Antitrust Health Care Law – No Agreement Between Alleged Sherman Act Conspirators Results in Upholding of Summary Judgment—Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697 (7th Cir. 2011)

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The Sherman Antitrust Act ("Sherman Act") prevents businesses from creating collusive agreements that unreasonably restrain trade.\(^1\) To prevail under the Sherman Act, plaintiffs must prove three elements: (1) the defendants had an agreement, (2) the agreement unreasonably restrained trade, and (3) the plaintiff suffered injury.\(^2\) In Omnicare, Inc. v UnitedHealth Group, Inc.,\(^3\) the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") considered whether the evidence offered by Omnicare, Inc. ("Omnicare") of the agreement between UnitedHealth, Inc. ("United") and PacifiCare, Inc. ("PacifiCare") was sufficient to survive summary judgment.\(^4\) The court affirmed the grant of summary judgment because Omnicare did not present sufficient evidence to prove that United and PacifiCare had an agreement—the first prong of the Sherman Act test.\(^5\)

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1 Sherman Antitrust Act, 15 U.S.C. § 1 (2006). Section 1 states: "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Id. Although the plain language of the statute restricts "restraint of trade[,]" the statute is interpreted to only restrict agreements that unreasonably restrain trade. State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). A "buyers' cartel" is an agreement between buyers to force the price that suppliers charge the cartel below the competitive price. Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984).
3 629 F.3d 697 (7th Cir. 2011).
4 Id. at 703–704 (stating issue under consideration).
5 Id. at 724. Generally, under 15 U.S.C. § 1, a plaintiff must prove: (1) the defendants had an agreement, (2) trade was unreasonably restrained as a result of the agreement, and (3) that the
Omnicare, the nation’s largest institutional pharmacy, entered into two separate Medicare Part D contracts with health insurance providers United and PacifiCare. The United contract was favorable to Omnicare; in contrast, the PacifiCare contract was significantly favorable to PacifiCare. Whether a contract was favorable to Omnicare depended on the reimbursement rate. The reimbursement rate was the rate at which United or PacifiCare paid Omnicare when a United or PacifiCare plan member bought a Part D prescription drug at an Omnicare pharmacy. After substantial due diligence plaintiffs were injured. See id. at 705. The Market Force test is a two-part test that asks (1) whether the plaintiff’s evidence of agreement is ambiguous, and (2) if the evidence could support a conclusion that the defendants were acting independently. Id. at 707 (citing Market Force, Inc. v. Wauwatosa Realty, 906 F.2d 1167, 1171 (7th Cir. 1980)). The court then looks for evidence that could exclude the possibility the defendants pursued independent interests. Omnicare, Inc., 629 F.3d at 707 (citing Market Force, Inc., 906 F.2d at 1171). United is a national health insurance provider, and PacifiCare is a smaller health insurance provider. Id. Omnicare provides pharmacist consulting, medical records, medical supplies and other services to long-term care facilities. Id. Omnicare has pharmacies in forty-seven states. Id. Medicare Part D is a prescription drug program for seniors and disabled individuals. Id. The Centers for Medicaid and Medicare Services (“CMS”) mandated private insurers, such as UnitedHealth and PacifiCare, to submit their Part D plan proposals by August 1, 2005. Id. For private insurer’s plans to be approved, they had to show CMS they had a pharmacy network in place to provide convenient access to their enrollees.” Omnicare, Inc., 629 F.3d at 700. Whether these contracts are favorable to a pharmacy, such as Omnicare, depends on the reimbursement rate of the contract. Id. at 700–01. A health insurer, such as United or PacifiCare, pays a pharmacy a fixed percentage when a pharmacy sells drugs to one of the health insurer’s enrollees. Id. at 700. The health insurer pays the pharmacy a fixed percentage of average wholesale price (“AWP”); this is a published price that the pharmacy is supposed to pay when it buys a drug from a wholesaler. Id. at 700 n.1. Typically, pharmacies pay prices that are lower than AWP. Id. at 700. The actual amount pharmacies pay for drugs is closer to 78% of AWP. Omnicare, Inc., 629 F.3d at 700. Omnicare’s contract with United provided for Omnicare to be reimbursed at 88% of AWP. Id. at 700. For example, if Omnicare bought a drug with a $100.00 AWP, Omnicare would pay the wholesaler $78.00. Id. at 700 n.1. When Omnicare sold that drug to one of United’s enrollees, United would reimburse Omnicare at 88% of AWP, or $88.00. Id. Therefore, Omnicare prefers to negotiate the highest possible reimbursement rate with health insurance providers, because the higher the reimbursement rate, the higher profit margin Omnicare will realize when selling drugs to the health insurer’s enrollees. See id. at 700. PacifiCare’s reimbursement rate was 84% of AWP. Id. at 701. Omnicare, Inc., 629 F.3d at 700 n.1 (explaining the importance of the reimbursement rate in determining whether a contract would be favorable to Omnicare). Id. at 700 n.1 (stating how to determine the reimbursement rate); see supra text accompanying note 7. The reimbursement rate is the fixed percentage that a health insurer, such as United or PacifiCare, pays a pharmacy when a pharmacy sells drugs to one of the health insurer’s enrollees. Omnicare, Inc., 629 F.3d at 700 (discussing how the reimbursement rate calculations relate to
between United and PacifiCare, the two companies signed a merger agreement. The merger agreement was signed after Omnicare entered into a contract with United, but before Omnicare contracted with PacifiCare. After the merger, PacifiCare took an aggressive negotiating strategy and coerced Omnicare to enter into a contract favorable to PacifiCare. United then informed Omnicare that it intended to terminate its current contract and join PacifiCare’s more favorable contract.

United and PacifiCare exchanged a significant amount of information before and during the Part D negotiating and contracting process with Omnicare. First, a PacifiCare executive sent a strategic options memorandum (“SOM”) in an e-mail to United, in which they agreed to complete a Part D item, and indicated that the two should schedule a teleconference to discuss further issues. The SOM also proposed using a third party “as a stalking horse to obtain the best service and contracts” as possible with Omnicare. The “stalking horse” plan meant RXSolutions, owned by PacifiCare, would act for both United and PacifiCare to obtain the best Part D reimbursement rate possible. Additionally, during the due diligence period preceding

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10 Omnicare, Inc., 629 F.3d at 701. By early June 2005, both companies were meeting regularly to discuss the merger, including topics such as PacifiCare’s Part D program. Id. On July 6, 2005, the two companies executed a formal merger agreement that included a provision that stated PacifiCare was not allowed to enter into contracts that would “incur liabilities of more than three million dollars prior to the consummation of the merger.” Id.

11 Id. at 702. When Omnicare became concerned that PacifiCare insured patients would be unable to receive their medications after January 1, 2006, Omnicare reached out to United. Id.

12 Id. Omnicare approached PacifiCare to reopen negotiations. Omnicare, Inc., 629 F.3d at 702. Omnicare did not send PacifiCare a revised contract, make a counteroffer, or propose amendments. Id. PacifiCare’s CEO simply signed PacifiCare’s “any willing provider contract” on December 6, 2005. Id. This contract included the lowest rate at which Omnicare contracted with any national pharmacy. Id. However, the rate was higher than the rates Omnicare contracted for with at least three small pharmacies. Id.

13 Id. at 702. When Omnicare became concerned that PacifiCare insured patients would be unable to receive their medications after January 1, 2006, Omnicare reached out to United. Id. on January 1, 2006, Omnicare reached out to United. Id.

14 Id. at 709 (discussing the extent of information exchanged as part of Omnicare’s due diligence process).

15 Id. at 707. Omnicare alleged this SOM served as a “blueprint for the collusion.” Id. In the e-mail, the PacifiCare executive stated she spoke with a United representative who was in agreement with PacifiCare. Omnicare, Inc., 629 F.3d at 708.

16 Id. The Part D item is unspecified, but was something that a PacifiCare executive and a United executive were in agreement should be done. Id.

17 Id. This agreement is referred to as the Strategic Options Memo (“SOM”). Id. RxSolutions is
their merger, United and PacifiCare exchanged Part D pricing information.\textsuperscript{18} These exchanges between United and PacifiCare included a “Part D Questions” exchange, a “Due Diligence Summary,” a Part D risk assessment, United’s average Part D pricing information, and discussions between United and PacifiCare about difficulties both companies experienced in negotiations with Omnicare.\textsuperscript{19}

Elements of PacifiCare’s negotiation with Omnicare and the merger agreement between United and PacifiCare were unusual because PacifiCare needed Omnicare in its pharmaceutical network to be approved as a Part D provider.\textsuperscript{20} Aware of this, PacifiCare terminated negotiations with Omnicare.\textsuperscript{21} PacifiCare was also the only health insurance provider that refused to negotiate with Omnicare.\textsuperscript{22} Additionally, the merger agreement between PacifiCare and United restricted PacifiCare from entering into any

\textsuperscript{18} See id. at 700. These exchanges took place in June and July of 2005. Omnicare, Inc., 629 F.3d at 699-700.

\textsuperscript{19} Id. at 710. United sent the “Part D Questions” to PacifiCare; PacifiCare answered all “Part D Questions” in general terms and disclosed less information than was requested by United. Id. The “Due Diligence Summary,” which included a table of Part D bid comparisons, provided more detailed information about “sample regions” and a “high level review.” Id. The Part D pricing information comparison, which was delivered in a sealed envelope to a PacifiCare employee not present at the meeting, used general terms such as “consistent,” “higher,” and “roughly.” Id. The conversation between United and PacifiCare about difficulties negotiating with Omnicare was explained in a deposition, when a United executive stated: “I do recall a conversation with Jaqueline Kosecoff in the context of difficulties that we were having reaching a timely contract with-with Omnicare, and I believe that she told me that [PacifiCare] was also having difficulties reaching an agreement with Omnicare, and I believe that she told me that [PacifiCare] was also having difficulties reaching an agreement with the contract.” Id. at 710-11.

\textsuperscript{20} See Omnicare, Inc., 629 F.3d at 700. Before the insurer’s plans could be approved, plan sponsors had to demonstrate pharmacy networks were available to serve their anticipated enrollees. Id.

\textsuperscript{21} Id. at 711. Omnicare’s proposed reimbursement rate was the basis for stopping negotiations. Id. Omnicare’s log of the negotiations shows cracks in the relationship shortly after they began to deal with PacifiCare. Id. at 713. The negotiation log further revealed Omnicare should not have been surprised when PacifiCare ended negotiations. Id. Omnicare discovered PacifiCare was discussing better price rates with Omnicare’s competitors. Id. PacifiCare could be confident in this move despite potentially losing its eligibility as a Part D provider if they had colluded with United. Omnicare, Inc., 629 F.3d at 712. PacifiCare had reopened negotiations with Managed Health Care Associates, a large pharmacy network that competes with Omnicare. Id. at 713. After successfully negotiating a deal and getting Managed Health Care Associates in its network, PacifiCare received CMS approval in September 2005. Id.

\textsuperscript{22} Id. at 700. After negotiations between PacifiCare and Omnicare broke down, Omnicare “[stood] ready to negotiate” but PacifiCare refused. Id. United employed Walgreens Health Initiative to negotiate with Omnicare and they eventually agreed on a contract. Id.
contract of three million dollars or more. However, an exception ("carve-out") allowed PacifiCare to amend any contracts related to Part D without United's consent. Omnicare filed a complaint alleging that United and PacifiCare formed a "buyers' cartel" in violation of the Sherman Act. The object of a buyers' cartel is to force the price that suppliers charge the members of the cartel below the competitive level. The District Court in the Northern District of Illinois granted summary judgment for United and PacifiCare because Omnicare failed to demonstrate a genuine issue of material fact as to whether there was an improper agreement between United and PacifiCare. Relying on the above evidence of an agreement between United and PacifiCare, the Seventh Circuit affirmed the district court's grant of summary judgment in favor of United and PacifiCare.

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23 Omnicare, Inc., 629 F.3d at 711.
24 Id. This exception was referred to by the parties as the "carve-out." Id. The carve-out allowed PacifiCare to enter into a Part D plan with Omnicare or another pharmaceutical network without the approval of United. Id. A carve-out is also a common term in Medicare and other contracts indicating an exclusion to an insurer's coverage of a consumer. BURTON T. BEAM JR. & JOHN J. McFADDEN, EMPLOYEE BENEFITS 325-26 (6th. ed. 2001).
25 Id. at 703. Omnicare alleged the defendants had "shared information and conspired to gain a competitive advantage over Omnicare." Id. United and PacifiCare employees exchanged emails which specifically addressed the Part D contracts each insurer had with Omnicare. Omnicare, Inc., 629 F.3d at 702-03. Through the communications, United learned that the PacifiCare-Omnicare contract included low reimbursement rates and no "Patient Protections." Id. at 702-03. After the United-PacifiCare merger, United informed Omnicare that United would "join" the PacifiCare-Omnicare contract rather than continue under the United-Omnicare contract, which had higher reimbursement rates and "Patient Protections." Id. at 703.
26 See United States v. U.S. Gypsum Co., 438 U.S. 422, 441 n.16, 446 n.22 (1978) (explaining that mere exchange of pricing or other information among competitors is not a per se violation of the Sherman Act). Buyers may violate the Sherman Act if they exchange pricing information with the intent of forcing the supplier to sell their products below the competitive market price. Id. at 441-43. In this situation, Omnicare would be the supplier, and United and PacifiCare would be the members of the alleged cartel. See Omnicare, Inc., 629 F.3d at 703.
27 Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F.Supp.2d 945, 974 (N.D. Ill. 2009) (granting summary judgment in favor of the defendants) Summary judgment was granted because Omnicare could not make an affirmative showing of proof of a contract, coordination or conspiracy between United and PacifiCare. Id. Omnicare alleged that the merger agreement between United and PacifiCare was proof of a conspiracy, but the court dismissed this argument because RxSolutions was specifically exempted from the approval requirement. Id. at 962. Omnicare also argued that PacifiCare's bargaining strategy and reimbursement rates were incomprehensible in the absence of a conspiracy with United. Id. at 964. The court concluded that the evidence showed "lawful conduct on the part of two competing entities engaged in legitimate merger discussions and planning" rather than a conspiracy. Id. at 974.
28 Omnicare, Inc., 629 F.3d at 721 (holding United and PacifiCare acted in their independent interests and Omnicare could not prove the existence of "a contract, combination or conspiracy" as required under the Sherman Act).
Summary judgment is appropriate if there is no genuine issue of material fact, and the moving party is entitled to a judgment as a matter of law; the test applied by federal courts to determine if a genuine issue of material fact exists is whether a reasonable jury could return a verdict for the non-moving party.29 During the summary judgment stage all reasonable inferences supported by the record should be drawn in favor of the non-moving party, which in this case was Omnicare.30 The purpose of the Sherman Act is to prevent businesses from creating collusive agreements.31 To prevail under the Sherman Act, plaintiffs must prove the defendants had an agreement, trade was unreasonably restrained as a result of the agreement, and that the plaintiffs were injured.32

To establish the first element, a Sherman Act plaintiff must show that the defendants were involved in a common scheme to achieve an unlawful goal.33 Most Sherman Act plaintiffs rely on circumstantial rather than direct evidence to prove the defendants had an agreement.34 When plaintiffs rely on circumstantial evidence, they

29 FED R. CIV. P. 56(a). Rule 56(a) of the Federal Rules of Civil Procedure states that a court will order summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Id. See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986) (stating test of summary judgment).
30 See Omosegbon v. Wells, 335 F.3d 668, 677 (7th Cir. 2003) (explaining summary judgment analysis).
31 See D.R. Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165, 173-74 (1915) (stating purpose of the Sherman Act). The purpose of the Sherman Act is to prevent "combinations or conspiracies in restraint of trade or commerce, the monopolization of trade or commerce, or attempts to monopolize the same." Id. Stated another way, the purpose of the Sherman Act is to free interstate commerce from restraints caused by conspiracies of all kinds. See Paramount Pictures, Inc. v. United Motion Picture Theater Owners of E. Pa., S. N.J. & Del., Inc., 93 F.2d 714, 719 (3d Cir. 1937) (explaining the purpose of the Sherman Act).
32 See Denny's Marina, Inc. v. Renfro Prods., Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) (articulating the standard of the Sherman Act).
34 See In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 661-62 (7th Cir. 2002) (noting difference between direct and circumstantial evidence). Direct evidence is "evidence tantamount to an acknowledgement of guilt." Id. Circumstantial evidence is "everything else including ambiguous statements." Id. Although ambiguous, circumstantial evidence is important because "most cases are constructed out of a tissue of such statements . . . since an outright confession will ordinarily obviate the need for a trial." Id.
must present evidence sufficient to infer the defendants had an agreement. For example, a plaintiff can satisfy the first element, and establish the presence of an unlawful agreement if they can prove the plan would result in a restraint on interstate commerce.

To show the existence of an agreement and avoid summary judgment, a plaintiff in a Sherman Act lawsuit must present direct or circumstantial evidence that tends to rule out the possibility that the defendants acted independently. However, the plaintiff need not meet a heightened burden of proof to defeat a summary judgment motion. The courts have adopted a two-part test to determine if a plaintiff has presented sufficient evidence of an agreement to overcome summary judgment. The first part of the test is to determine whether the evidence of the defendants' agreement is ambiguous, that is, whether it is as consistent with independent action as it is with collusive action. If the action is ambiguous, the next part of the test is to determine if any evidence tends to exclude the possibility that the defendants were acting independently. Furthermore, summary judgment should be granted sparingly in antitrust litigation where motive and intent are central to the analysis; dismissing such cases at the summary judgment stage does not give plaintiffs sufficient time to develop the necessary facts to prove motive and intent. The Seventh Circuit has held that

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35 Id. at 655-56 (discussing three traps a court should avoid in analyzing antitrust evidence when ruling on defendant's summary judgment motion). The first trap to avoid is to weigh conflicting evidence. Id. at 655. The second trap to avoid is viewing the plaintiff's evidence in a piecemeal way, not as whole. *High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d at 655. "The third trap [to avoid] is failing to distinguish between the existence of a conspiracy and its efficacy." Id. at 656.


37 See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). At summary judgment, plaintiff's conspiracy evidence "must tend to rule out the possibility that the defendants were acting independently." *Miles Distrubrs., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 449 (7th Cir. 2007) (stating circumstantial evidence of conspiracy must tend to exclude the possibility that the defendant's acted independently).

38 See *Eastman Kodak Co. v. Image Technical Servs.*, Inc., 504 U.S. 451, 468 (1992) (noting the Court had previously declined to introduce any special burden on antitrust plaintiffs facing summary judgment).


40 *Market Force Inc.*, 906 F.2d at 1171.

41 Id.

courts should evaluate the evidence in its entirety rather than piecemeal, and failing to draw reasonable inferences from evidence usurps the proper role of the jury.43

In Omnicare, the Seventh Circuit considered Omnicare's Sherman Act claim and whether the company produced sufficient evidence to demonstrate a genuine issue of material fact as to whether an agreement existed between United and PacifiCare.44 The court individually considered each piece of Omnicare's circumstantial evidence to determine if a reasonable juror could infer there was an agreement.45 The court first looked to the SOM memo and rejected Omnicare's argument that a reasonable jury could infer that a price fixing agreement existed between United and PacifiCare based on the memo alone.46 The court reasoned that the statements in the SOM about "agreements," "sensitive items," and "stalking horse" were ambiguous because these statements were equally likely to refer to legitimate business matters as they were a price fixing agreement.47 Additionally, the court noted that the timing of the SOM made this antitrust litigation; where motive and intent are central, the conspirators have possession of most of the proof that the plaintiffs need and one or more of the plaintiff's witnesses are hostile. *Id.* See, e.g., Green County Food Mkt., Inc. v. Bottling Group, LLC, 371 F.3d 1275, 1278 n.1 (10th Cir. 2004) (noting antitrust summary judgment should be used sparingly).

43 See Omnicare, Inc., 629 F.3d at 704 (citing Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 717 (7th Cir. 2006); In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d at 655-56).

44 Omnicare, Inc., 629 F.3d at 704 (identifying issues under consideration). The court looked at whether PacifiCare's hard line negotiating strategy "was made not by PacifiCare alone but rather by PacifiCare acting in concert with United while the two were horizontal competitors." *Id.* at 706.

45 *Id.* at 707. The court considered seven key items of evidence offered by Omnicare: the SOM, the pre-merger information exchange, the carve-out, PacifiCare's hard line negotiating tactics, a series of messages collectively referred to as the "October e-mails," the contract rate, and United's behavior toward Omnicare. *Id.* at 707-20.

46 *Id.* at 707-09. In its brief, Omnicare claimed the SOM served as a "blueprint" for the collusion between United and PacifiCare. *Id.* at 707. The first draft of the SOM sent by an executive of PacifiCare recommended using the pharmacy benefits manager, RxSolutions, "as a stalking horse to obtain the best service[s] and contracts." *Omnicare, Inc.*, 629 F.3d at 708. The court pointed out that the SOM drafts continually discussed options that "need to be considered," not options that were being actively pursued. *Id.* The court did not find the "blueprint" argument persuasive, and determined the SOM's usefulness in showing an inference of collusion was minimal, especially because the SOM was adopted well after the collusion alleged by Omnicare was said to have begun. *Id.* See supra text accompanying note 17.

47 See Omnicare, Inc., 629 F.3d at 708. After finding that the evidence presented by Omnicare in the SOM was ambiguous, the court stated, "[I]t is well established that evidence of informal communications among several parties does not unambiguously support an inference of conspiracy." *Id.* The court further reasoned that the sensitive items could just as likely be related to legitimate business reasons as they could be related an illicit agreement. *Id.*
evidence ambiguous as an indicator of an agreement; the SOM continued to be circulated after the Part D contracts and merger were finalized, and was not circulated until after Omnicare’s alleged beginning of the conspiracy.48

Next, the court considered several pre-merger information exchanges between United and PacifiCare, including the exchange of pricing information.49 The court determined that the information exchanged between United and PacifiCare would not allow a reasonable juror to infer there was an agreement.50 Further, in applying the second part of the test to this group of information, the court stated the pre-merger information exchange did not exclude the possibility of United and PacifiCare acting independently.51 The court continued its analysis by considering the carve-out in United and PacifiCare’s merger agreement, including expert testimony that United likely agreed to the carve-out because it became familiar with PacifiCare’s pricing information and negotiating strategy.52 The court also considered the expert’s contradicting statement that United reviewed the information only at a “very high level.”53 The court reasoned that the expert’s conflicting testimony would limit a juror’s ability to infer an agreement.54

48 Id. at 707-08.
49 Id. (considering “Pre-Merger Information Exchange” generally). The court noted that information exchange can support the inference of an agreement; however, circumstantial evidence of an agreement does not show an agreement on its own. Id.
50 Omnicare, Inc., 629 F.3d at 707-08 (reasoning pre-merger information exchange, viewed separately or collectively, would not allow a reasonable juror to infer an agreement). At the end of its pre-merger information exchange analysis, the court noted that this evidence does not alone meet summary judgment test but it “may illuminate other evidence . . . so we keep it in mind as we work toward completing the evidentiary picture.” Id. When analyzing the information exchanged between United and PacifiCare, the court evaluated the information collectively. Id.
51 Id. at 711.
52 Id. at 711-12. The court stated that part of the expert’s testimony could support a reasonable inference that United and PacifiCare had an agreement regarding a carve-out during merger negotiations. Id. at 712. This inference, however, was not sufficient to establish “collusion” with regards to the Part D negotiating and contract strategy. Omnicare, Inc., 629 F.3d at 712.
53 See id. at 711.
54 Id. at 712. The expert’s testimony opined that the existence of the carve-out inferred “United had become comfortable with PacifiCare’s Part D contracting strategy based upon the confidential information it obtained.” Id. While the court recognized the expert’s suggested inference might be a reasonable one juror’s could make, Omnicare faced an additional problem. Id. To conclude the carve-out demonstrated an agreement relating to Part D contracting strategies existed, jurors would have to make additional inferences based upon expert’s suggested inference. Id. As the carve-out specifically addressed Part D, the court stated such an inference could be a reasonable one even though countervailing evidence existed. Omnicare, Inc., 629 F.3d at 712.
Finally, the court considered PacifiCare's hard line negotiating strategy, and reasoned that because Omnicare controlled any additions to United's and Omnicare's reimbursement contract, Omnicare's theory broke down, and therefore PacifiCare's actions were as consistent with independent action as they were with a collusive agreement. Thus, the Seventh Circuit ultimately held that the district court properly granted summary judgment because Omnicare's evidence did not satisfy the two-part test applied to summary judgment motions in antitrust litigation. Specifically, Omnicare's evidence of the defendant's agreement was equally consistent with independent action as it was with collusive action, and Omnicare did not present any evidence that tended to exclude the possibility that the defendants were acting independently.

In Omnicare, the Seventh Circuit (1) failed to consider the health law implications, (2) failed to draw reasonable inferences in favor of Omnicare, (3) failed to consider the evidence Omnicare presented as a whole, and (4) neglected to consider the purpose of the Sherman Act. Preventing valid actions from proceeding past the summary judgment stage could have significant effects on the medical industry in general, including Medicaid and Medicare. For example, collusive mergers that

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55 Id. at 715. Omnicare's theory was that PacifiCare's sequence of negotiating tactics only made sense if it had coordinated such negotiations with United. Id. at 713. The theory was based on the abruptness of the negotiation's termination and on United's lack of contingency planning to provide medication to its Part D enrollees who were presiding in Omnicare-serviced facilities. Id. The court reasoned that if PacifiCare took a hard line negotiating strategy with Omnicare and failed, PacifiCare could join United's contract, or United would go through with the merger anyways because it was a complicated deal and they would not want to back out so late. Id. at 715. The court further reasoned Omnicare's theory breaks down because United did not control the power to add other insurers, such as PacifiCare, to its contract with Omnicare. Id. For these reasons, the court found the existence of an agreement based on PacifiCare's negotiation tactics to be just as likely as PacifiCare and Omnicare acting in their own economic interests. Omnicare Inc., 629 F.3d at 715.

56 Id. at 720 (affirming district court's summary judgment).

57 Id. at 719-20 (pointing to Omnicare's evidence to hold that the district court properly granted summary judgment).

58 See infra notes 59-68 and accompany text (arguing the court failed to draw reasonable inferences in favor of Omnicare); supra note 35 and accompanying text (exemplifying the court's failure to consider the evidence Omnicare presented as a whole); supra note 31 and accompanying text (explaining the purpose of the Sherman Act).

increase prices and decrease output could lead to an increase in government health care expenditures, particularly Medicaid and Medicare. Omnicare now has to pay a higher reimbursement rate because of the collusive actions of United and PacifiCare, which could lead the nation’s largest institutional pharmacy to increase its prices to maintain previous profit margins. These price increases could ripple throughout the system, especially in light of the Patient Protection and Affordable Care Act’s ("PPACA’s") increase in insurance coverage for patients with pre-existing conditions, many of whom would be reliant on Omnicare’s pharmacies located at long term care facilities. Additional increases in health care costs could result in greater opposition to the recently passed PPACA legislation.

Further, the court failed to draw reasonable inferences in favor of Omnicare during the courts analysis of the SOM. The court reasoned that because the SOM continued to be circulated after the Part D contracts and merger had been finalized, and was not circulated until after the alleged beginning of the conspiracy, the SOM was not a "blueprint" of the conspiracy. The court reached this conclusion without drawing obvious inferences in favor of Omnicare; for example, if the SOM was a "blueprint" of the conspiracy, the date of its circulation is unimportant, and the existence of the SOM is evidence that discussions may have occurred before its circulation. By drawing inferences in favor of United and PacifiCare, the court improperly disposed of a
potentially valid claim. Additionally, the court dismissed Omnicare's expert testimony indicating that (1) acquisition targets in mergers typically act conservatively, and (2) PacifiCare would not have pursued such a risky negotiation strategy without previously entering into an agreement with United. This reasoning fails to draw a proper inference in favor of Omnicare because, although PacifiCare could not join United's contract, it was free to enter into a similar contract with United at a higher reimbursement rate. The reasonable inference, when drawn in favor of Omnicare, is that PacifiCare was trying to negotiate a contract with a low reimbursement rate that United could later enter; and if this strategy failed, PacifiCare could always enter into a contract with Omnicare at a reimbursement rate more favorable to Omnicare.

The court also failed to consider Omnicare's evidence as a whole. For example, in the court's analysis of PacifiCare's aggressive negotiating strategy, the court noted that a United executive pointed out that "in year 2, we can move them [PacifiCare] to our contracts," and this statement indicated the opposite of a collusive agreement between United and PacifiCare. By drawing this conclusion, the court failed to consider the evidence as a whole. If the court considered PacifiCare's refusal to continue negotiations with Omnicare in conjunction with the statement by a United executive, a likely conclusion would have been that PacifiCare was taking a hard line negotiating strategy with Omnicare because, as the United executive stated, PacifiCare could always fall back and join a contract like Omnicare's.

See supra note 65 and accompanying text.

68 Omnicare, Inc., 629 F.3d at 720.

69 See supra text accompanying note 7 (explaining reimbursement rates generally).

70 See supra text accompanying note 65 (discussing drawing proper inferences in summary judgment proceeding).

71 See Omnicare, Inc, 629 F.3d at 720-21 (purporting to examine the bulk of Omnicare's evidence both separately and collectively).

72 See id. at 720. The court reasoned this evidence indicated the opposite of a collusive agreement because moving PacifiCare to United's contract was the reverse of what Omnicare alleged the collusion was between United and PacifiCare. Id. at 699. Omnicare alleged that the collusion between United and PacifiCare was to have PacifiCare take a hard line negotiating strategy with Omnicare and if successful, have United join PacifiCare's contract with better terms. Id.

73 See In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651, 655-56 (7th Cir. 2002) (discussing a common mistake made by courts in deciding summary judgment antitrust actions). One of the common mistakes listed was considering the evidence in a piecemeal fashion instead of considering the evidence as a whole. Id.

74 See Omnicare, Inc., 629 F.3d at 717-18. As the court discussed, PacifiCare could not fall back on United's Part D contract with Omnicare because Omnicare controlled adding additional providers to the contract. Id. at 716. However, this misses the point, as PacifiCare could likely agree to a similar Part D contract that United signed with Omnicare because Omnicare would want to enter into this type of contract with a favorable reimbursement rate. See id.
Finally, the court did not consider the purpose of the Sherman Act, which is to prevent restraint on interstate commerce produced by conspiracies of any kind.\(^{75}\) The court reasoned that allowing Sherman Act claims based on conversations between two competitors during merger talks would dampen business activity, as competitors would be afraid to pursue mergers with each other in fear of an impending Sherman Act claim.\(^{76}\) The court should have considered and applied the purpose of the Sherman Act in this line of reasoning; that allowing Sherman Act claims to proceed past the summary judgment stage ensures that collusive agreements between competitors do not dampen business activity.\(^{77}\) If other cases follow this court's holding and dismiss similar Sherman Act claims at the summary judgment stage, this ruling could have the same business dampening effect the court was trying to avoid.\(^{78}\) By not allowing Sherman Act claims to proceed past the summary judgment stage, businesses are encouraged to enter into collusive agreements, which in turn increases prices and decreases output in the long term.\(^{79}\)

In *Omnicare, Inc. v UnitedHealth Group, Inc.*, the Seventh Circuit considered whether Omnicare's evidence of an agreement between United and PacifiCare was sufficient to survive summary judgment.\(^{80}\) The court drew improper inferences in favor of United and PacifiCare while also not drawing reasonable inferences in favor Omnicare, the non-moving party.\(^{81}\) These inferences resulted in Omnicare's potentially valid claim being disposed of during summary judgment and could have lasting negative effects on the health care industry.\(^{82}\)

\(^{75}\) *See supra* note 31 and accompanying text.

\(^{76}\) *See Omnicare, Inc.*, 629 F.3d at 709-710 (citing Omnicare, Inc. v. UnitedHealth Group, Inc., 594 F.Supp.2d 945, 968 (N.D. Ill. 2009)).

\(^{77}\) *See supra* note 31 and accompanying text.

\(^{78}\) *See* Peter C. Carstensen, *Buyers Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy*, 1 WM. & MARY BUS. L. REV. 1, 10 (2010), *available at* http://scholarship.law.wm.edu/wmblr/vol1/iss1/2 (discussing consequences of buyers causing a sufficient reduction in output).

\(^{79}\) *Id.* *See supra* note 31 and accompanying text.

\(^{80}\) *See* Omnicare, Inc. v. UnitedHealth Group, Inc., 629 F.3d 697, 724 (11th Cir. 2011) (affirming the district court's dismissal of Omnicare's claims).

\(^{81}\) *Id.* at 721.

\(^{82}\) *Id.* (stating court's analysis leading to affirming dismissal of Omnicare's claims).