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Federal Appeals Court Clarifies the Bounds of Lawful Information Exchanges in Pre-Merger Due Diligence

George Paul (White & Case) · Wednesday, February 23rd, 2011

Information sharing between merging parties is a crucial part of pre-merger due diligence, yet courts have rarely weighed in to clarify when, if ever, such information exchanges run afoul of the antitrust laws. On January 10, 2011, a federal appeals court spoke for the first time on the topic. In *Omnicare, Inc. v. UnitedHealth Group, Inc.*, No. 09-1152, a three-judge panel on the Seventh Circuit found that two merging health insurance companies had not violated antitrust and consumer-protection laws by sharing "generalized and averaged high-level pricing data" before consummation of the merger.

The dispute arose out of contracts between the institutional pharmacy, Omnicare, and two health insurers, UnitedHealth and PacifiCare, that were in the process of merging in mid-2005. Both of the insurance companies had entered into Medicare Part D contracts with Omnicare, but PacifiCare had secured better terms than UnitedHealth. After the merger, the combined company cancelled the less favorable UnitedHealth contract. Omnicare sued, alleging that PacifiCare and UnitedHealth had conspired to gain a competitive advantage over Omnicare by sharing competitively sensitive information, including anticipated Medicare Part D reimbursement rates, during pre-merger due diligence. According to Omnicare, the exchange of pricing information allowed the merging parties to use PacifiCare as a "stalking horse" to obtain the lowest possible price from Omnicare before moving UnitedHealth's enrollees onto the PacifiCare contract.

The Seventh Circuit's decision focused on the pre-merger exchange of pricing information during merger talks. The Court agreed with the district court that assessing information-exchanges can sometimes require the courts to "walk a fine line" between chilling legitimate business activities by companies that would merge and permitting allegedly "sham merger negotiations." The Court held in favor of permitting the information exchange in light of the precautions taken by the merging parties. The Court concluded that "Omnicare's evidence purporting to show this illicit exchange demonstrates only a circulation of generalized and averaged high-level pricing data, policed by outside counsel, that is more consistent with independent than collusive action."

Omnicare argued that these exchanges supported the inference of a price-fixing agreement. In affirming the trial court's dismissal of the case, the court found that merging parties had exchanged only "generalized and averaged high-level pricing data, policed by outside counsel, that is more consistent with independent than collusive action." Judge Tinder, writing for the Seventh Circuit panel, noted that the pricing information had been used for legitimate pre-merger valuation purposes and that the pricing figures had been restricted to counsel and a handful of executives.

Indeed, the defendants showed that the UnitedHealth manager responsible for pharmaceutical contracting had not received the pricing information.

Practical Implications

Generally speaking, the *Omnicare* decision reinforces the following guidance:
• Merging parties can of course exchange information necessary for due diligence and integration planning, but must be cautious and must carefully manage the sharing of any competitively sensitive information.
• Companies should consult with antitrust counsel to manage risks while still obtaining necessary information for diligence and integration purposes.
• Confidential information acquired during pre-merger due diligence should be shared only with counsel and those with a demonstrated need to know, and not with those individuals who would use it for competitive purposes.
• Companies should avoid exchanging any information beyond what is necessary for valuing the transaction and setting the stage for post-merger integration. Detailed, current competitive information presents the highest antitrust risk.
• For necessary but extremely sensitive information, consider aggregation or using third-party vendors to review and summarize the information.
• Careful planning and process documentation can reduce the risk of an allegation of improper information sharing.

This communication is not designed to provide legal advice to any particular party. Each transaction can present unique antitrust compliance issues.

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