COURT AFFIRMS THAT, WITH SAFEGUARDS, COMPETITORS MAY SHARE SENSITIVE DUE DILIGENCE INFORMATION IN CONNECTION WITH A PROPOSED MERGER

When competitors engage in due diligence in connection with a proposed transaction, the information they share can expose them to significant antitrust risks. Few cases address the legal standard under which such exchanges of information should be judged. Notably, in *Omnicare, Inc. v. UnitedHealth Group, Inc.*, Civ. No. 06 C 6235 (N.D. Ill. Jan. 16, 2009), a federal district court concluded that competitors may share certain competitively sensitive information without violating Section 1 of the Sherman Act, where such exchange occurs pursuant to a bona fide due diligence process and within appropriate safeguards governing the flow of such information.

Background

UnitedHealth Group ("UnitedHealth") and PacifiCare Health Systems, Inc. ("PacifiCare") compete to provide prescription drug coverage to senior citizens under the Medicare Part D program. In January 2005, UnitedHealth and PacifiCare began discussing a potential merger.

The companies' information exchanges in connection with the proposed merger occurred pursuant to a confidentiality agreement that limited access to due diligence information to members of UnitedHealth's due diligence team and prevented them from sharing it with others outside that team. Further, highly confidential material was provided by PacifiCare only to members of a "clean team," which was a subgroup of the UnitedHealth due diligence team, pursuant to a separate confidentiality agreement.

During the negotiations preceding the agreement to merge, UnitedHealth negotiated a pharmacy services agreement with Omnicare. After the merger agreement had been signed but prior to closing the merger with UnitedHealth, PacifiCare successfully negotiated a more favorable pharmacy services agreement with Omnicare. After the merger closed, UnitedHealth withdrew from its agreement with Omnicare and opted to purchase under PacifiCare's more favorable agreement with Omnicare.

Believing that PacifiCare's negotiations were influenced by its alleged knowledge of Omnicare's agreement and prices with UnitedHealth, Omnicare sued UnitedHealth and PacifiCare, alleging that the parties engaged in an anticompetitive conspiracy in violation of Section 1 of the Sherman Act. A significant component of the conduct that Omnicare challenged related to communications and exchanges of information between UnitedHealth and PacifiCare during the due diligence process.

Appropriate Due Diligence Safeguards Are Important

The *Omnicare* court granted defendants' motion for summary judgment on plaintiff's claim that the defendants had violated Section 1 of the Sherman Act. The court considered, in part, whether communications and exchanges of information between the parties prior to their merger provided evidence of a conspiracy to restrain competition unlawfully. The court concluded that the plaintiff failed to produce evidence of action by the defendants that was "inconsistent with lawful conduct on the part of two competing entities engaged in legitimate merger discussion and planning."

The court noted that, while it should not set a standard that "could chill business activities by companies that would merge but for a concern over potential litigation . . ., the mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information." In reaching its decision, the court assessed whether the information exchanges were "necessary for the due diligence process" and "performed in a reasonably sensitive manner." After reviewing the record, the court concluded that the information exchanges were necessary to due diligence and appropriately controlled. In effect, the court balanced the merger-related business need for the information against the risk to competition that the information exchange raised and the extent to which the exchange was reasonably tailored to minimize such risks.

Specifically, the court found that the most competitively sensitive information that was disclosed, which related to pricing, was disclosed late in the due diligence process (less than one month before the signing of the merger agreement) and that it was "conveyed in the form of averages and ranges rather than specific bargained-for rates." Further, the court found that such information exchanges were as general as possible to enable UnitedHealth to evaluate PacifiCare's Part D readiness and its level of business risk.

The court also viewed favorably the fact that the parties had entered into confidentiality agreements whereby only a clean team, which apparently included only high-level executives and not operational business personnel, had access to highly confidential pricing information. The court noted that the justification for sharing competitively sensitive due diligence information is weaker when the information flows from a prospective buyer to a seller or after an agreement is reached, although the court did not exclude the possibility that such an exchange might be appropriate under some circumstances.

For competitors who plan to engage in due diligence in connection with a proposed merger or acquisition, the *Omnicare* litigation highlights the importance of establishing appropriate safeguards to control the content of the information that is exchanged and the manner in which information is exchanged. The substance and specificity of information that is shared, the identify of those who have access to such information, when the information is shared, and the reason for the exchange are all relevant to developing a due diligence framework for protecting the parties from undue antitrust risk.

Due diligence needs typically can be met, and antitrust risk minimized, with careful planning and safeguards. Such safeguards, however, must be tailored to the specific facts of a proposed transaction and require close collaboration among counsel and the relevant business personnel.

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