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Seventh Circuit Affirms Dismissal of "Buyers' Cartel" Claim, Provides Guidance Regarding Premerger Information Sharing

In a recent decision, *Omnicare, Inc.* v. *UnitedHealth Group*,[1] the United States Court of Appeals for the Seventh Circuit provided useful guidance regarding the nature and scope of information that may be shared among competitors in advance of a merger. Although the Court affirmed the dismissal, on summary judgment, of plaintiff's antitrust claim, the decision serves as a reminder that premerger information sharing among competitors may be subject to scrutiny by courts, as well as by the Department of Justice and Federal Trade Commission.

Omnicare arose out of the merger of two health insurers, UnitedHealth and PacifiCare. The plaintiff, Omnicare, is an institutional pharmacy that contracted with both United and PacifiCare to provide pharmaceutical services under the Medicare Part D program – a government-subsidized prescription drug program for senior citizens and people with disabilities.

In the months leading up to the merger of United and PacifiCare, while the merging parties were engaged in due diligence, Omnicare negotiated with each company separately in an attempt to agree upon the terms of a Medicare Part D contract. Omnicare and United reached agreement on a contract in July 2005. Negotiations between Omnicare and PacifiCare were more contentious. In December 2005, two weeks before the merger closed, Omnicare signed a contract with PacifiCare on terms significantly less favorable to Omnicare than the July 2005 United contract.

Subsequent to the merger, United informed Omnicare that it was abandoning the July 2005 contract and joining the PacifiCare contract. In response, Omnicare filed a lawsuit alleging that United and PacifiCare – prior to their merger – had formed an unlawful "buyers' cartel," with the aim and effect of depressing the price at which they would deal with Omnicare, in violation of Section 1 of the Sherman Act.

The district court granted summary judgment in favor of the defendants. The court found that Omnicare had "failed to produce evidence of action by UnitedHealth and PacifiCare that is inconsistent with lawful conduct on the part of two competing entities engaged in legitimate merger discussions and planning," and thus had failed to establish a Sherman Act Section 1 claim.[2] The Court of Appeals affirmed.

1 No. 09-1152, 2011 WL 61649 (7th Cir. Jan. 10, 2011).

2 *Id.* at *7 (internal quotation marks omitted).

The centerpiece of Omnicare's complaint was that prior to consummating their merger, United and PacifiCare had improperly shared information regarding their respective Medicare Part D pricing and had coordinated their negotiating strategies with respect to Omnicare. According to Omnicare, the parties agreed premerger that PacifiCare would "play[] hardball" with Omnicare, while United "lay patiently in wait."[3] This premerger agreement was allegedly "furthered by continual exchanges of sensitive pricing information."[4] Under Omnicare's theory, the "alleged conspiracy achieved its ultimate goal in February 2006, when United" abandoned its prior agreement with Omnicare and joined "PacifiCare's much more favorable contract."[5]

In opposing defendants' summary judgment motion, Omnicare was unable to offer any direct evidence, such as an admission, that the parties had formed an agreement. Instead, it relied on circumstantial evidence, primarily in the form of documents reflecting the information that the parties had shared with each other during due diligence. In particular, Omnicare pointed to evidence that United and PacifiCare had shared average Medicare Part D pricing information as well as a comparison of Part D bids, among other things, prior to completing their merger.

The Court of Appeals observed that evidence relating to the exchange of information between competitors can, in some circumstances, "help support an inference of a price-fixing agreement." But, "like all circumstantial evidence of conspiracy," information exchange is "not on its own demonstrative of anticompetitive behavior, even when pricing data is what is exchanged."[6] In this case, the Court concluded, Omnicare's evidence fell short because the information that United and PacifiCare had exchanged reflected nothing more than "innocuous due diligence."[7]

In reaching this conclusion, the Court found it significant that the pricing and bid information that the parties had shared premerger was restricted to high-level estimates and summaries; that the defendants had been able to offer a legitimate business purpose for sharing this information – namely, that it was necessary to United's valuation of PacifiCare for purposes of the merger; and that the entire process of premerger information exchange had been closely supervised by the merging parties' respective outside counsel. Nevertheless, the Court acknowledged that in assessing premerger information sharing from an antitrust perspective, courts must "walk a fine line" – balancing concerns about chilling efficient business activity and potentially discouraging procompetitive mergers, on the one hand, against concerns

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3 *Id.* at *5.

4 *Id.* at *22.

5 *Id.*

6 *Id.* at *11 (citations omitted).

7 *Id.*

about providing cover for parties to engage in anticompetitive behavior through "sham" merger negotiations, on the other.[8]

Omnicare serves as a reminder that, even after a merger has been approved by regulators and consummated, premerger information sharing among competitors may give rise to antitrust claims. In this case, the Court determined that defendants had conducted themselves properly throughout the premerger process, but its analysis of plaintiff's claim was fact-intensive. To reduce the risks associated with similar claims, merging companies should proceed with caution in sharing competitively sensitive information during due diligence and should consult with outside counsel regarding potential antitrust issues early in the merger process.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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[8] *Id.* Similar concerns inform the analysis of antitrust enforcement agencies in applying the "gun-jumping" doctrine, which – pursuant to Section 1 of the Sherman Act and Section 7A of the Clayton Act – prohibits parties from combining their operations and engaging in certain coordinated activities prior to a merger's closing. *See* "FTC General Counsel Clarifies Boundaries of 'Gun Jumping' Doctrine" (Nov. 2005), available at http://www.paulweiss.com/files/upload/memo112005.pdf.

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