Bank and Corporate Governance Law Reporter
1601 Connecticut Avenue, N.W., Suite 701, Washington, D.C. 20009 • 202-462-5755 • Fax 202-328-2430

Recent Developments

Court Upholds Legality of Information Exchange by Competitors During Merger Discussions

Ilene Knable Gotts, David A. Katz,
& David A. Schwartz

Wachtell, Lipton, Rosen, & Katz

The United States District Court for the Northern District of Illinois recently granted summary judgment for two merging parties on a plaintiff's claim that their exchange of certain competitively sensitive business information during merger negotiations and due diligence had violated the antitrust laws. *Omnicare, Inc. v. UnitedHealth Group, Inc.*, Civ. No. 06 C 6235 (N.D. Ill. January 16, 2009). Omnicare negotiates with health insurers, such as UnitedHealth Group and PacifiCare Health Systems, Inc., to provide seniors with prescription drug coverage under Medicare. During merger discussions between UnitedHealth and PacifiCare, but before they signed a merger agreement, Omnicare negotiated a pharmacy services agreement with UnitedHealth. Omnicare then separately negotiated an agreement with PacifiCare after the insurers had signed a merger agreement, but before its consummation. Once the insurers closed their merger, UnitedHealth withdrew its agreement with Omnicare and joined PacifiCare's more favorable agreement. Omnicare alleged that the two health insurers had conspired to obtain lower prices from Omnicare, as purportedly evidenced through the sharing of competitively sensitive strategic information and prescription pricing data.

The court's summary judgment decision recognizes the legitimacy of information exchanges of competitively sensitive materials during transactional due diligence. In this matter, the court specifically reviewed and confirmed the legitimacy of the exchange of average prescription drug reimbursement rates, a form prescription drug services agreement, and averages and ranges of prescription drug reimbursement rates. The court particularly noted that the insurers had not shared any detailed drug price data or specific pricing strategies. The court also noted with approval (1) the limitation of access to the information during due diligence to high-level executives evaluating the transaction, and not personnel responsible for negotiating the supply arrangements; and (2) the use of antitrust advisors throughout the process to ensure that proper information sharing safeguards were in place. The court indicated that although there may be a weaker rationale for exchanges of information after the conclusion of due diligence or for reverse (buyer to seller) exchanges, such exchanges may be appropriate in the right circumstances. The court concludes that the information exchange was "necessary to due diligence and was performed in a reasonably sensitive manner."

The court's decision is consistent with current guidance from U.S. antitrust authorities regarding information sharing during transaction negotiations. Merging parties may exchange information necessary to perform deal due diligence, but should establish appropriate safeguards to minimize the potential of antitrust liability (including using outside advisors to review certain sensitive information); such safeguards may also make business sense, particularly if negotiations ultimately falter or the transaction is not consummated. Finally, the court's decision highlights the benefits of building procedural safeguards into confidentiality agreements, as these safeguards demonstrate a commitment to prevent inappropriate sharing of competitively sensitive information.

* * *

