District Court Provides Clarity Regarding Gun-Jumping Issues

The Hart-Scott-Rodino Act (HSR) prohibits consummation of certain mergers and acquisitions until the HSR waiting period has expired. The parties to these transactions are viewed as "competitors" under the antitrust laws until the transaction closes, and there are limits on their ability to move forward with transition and integration planning. In the diligence period prior to signing a definitive agreement and in the period prior to closing, parties must take care to avoid the improper exchange of pricing information, marketing strategies and other highly sensitive competitive information. The parties' failure to maintain the requisite degree of separation gives rise to a "gun-jumping" claim where either the federal agencies or a private plaintiff alleges a violation of Section 1 of the Sherman Antitrust Act.

While we have counseled clients for years on the perils of "gun-jumping" and encourage the use of certain common-sense strategies to avoid liability in this context, most of the guidance available to date has taken the form of policy pronouncements from the Federal Trade Commission and the Justice Department's Antitrust Division. Although federal court cases on this subject are infrequent, a recent ruling of the United States District Court for the Northern District of Illinois provides useful guidance consistent with the agencies' pronouncements.

On January 16, 2009, Judge Rebecca Pallmeyer of the United States District Court for the Northern District of Illinois engaged in a detailed judicial discussion of gun-jumping issues in the course of granting defendants' motion for summary judgment in *Omnicare v. UnitedHealth Group*. The court discussed the propriety of sharing certain types of competitively sensitive information during merger due diligence both pre- and post-signing, including the appropriate limitations on dissemination of such information.

In 2005, UnitedHealth and PacifiCare, two health insurers, agreed to merge. During the merger discussions, Omnicare, a leading provider of pharmaceutical care for seniors, was negotiating services contracts with both of the merging parties. Before signing the UnitedHealth/PacifiCare merger agreement, Omnicare and UnitedHealth reached an agreement under which Omnicare would provide UnitedHealth with various pharmaceutical services. Post-signing, Omnicare and PacifiCare reached an agreement that contained terms that were more favorable to PacifiCare than the terms that UnitedHealth reached with Omnicare. After the merger between UnitedHealth and PacifiCare closed in early 2006, UnitedHealth withdrew from its agreement with Omnicare and informed Omnicare that it would operate according to the agreement with PacifiCare. Omnicare then sued UnitedHealth and PacifiCare on the grounds that they conspired to obtain lower prices from Omnicare in violation Section 1 of the Sherman Act.

The court rejected Omnicare's claims, which focused on both the pre-signing and post-signing activities of the merging parties. With respect to the pre-signing activities, Omnicare claimed that the exchange of certain information, including Medicare Part D pricing, constituted a conspiracy. The court disagreed. Because the exchanges were between and among high-level officials, consisted of averages and ranges, and were subject to confidentiality agreements that created a "clean room" limiting the exchange of competitively sensitive information, the court held that the information exchanges were reasonably necessary as a part of the due diligence process and did not violate Section 1. With respect to the post-signing activities, Omnicare pointed to a memorandum that referred to the PacifiCare agreement as a "stalking horse," but the court did not find that this memorandum was sufficient evidence of a conspiracy. Finally, the court concluded that a clause in the UnitedHealth/PacifiCare merger agreement that required UnitedHealth's approval of expenditures greater than $3 million was appropriate under the circumstances and did not give rise to an inference of conspiracy. The court reasoned that such a provision is appropriate to ensure that the seller does not unilaterally commit the buyer to extraordinary investments or expenditures that could materially affect the value of the business.

This decision is consistent with existing guidance as well as our advice regarding information sharing and serves as a reminder that information sharing between merging parties can create antitrust risk. Whether they occur pre-signing or post-signing, gun-jumping issues can delay an agency's review of a transaction, predispose the agency against the transaction itself, and may also violate Section 1 of the Sherman Act, exposing the companies to civil and possibly even criminal liability.

The court's decision in Omnicare underscores the need for care in this area. While parties to a transaction can engage in meaningful and effective integration planning, they must remain independent, operate in the normal course of business and refrain from exchanging competitively sensitive information during the waiting periods. Analysis of the antitrust risk of pre-closing exchanges of information requires close examination of the particular facts. Parties to potential transactions should consult with Ropes & Gray's experienced antitrust counsel to ensure that appropriate precautions are taken.

For further information contact your usual Ropes & Gray advisor.