Seventh Circuit Outlines Merger Discussion and Due Diligence Safeguards to Protect Against Antitrust Violations

Parties contemplating a merger must often discuss and exchange critical business information as part of their due diligence activities, even when they are direct competitors. These discussions and exchanges are generally permissible. However, because the antitrust laws require that merging firms operate as separate entities until the closing of the transaction, parties must proceed with care and adopt appropriate antitrust guidelines and safeguards.

Whether such discussions and exchanges raise antitrust concerns is governed by several factors, including the reason for the exchange, the sensitivity of the information, the method and timing of the exchange, and the role of the recipients within the merging companies. The Department of Justice, for example, has challenged merging parties sharing their customer contract terms and rates, correspondence relating to contract negotiations, and full drafts of proposed contracts in connection with pre-merger “gun-jumping” violations and for facilitating unlawful conspiracies to fix prices.¹

The plaintiff in Omnicare, Inc. v. UnitedHealth Group² alleged that the defendants’ merger discussions and due diligence interfered with the plaintiff’s ability to negotiate a competitive contract with the defendants. The Seventh Circuit, however, held that the defendants were entitled to summary judgment because the firms had implemented important safeguards—safeguards that should be applied whenever competitors engage in merger discussions and due diligence. The Omnicare decision serves as a reminder that a well-counseled approach to due diligence and integration planning will facilitate the exchange of critical business information, even between competitors, without exposing a company to antitrust liability.

Background

In 2005, UnitedHealth, a national provider of health insurance, initiated discussions to acquire PacifiCare, a smaller California-based health insurer. While the merger negotiations were ongoing, both companies were preparing proposals to participate in the Medicare Part D

program. PacifiCare’s Part D business was material to its valuation, and UnitedHealth had questions about how PacifiCare was approaching the Part D program. As a result, the companies had several discussions and shared significant information about their plans for the Part D program.

Both companies were also in separate negotiations with Omnicare to supply them with institutional pharmacy services under Part D. UnitedHealth and Omnicare negotiated and signed a Part D reimbursement contract, but Omnicare’s negotiations with PacifiCare broke down. PacifiCare submitted and received approval for its Part D proposal without Omnicare in its pharmacy network. Omnicare subsequently asked UnitedHealth whether PacifiCare would operate under UnitedHealth’s contract after the merger closed. UnitedHealth responded that the two companies’ Part D proposals were independent. Accordingly, Omnicare sought to re-open negotiations with PacifiCare. PacifiCare, however, refused to agree to anything other than its “any willing provider” contract, which had terms that were far less favorable than those sought by Omnicare or those in the UnitedHealth contract. After the merger closed, Omnicare signed PacifiCare’s “any willing provider” contract. Soon thereafter, UnitedHealth, unhappy with its less favorable contract, informed Omnicare that it would terminate the contract and operate under the more favorable PacifiCare-Omnicare contract.

Omnicare sued, alleging that UnitedHealth and PacifiCare had formed a per se illegal “buyers’ cartel” by sharing competitively sensitive information and coordinating their negotiation strategies in order to gain a competitive advantage over Omnicare.

The Seventh Circuit’s Decision

The Seventh Circuit acknowledged that there are legitimate business justifications for exchanging information during due diligence, even between competitors. The court cautioned, however, that “the mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information [because that] … could lead to … 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 critical question for the court was whether the information sharing could facilitate coordination. In granting summary judgment in favor of UnitedHealth and PacifiCare, the court heavily relied on the fact that the parties implemented safeguards in connection with their discussions and due diligence that mitigated the competitive impact of the information exchanged. Among the factors considered by the court were:

- **There was a justification for sharing the sensitive information.** The court recognized that the information relating to PacifiCare’s Part D contracts, while highly sensitive, was critical for a proper valuation of the company.
- **The most sensitive information was scrubbed.** The most competitively sensitive information, the data on pricing and contract bids, was not exchanged in its raw form.

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3 Id. at *11 (citing Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F. Supp. 2d 945, 968 (N.D. Ill. 2009).
Instead, that information was conveyed in averages and ranges rather than specific bargained-for rates. In addition, the “Due Diligence Summary” indicated that review was conducted on a “high level,” and the comparison of PacifiCare’s and UnitedHealth’s pricing and benefits was restricted to general terms like “consistent,” “higher,” and “roughly.”

- **Firewalls and outside advisors were used to screen sensitive information.** The parties had a confidentiality agreement that created a “clean room” for highly confidential materials. Only members of UnitedHealth’s “clean team,” a limited subgroup of the due diligence team, had access to those materials. PacifiCare’s outside counsel also reviewed all of PacifiCare’s documents to determine the propriety of sharing them with UnitedHealth. Furthermore, the detailed communications between UnitedHealth and PacifiCare concerning sensitive bid-related information were conducted by an outside actuary, who did not directly relay the information to UnitedHealth, but provided a report with a general summary and conclusions. The actuary’s report was further reviewed by PacifiCare’s outside counsel, who excised the most “competitively sensitive” details and then by UnitedHealth’s outside counsel prior to being shared with UnitedHealth’s executives.

- **Sensitive information was shared with a limited group and late in the process.** The competitively sensitive information was shared among a limited number of senior executives who were not directly involved in developing the Part D proposals. The court also noted that the UnitedHealth employee who was directly involved in negotiations with Omnicare was not privy to the competitively sensitive information. Furthermore, some of the more sensitive information was not shared with UnitedHealth’s executives until the eve of the merger agreement.

Concluding that the information exchanged did not temper competition, the court dismissed Omnicare’s remaining evidence of a conspiracy, holding that knowledge of the exchanged information was unlikely to have “facilitated the development or advancement of a coordinated negotiating and pricing strategy.”

### Implications

The *Omnicare* opinion highlights the benefits of implementing appropriate safeguards when discussing or sharing sensitive information with competitors. Improper information sharing in violation of the antitrust laws is subject to treble damages under Section 1 of the Sherman Act and could result in penalties by the antitrust agencies of up to $16,000 a day, if the information exchanged is akin to a transfer of “beneficial ownership” of the target.

Merging parties should even be mindful of antitrust issues after signing the merger agreement, as they are required to operate as separate firms until the transaction closes. The complaint in

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4 Id. at *13.
Omnicare may not have survived a motion to dismiss had the parties ceased their Part D discussions after the due diligence period ended, when the business justifications for the information exchange became less compelling. However, the analysis for the legality of information exchanges is fact-specific. Therefore, it is prudent to engage antitrust counsel to provide guidance in connection with merger discussions and due diligence, especially when the information being discussed and shared is between competitors, non-public, and competitively sensitive.

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