SMITH ANDERSON

Client Alert

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Federal Trial Court Clarifies Approaches to Premerger "Gun Jumping"

Merger participants and their counsel are often required to consider what levels of pre-closing communication and coordination are permissible under the federal antitrust laws. Premature transfers of beneficial ownership of a target company, or the failure of independent economic entities to maintain their separate identities before closing, can lead to antitrust liability on the theory that the parties have "jumped the gun" by integrating operations before consummating the deal. Pre-closing conduct is particularly risky if it is not necessary to protect the integrity of the transaction or where the parties are competitors.

The law in this area is not well developed. The best sources of information have been policy pronouncements by agency officials and court documents prepared by federal antitrust enforcement agencies in prior cases involving egregious pre-closing conduct. In these sources it has not been clear whether the enforcement agencies were interpreting the antitrust laws in the same way a court would apply them.

A recent federal trial court ruling has shed some light on information sharing techniques that parties to a merger or acquisition can use to avoid gun jumping problems. In January 2009, the U.S. District Court for the Northern District of Illinois granted summary judgment to two merger partners in the "gun-jumping" claim of a private plaintiff. Although not binding on any other court, the decision in *Omnicare v. UnitedHealth Group* offers useful guidance on the appropriateness of sharing certain types of competitively sensitive information before a transaction closes. The court's comments on gun jumping are generally consistent with approaches recommended by the antitrust enforcement agencies in the past.

Antitrust Laws Affecting Pre-Closing Activities

Three federal statutes regulate pre-merger transition planning and coordination: Section 7A of the Clayton Act (better known as the Hart-Scott-Rodino Antitrust Improvements Act), Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commission Act. The antitrust enforcement agencies consider each of these laws appropriate tools to address gun jumping. Moreover, private parties may bring civil suits under Section 1 of the Sherman Act to recover treble damages for premerger violations of Section 1. That is what happened in the *Omnicare* case.

The Background of *Omnicare*

Omnicare, the largest provider of pharmaceutical services to institutional health care providers, negotiates contracts with prescription drug providers ("PDPs") under

the Medicare Part D program for a suite of services. UnitedHealth and PacifiCare are health insurers that serve as PDPs under the Medicare Part D program.

UnitedHealth and PacifiCare agreed to merge in 2005. Before signing the merger agreement with PacifiCare, UnitedHealth entered into an agreement with Omnicare under which Omnicare would provide various services to UnitedHealth. At the same time, PacifiCare was negotiating to obtain similar services from Omnicare. After the merger agreement was signed, Omnicare and PacifiCare reached an agreement containing more favorable terms than the UnitedHealth-Omnicare agreement. After the UnitedHealth/PacifiCare merger closed, UnitedHealth terminated its agreement with Omnicare and adopted PacifiCare's more favorable contract. Omnicare sued UnitedHealth and PacifiCare, alleging that they had conspired to lower the prices of Omnicare's services in violation of Section 1 and improperly shared competitively sensitive information about the terms of the UnitedHealth-Omnicare agreement during the due diligence process.

Omnicare's Claims Rejected

Omnicare made various claims asserting that UnitedHealth and PacifiCare had engaged in a conspiracy to fix prices. The court rejected all these claims, holding that Omnicare failed to establish a genuine issue of material fact as to whether an illegal agreement was made. For example, Omnicare contended that a provision in the merger agreement prohibiting PacifiCare from entering into contracts outside of the ordinary course of business valued in excess of $3 million without UnitedHealth's express authorization effectively granted UnitedHealth "control" over PacifiCare's Medicare Part D contracts. However, a letter agreement between the parties (referred to in the merger agreement) expressly relieved PacifiCare of the requirement of seeking UnitedHealth's approval for Medicare Part D contracts. Omnicare also argued that information exchanged in due diligence, including Medicare Part D pricing information, constituted a conspiracy. The court disagreed, finding that Omnicare failed to produce any evidence that UnitedHealth and PacifiCare ever discussed pricing with Omnicare. The court emphasized that the parties had been careful to ensure that the exchanges of competitive information were only between high-level company officials rather than personnel directly responsible for overlapping product lines. The information itself consisted of "averages" and "ranges" and was subject to confidentiality agreements limiting its dissemination.

Takeaways

Omnicare underscores the importance of careful planning with antitrust counsel for pre-closing due diligence, information exchanges, coordination and business integration. While information sharing between merging parties – especially competitors – can raise antitrust risks, guidelines and safeguards such as those adopted by UnitedHealth and PacifiCare can mitigate those risks. These may include:

- Using confidentiality agreements to protect confidential information.
- Staging due diligence and delaying disclosure of competitively sensitive information until the likelihood of closing increases.
- Limiting access to the information by using a "clean room" and "clean team."
- Having counsel review company documents (including business diligence materials) for antitrust concerns prior to disclosure.
- Limiting the information exchanged in due diligence (UnitedHealth did not review PacifiCare's Medicare Part D contracts).

- Allowing only high-level executives with no day-to-day responsibility for competing product lines to attend due diligence meetings at which those product lines were discussed.
- Using third parties to review competitively sensitive information, with clearly understood reporting obligations which reveal no more than is necessary to evaluate the significance of the information to the transaction.
- Using averages and ranges rather than specific rates when exchanging pricing information.
- Limiting, by careful drafting of the definitive agreement or a side letter, the control one party has over the other in the post-signing, pre-closing period.

Omnicare has said it will appeal the district court's ruling to the U.S. Court of Appeals for the Seventh Circuit. The Seventh Circuit's decision could be the one of the first significant pronouncements from a federal appeals court on gun jumping. We will be following the progress of the appeal and will inform our clients of any significant developments.

Analysis of the antitrust risks of pre-closing due diligence and information exchanges requires careful examination of the particular facts and circumstances of each deal. If you have questions about these or other antitrust issues related to a potential transaction, please contact one of the members of our M&A regulatory group listed below or the Smith Anderson lawyer with whom you work.

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