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PRIVATE RIGHT OF ACTION TO CHALLENGE PRE-MERGER "GUN-JUMPING" RECOGNIZED

BY: PETE BARILE*

In a year that would be fair to describe as devastating to the plaintiffs' antitrust bar, with four significant Supreme Court cases narrowing the ability of private plaintiffs to bring treble damages actions in a variety of contexts, as well as the indictments and guilty pleas resulting from the Milberg Weiss scandal, a recent case provides at least a glimmer of hope to plaintiffs that all is not lost. A recent Northern District of Illinois case, *Omnicare v. UnitedHealth Group, Inc.*, No. 06-C-6235, __ F. Supp. 2d ___, 2007 WL 2875227 (N.D. Ill. Sept. 28, 2007), at once opens up a new avenue of litigation by adopting a private right of action for gun-jumping, limits the *Twombly* case, and is particularly plaintiff-friendly in an area of utmost importance to private antitrust litigation—antitrust injury.

Omnicare on Gun Jumping in the Antitrust Arena

Omnicare established that there is a private right of action under Section 1 of the Sherman Antitrust Act for pre-merger "gun-jumping"—the practice of prospective merger partners colluding in the marketplace during the period between signing and closing their deal. The *Omnicare* court's holding as to private antitrust suits is in accord with the established interpretation and enforcement of the antitrust laws by the federal government.

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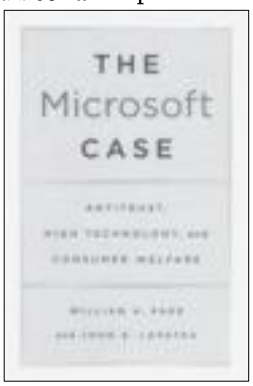
Book Review

THE MICROSOFT CASE: ANTITRUST, HIGH TECHNOLOGY, AND CONSUMER WELFARE

REVIEWED BY: JEFFREY PRISBREY*

Introduction

Undoubtedly, understanding the *Microsoft* case and its antitrust context requires a detailed knowledge of the vast number of the underlying facts and events of the case. In their recent book, *The Microsoft Case: Antitrust, High Technology, and Consumer Welfare*, authors William H. Page and John E. Lopatka carefully reconstruct these facts and events, including the antitrust context that gave rise to the government's action. The book is worth reading for this information alone.



In addition, however, Page and Lopatka also provide extensive and pointed commentary about the arguments made in *Microsoft* and the conclusions reached by the courts. The authors are not shy about their pro-Microsoft opinions, and they effectively use *Microsoft* and the arguments surrounding it to advocate an "evolutionary" or market-oriented position towards monopolization cases. In fact, it would not be unreasonable to conclude that

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PRIVATE RIGHT OF ACTION TO CHALLENGE PRE-MERGER "GUN-JUMPING" RECOGNIZED

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Pre-merger coordination. It has been long recognized by antitrust enforcers (and the antitrust bar) that prospective merger partners must "maintain their separate identities and act in a competitive manner until [the] transaction closes." ABA SECTION OF ANTITRUST LAW, PREMERGER COORDINATION 2 (2006). Mergers are subject to the provisions of Section 7A of the Clayton Act, 15 U.S.C. §18a, which explicitly prohibits the combination of two merging corporations subject to the Act prior to the expiration of the applicable statutorily prescribed waiting period. As has been explained by the Federal Trade Commission ("FTC"):

> [O]nce a purchase contract is signed, the parties may not proceed further with joint activity, such as assuming control through management contracts, integrating operations, joint decision making, or transferring confidential business information for purposes other than due diligence inquiries . . . .

David A. Balto & William J. Baer, *New Myths And Old Realities: Recent Developments In Antitrust Enforcement*, 1999 COLUM. BUS. L. REV. 207 (1999). More recently, the General Counsel of the FTC likewise confirmed that prior to closing "firms proposing to merge are not yet a single entity, and their activities [also] are subject to Section 1 of the Sherman Act." William Blumenthal, Gen. Counsel, FTC, *Remarks Before the Ass'n of Corporate Counsel: The Rhetoric of Gun Jumping* 1 (Nov. 10, 2005). Thus, "[c]oordination on prices to be charged during the interim period or on the allocation of accounts during that period . . . will generally remain *per se* illegal when reached between competitors, just as they would have been under Section 1 outside the merger context." *Id.* at 8.

Indeed, the Department of Justice and the FTC have brought numerous cases against merging parties for pre-merger coordination of prices or bidding under Section 1 of the Sherman Act, as well as under Section 7A of the Clayton Act. *See, e.g.*, *United States v. Gemstar-TV Guide Int'l, Inc.*, No. 03-0198, 2003 WL 21799949 (D.D.C. July 11, 2003) (consent decree resolving challenge to agreement between merger partners to "slow roll" their ongoing negotiations with various cable service providers upon, *inter alia*, payment of $5.67 million civil penalty); *United States v. Computer Assocs. Int'l, Inc.*, No. 01-02062, 2002 WL 31961456 (D.D.C. Nov. 20, 2002) (consent decree resolving matter upon, *inter alia*, payment of $1.267 million civil penalty).

It has been long recognized by antitrust enforcers (and the antitrust bar) that prospective merger partners must maintain their separate identities and act in a competitive manner until the transaction closes.

The Omnicare Case. At issue in *Omnicare* was a merger between two Medicare Part D health insurers—UnitedHealth and PacifiCare. *Omnicare*, 2007 WL 2875227, at *2. Plaintiff Omnicare, a large institutional pharmacy, dealt with both entities in relation to reimbursement for serving Part D patients—prior to the execution of the merger agreement and during the time between signing and closing, as well as after the deal was closed. *Id.* at *1. Under the terms of merger agreement, PacifiCare was required to obtain UnitedHealth's consent before entering into any Part D agreement with Omnicare. *Id.* at *2. One week after accepting UnitedHealth's merger offer, but about five months before the merger was complete, PacifiCare informed Omnicare that it would not be willing to negotiate the terms of a contract, demanding (unlike UnitedHealth that already had signed a reimbursement deal with Omnicare) that Omnicare accept a non-competitive reimbursement rate. *Id.* PacifiCare allegedly made this demand only after consulting with UnitedHealth. *Id.* After some time passed, at the behest of the Centers for Medicare & Medicaid Services, Omnicare relented and eventually accepted PacifiCare's offer and thus its below-market reimbursement rates. *Id.* Upon the closing of the UnitedHealth/PacifiCare merger, UnitedHealth notified Omnicare that it was withdrawing the UnitedHealth plans from its original agreement with Omnicare, and that it would switch them to the PacifiCare plan, with its below-market reimbursement rate. *Id.* Omnicare filed suit alleging that the pre-merger coordination violated Section 1 of the Sherman Act.

In seeking dismissal, defendants relied in main upon *International Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389 (8th Cir. 1993), a case in which the Eighth Circuit held that two corporations that are parties to an unconsummated merger might be shown to be a single entity under *Copperweld*, if the merging parties "lacked independent economic consciousness after they decided to merge and before the merger was completed." *NWA*, 991 F.2d at 1397 (citing *Copperweld Corp. v. Independnce Tube Corp.*, 467 U.S. 752, 767 (1984)); *see Omnicare*, 2007 WL 2875227, at * 3. The court's refusal to rely upon to *NWA* to dismiss the case should not have come as a big surprise to the defendants, as the case is contrary to longstanding federal policy and has not been embraced by any other Circuit Courts of Appeal. Importantly, the leading academic authority on antitrust law "disagree[s] with the holding in [*NWA*] that two firms that had agreed to merge but had

not yet completed the transaction lacked conspiratorial capacity." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, ¶ 1465 & n.39 (2d ed. 2004). Moreover, at the time *NWA* was decided, the head of the FTC's Bureau of Competition stated unequivocally that the *Copperweld* defense "does not apply during the period between contract and closing." Mary Lou Steptoe, Acting Dir., Bureau of Competition, FTC, *Remarks Before the ABA Section of Antitrust Law* (Apr. 7, 1994). Omnicare thus marks a convergence of federal and private enforcement, an opportunity for wronged vendors or customers of merging parties to seek redress, and a cautionary note to merging parties.

Omnicare marks a convergence of federal and private enforcement, an opportunity for wronged vendors or customers of merging parties to seek redress, and a cautionary note to merging parties.

Other Pro-Plaintiff Aspects of *Omnicare*

Twombly. The *Omnicare* case also finds itself among the relatively small number of cases upholding antitrust complaints in the face of motions to dismiss premised on *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007). The Court arguably increased the Rule 8 pleading requirements for antitrust (and other) claims brought in federal court. "*Twombly* motions" are *au currant* in antitrust circles and federal courts are responding favorably by demanding more concrete allegations from plaintiffs in *Twombly's* wake. *See, e.g.*, *In re GPU Antitrust Litig.*, MDL No. 1826, 2007 WL 2875686, at *12 (N.D. Cal. Sept. 29, 2007). Recently, in affirming a dismissal of an antitrust case, the Second Circuit observed that after *Twombly*, a "complaint must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion." *Port Dock & Stone Corp. v. Oldcastle Northeast, Inc.,* 507 F.3d 117 (2d Cir. 2007). In *Omnicare*, the Court limited *Twombly*, holding it inapplicable to allegations concerning express agreements:

> This test is easily met here: Omnicare has alleged that UnitedHealth and PacifiCare entered into an explicit merger agreement which restricted PacifiCare's ability to enter into contracts. After entering this agreement, but before the merger was complete, UnitedHealth and PacifiCare allegedly coordinated their decisions regarding PacifiCare's entry into new agreements. This is a straightforward allegation of an explicit agreement between the Defendants, satisfying the first element of a Sherman Act Section 1 claim.
>
> Here, Omnicare has pleaded an outright agreement, with enough specific facts, including quotations from the agreement itself, to render the allegation of agreement plausible.

Omnicare, 2007 WL 2875227 at *3; *accord In re Hypodermic Products Antitrust Litig.*, MDL No. 1730, 2007 WL 1959224, at *14 (D.N.J. June 29, 2007) (denying *Twombly* motion to dismiss where complaint alleged "specific anti-competitive agreements").

Antitrust Injury. The case also will be of particular benefit to plaintiffs' allegations of antitrust injury for a number of reasons. Section 4 of the Clayton Act affords a private right of action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. A plaintiff may only prosecute a private action where it has suffered "antitrust injury," specifically "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 77, 87 (1977). In this regard, the court qualified the mantra that the antitrust laws were designed to protect "competition, not competitors." The Court rejected out of hand the notion that an allegation of harm to downstream consumers or so-called market-wide competition is needed to survive a motion to dismiss. *Omnicare*, 2007 WL 2875227 at *3. The court also rejected defendants' reliance on dicta from both sellers' conspiracy cases and competitor cases to that effect. *Id.* The court held straightforwardly that "Omnicare has in fact alleged both a harm to competition – the claimed conspiracy between the Defendants – and an injury arising out of that violation – the receipt of lowered prices for services supplied to PacifiCare." *Id.*

* * *

It bears watching whether the *Omnicare* case will inspire future injured customers or vendors to bring suits against merging companies that may have colluded between signing and closing. While as counsel for merging parties traditionally advise their clients of the parties' duties to remain separate and compete on the merits prior to closing, counsel for customers of, and vendors to, merging parties may wish to advise their clients of such duties as well. Furthermore, *Omnicare* may prove to be a leading case interpreting the *Twombly* decision, and may signal a retrenchment from the increasingly restrictive rules for antitrust injury and standing that have developed in recent years. Stay tuned.

ENDNOTES

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