PRE- AND POST-SIGNING DISCUSSIONS FOUND NOT TO VIOLATE SHERMAN ACT

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To Our Clients and Friends:

An Illinois federal district court recently rejected claims brought by Omnicare, Inc. under Section 1 of the Sherman Act, challenging certain information exchanges between merging parties UnitedHealth Group and PacifiCare Health Systems.[1] Omnicare alleged that the parties' exchanges of information during pre-signing due diligence and post-signing merger planning constituted a "conspiracy in restraint of trade." The decision includes a rare extended discussion of the relevant principles, for, as the court noted, "virtually no case law establishes standards for determining when premerger discussions are anticompetitive."

THE DISPUTE

An important part of the businesses of UnitedHealth and PacifiCare involved Medicare Part D, a program established in 2003 pursuant to which health insurers contract with prescription drug providers like Omnicare to provide prescription drugs to eligible individuals. The health insurers earn money through, among other things, premiums paid by enrollees. Drug providers in turn receive their payments under contracts with health insurers.

UnitedHealth and PacifiCare entered into merger discussions in January 2005, signed a merger agreement on July 6, 2005, and closed the merger on December 20, 2005. UnitedHealth signed its contract with Omnicare on July 29, 2005, and PacifiCare signed its contract with Omnicare on December 6, 2005— in each case, after the merger agreement was signed. The PacifiCare contract was more favorable to the health insurer than the UnitedHealth contract. In February 2006, after the merger had been completed, UnitedHealth withdrew from its contract with Omnicare and informed Omnicare that it would operate under the PacifiCare contract. UnitedHealth claimed it withdrew because provisions of its contract were inconsistent with the Medicare Part D rules.

Omnicare filed suit, alleging that prior to the merger UnitedHealth and PacifiCare conspired to have PacifiCare obtain the lowest possible price from Omnicare and then have UnitedHealth switch to the more favorable contract post-merger, thus fixing the prices paid by defendants to Omnicare.

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[1] *Omnicare v. UnitedHealth Group, No. 06-C-6235, N.D. Ill.*

PRE-SIGNING CONDUCT

Omnicare complained that during pre-signing diligence meetings, the merger partners exchanged strategic information, including Medicare Part D average pricing. The court rejected this exchange as insufficient to support a Sherman Act claim. It noted that the information was exchanged between high-level executives who were less likely to be directly involved in developing the Medicare Part D proposals and appeared not to include the individuals who had the most direct contact with Omnicare. The court found that UnitedHealth's request for this pricing information was "appropriately circumspect" because it sought only averages and ranges, not pricing information about all relevant markets or specific bargained-for rates.

The court then focused on whether this information was necessary for the due diligence process and concluded that it was and that the diligence was performed in a reasonably sensitive manner. The information was necessary because the Medicare Part D business was clearly important to both companies. The exchange was performed sensitively because it was "as general as possible to enable UnitedHealth to evaluate PacifiCare's Part D readiness and its level of business risk."

The court also pointed favorably to the exchange of this potentially sensitive information late in the diligence process and to the parties' confidentiality agreements— one covering the general exchange of information and the other creating a "clean room" for particularly sensitive or competitive information that could be reviewed only by a subgroup of UnitedHealth's full diligence team. The court expressed some concern that sensitive information might have leaked outside the parameters of the confidentiality agreements, but found that in themselves any leaks were not inconsistent with the view that the two insurers were acting independently.

It is worth noting that UnitedHealth, which acquired PacifiCare for stock and cash, had also shared its average price information with PacifiCare. The court recognized that the rationale for sharing competitive information with a target is weaker, but in this case it was reasonable for PacifiCare to seek some assurance that its acquirer was well run and had a "strong strategic vision for the future."

POST-SIGNING CONDUCT

According to the court, the parties had limited communication about Medicare Part D pricing or strategy between signing the merger agreement and consummating the merger. Omnicare made much of a memorandum dated after the signing of the merger agreement and apparently shared between high-level UnitedHealth and PacifiCare executives, in which UnitedHealth referred to the PacifiCare/Omnicare agreement as a "stalking horse." The court rejected Omnicare's claim that the memorandum constituted evidence of a conspiracy.

CONCLUSIONS

The court recognized that allowing plaintiffs to pursue Sherman Act claims based on pre-signing business and diligence discussions between competitors during merger talks could "chill business activity by companies that would merge but for a concern over potential litigation." Keeping the discussions as general as practicable and sharing only average prices and ranges of prices, appropriately limiting the people who gain access to the most sensitive information, and providing sensitive information as late in the process as possible all help demonstrate that the goal of the information exchange is evaluation of the risks and rewards of a business combination, not price fixing.

Although the court did not find any post-signing evidence of a conspiracy, it did write that "[o]nce price is agreed upon . . . and an agreement to merge is reached, further information exchanges are more difficult to justify."[2] This suggests that the post-signing goals of monitoring, transition planning and integration may not carry the same force as the performance of pre-signing due diligence in evaluating the legality of sensitive information exchanges between competitors.

Please feel free to contact us with any questions.

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[2] *Quoting William Blumenthal, The Scope of Permissible Coordination Between Merging Entities Prior to Consummation, 63 Antitrust L.J. 1 (Fall 1994).*