more unconventional cases the United States antitrust agencies have brought in recent memory was Amgen/Horizon where the FTC alleged the merger violated Section 7 even though there were no horizontal overlaps or foreclosure. The Amgen/Horizon complaint was basically that a big company is bad, an attempt to resuscitate the conglomerate theory of harm from the 1970s. The parties in Amgen/Horizon filed an answer that looked a lot like a motion to dismiss. And ultimately they came up with a consent that gave the parties the vast majority of their transaction. I suspect that the inclusion of the HSR count here was to make Amedisys look bad to the court. In reality, I think it makes the DOJ look bad because the DOJ does not state a claim upon which relief may be based. The HSR count also serves as an invitation to move to dismiss the substantive Section 7 count. Motions to dismiss are very useful in antitrust suits generally because they offer the parties the opportunity to shape the court's view of the counterarguments. Parties to governmental Section 7 challenges have been unwilling to do so because courts granted the agencies deference and because the complaints were usually sufficiently plead. The lesson of Amgen/Horizon is, I think, that sometimes you should file a motion to dismiss a merger complaint.

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[1] The only case the Complaint cites for its proposition that the merger is anticompetitive is United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–64 (1963) (a merger to 30% of the market is anticompetitive); but see U.S. v. Baker Hughes, Inc., 908 F.2d 981 (D.C. Cir. 1990) (market shares alone are insufficient to establish liability). Philadelphia National Bank was decided before Bell Atlantic Corp. v. Twombly 550 U.S. 544 (2007) which held that plaintiffs, including the government, must allege a plausible cause of action to survive a motion to dismiss, and therefore arguably overruled Philadelphia National Bank.

[2] The Complaint does allege that the deal will result in UnitedHealth controlling 75% of the market on the Eastern Shore of Maryland, ¶60, and 90% in Parkersburg, West Virginia, ¶66. The Complaint

then lists geographic areas where the combination will violate Section 7 but offers no basis for that conclusion, only their unsubstantiated allegation.