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Court of Appeals Releases Omnicare Decision Upholding Pre-Transaction Information Exchange

The U.S. Court of Appeals for the Seventh Circuit has become the first Court of Appeals to address information exchanges in the pre-transaction context. In the long-awaited *Omnicare, Inc. v. UnitedHealth Group, Inc.*, the Seventh Circuit examined, among other topics, whether the pre-closing exchange of certain pricing information between competitors UnitedHealth Group and PacifiCare Health Systems was legal under Section 1 of the Sherman Act. The Court held it was.

In early 2005, UnitedHealth and PacifiCare — two health insurers — began discussing the possibility of a merger. UnitedHealth conducted due diligence on PacifiCare and entered a merger agreement in July 2005.

Around the same time, UnitedHealth and Omnicare entered into a contract for Omnicare to supply pharmaceutical services. The contract was favorable to Omnicare. PacifiCare had refused to enter a similar contract with Omnicare.

In the fall of 2005 while the UnitedHealth-PacifiCare merger was still pending, Omnicare approached UnitedHealth and inquired as to whether PacifiCare would join the UnitedHealth contract after the merger. UnitedHealth responded that Pacificare would not. Based on that response, Omnicare approached PacifiCare and eventually signed a contract that was "significantly" more favorable to PacifiCare than the contract between Omnicare and United Health was to UnitedHealth.

UnitedHealth and PacifiCare closed their merger at the end of 2005. Shortly afterward UnitedHealth informed Omnicare that it was joining the PacifiCare contract, essentially terminating its contract with Omnicare.

Omnicare sued UnitedHealth and PacifiCare alleging that pricing information exchanged between UnitedHealth and PacifiCare during the pre-merger period allowed PacifiCare to enter into its contract with Omnicare on terms less favorable to Omnicare — and this amounted to price fixing in violation of the Sherman Act.

The Seventh Circuit disagreed. The Court highlighted the importance of information exchanges and the chilling effect that unreasonable limitations on information exchanges might have, while also recognizing that the absence of any regulation might lead companies to use merger negotiations as a pretext for price fixing. Despite the sharing of price information between two competitors, the Court authorized the conduct surrounding the information exchange. The permitted

conduct included a number of protections, including: (a) limiting the sharing to information necessary for valuation; (b) recasting competitively sensitive information in more general terms before it is shared; and (c) limiting the distribution of information within the receiving organization.

This is the first Court of Appeals decision addressing the permitted scope of pre-merger information exchanges. The decision is consistent with the post-2005 pronouncements from the US antitrust agencies on the subject of information exchanges — namely, recognition that transacting parties must engage in pre-closing information exchanges at levels of detail not ordinarily permissible, that certain information exchanges are reasonable and necessary to the transaction, and that such exchanges are permissible.

"We agree with the district court that the nature of Omnicare's information-exchange contentions requires us to walk a fine line:

On the one hand, courts should not allow plaintiffs to pursue Sherman Act claims merely because conversations concerning business took place between competitors during merger talks; such a standard could chill business activity by companies that would merge but for a concern over potential litigation. On the other hand, the mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information. This standard could lead to "sham" merger negotiations, or at least allow for periods of cartel behavior when, as here, there is a substantial period of time between the signing of the merger agreement and the closing of the deal."

The relevance of the decision is limited to mergers between competitors in the same industry. In that setting, pre-closing information exchanges of competitively sensitive information are generally permitted in the US when limited to what is reasonable and necessary for valuation and other legitimate business purposes. The US antitrust authorities have prosecuted only the most egregious conduct — that is, cases where competitively sensitive information is exchanged without a legitimate business purpose followed by an adverse affect on competition.

"Information exchange can help support an inference of a price-fixing agreement, but, like all circumstantial evidence of conspiracy, it is not on its own demonstrative of anticompetitive behavior, even when pricing data is what is exchanged."

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