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Cautious Due Diligence Defeats Allegations of Conspiracy and Gun Jumping

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The Seventh Circuit Court of Appeals recently offered rare and detailed guidance on how merging competitors may share sensitive information during the due diligence process without violating antitrust proscriptions.

Due diligence and other aspects of information-sharing between competitors involved in M&A activities have long been necessary, but sometimes risky, activities. Directors and executives often have good reasons to seek competitively sensitive information about potential merger partners or acquisition targets, before making final decisions on price or suitability. Transaction counsel generally warn that the very process of sharing that information, however, may lead to allegations of conspiracy or gun jumping if the transaction craters and the parties revert to being competitors. Even if the transaction is consummated, if the preclosing period is lengthy, customers or vendors may allege that the parties engaged in gun jumping by sharing information that helped them collude prior to closing.

Exactly such an allegation was made by a vendor to two merging parties in *Omnicare v. United Health Group, etc., et al.*, 7th Cir., Jan. 10, 2011. More specifically, the plaintiff, a vendor of pharmaceutical products to the

defendant insurers, alleged that the preclosing exchange of information between the defendants during due diligence had enabled the merging parties to conspire on the terms of contracts with the plaintiff. The Court of Appeals for the Seventh Circuit recognized the potential problem, but concluded that the evidence here would not support a conclusion of preclosing conspiracy. The court emphasized that, while business rivals cannot freely exchange competitively sensitive information merely because they may eventually consummate a merger, where appropriate precautions are taken, such an exchange will not support an inference of conspiracy.

The court consequently affirmed summary judgment for the defendants, after observing:

1. Competitively sensitive information had been conveyed to executives only through high-level conclusions and characterizations, e.g., summarizing pricing information as "consistent," "higher," "roughly," etc.;
2. There was no evidence that detailed data was shared directly with executives;
3. Sensitive information was first sent through outside counsel for redacting.

The court characterized the due diligence process in this transaction as involving "only a circulation of generalized and averaged high-level pricing data, policed by outside counsel, that is more consistent with independent than collusive action."

While every transaction is unique, the detailed evaluation of a successful due diligence process in this case may be a useful reference whenever competitors find it necessary to share information in due diligence or for any other legitimate reason.