



## Noted with Interest—Assessing Circumstantial Evidence in Price-Fixing Conspiracy Cases: A Comparison of the Seventh Circuit’s Recent Decisions in Text Messaging and Omnicare

Maria Fehretdinov

Latham & Watkins, LLP—Washington, DC

At first blush, the Seventh Circuit Court of Appeals’ recent decisions in *In re Text Messaging Antitrust Litigation* and *Omnicare, Inc.*<sup>1</sup> v. *UnitedHealth Group, Inc.*<sup>2</sup> may appear seemingly at odds. While the *Text Messaging* court found the circumstantial evidence in that case sufficient to allege a price-fixing conspiracy, such evidence was insufficient to survive a summary judgment motion in *Omnicare*. The court’s differing treatment of the circumstantial evidence in the two cases, however, may be strictly a function of the different procedural stages at which the two cases reached the court.

The class plaintiffs in *Text Messaging* alleged that the defendant cellular telephone service providers conspired to fix prices for text-message services, relying entirely on circumstantial evidence, including the following: (1) “defendants belonged to a trade association and exchanged price information directly at association meetings”; (2) defendants “met with each other in an elite ‘leadership council’ within the association and the leadership council’s stated mission was to urge its members to substitute ‘co-opetition’ for competition”; (3) “in the face of steeply falling costs, the defendants increased their prices”; and (4) “all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third.”<sup>3</sup>

Defendants moved for dismissal based on the complaint's lack of direct evidence of a conspiracy, "which would usually take the form of an admission by an employee of one of the conspirators, that officials of the defendants had met and agreed explicitly on the terms of a conspiracy to raise price."<sup>4</sup> Judge Posner acknowledged that the plaintiffs' allegation as to the substance of the defendants' agreement was "an inference from circumstantial evidence," but held that "[d]irect evidence of conspiracy is not a sine qua non . . . . Circumstantial evidence can establish an antitrust conspiracy."<sup>5</sup> The court further concluded that it "need not decide whether the circumstantial evidence that [it] ha[d] summarized is sufficient to compel an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's 'plausibility.'"<sup>6</sup> Finally, the court noted that "[d]iscovery may reveal the smoking gun or bring to light additional circumstantial evidence that further tilts the balance in favor of liability," and allowed that discovery to proceed.<sup>7</sup>

Soon after in *Omnicare*, the court effectively held that circumstantial evidence carries less weight at the summary judgment stage. *Omnicare*, the nation's largest institutional pharmacy, entered into separate service contracts with two health insurance companies: UnitedHealth Group ("United"), "a large national provider," on terms favorable to *Omnicare*; and PacifiCare, "a smaller, California-based health insurer," on significantly less favorable terms.<sup>8</sup> Shortly thereafter, United merged with PacifiCare, abandoned its contract with *Omnicare* and joined PacifiCare's contract.<sup>9</sup> *Omnicare* filed suit, alleging that United and PacifiCare conspired to effectively bind a large portion of its business to the relatively small portion previously bound by the PacifiCare contract. In particular, *Omnicare* claimed that the defendants traded sensitive information regarding *Omnicare* during the due diligence phase of their merger, which enabled them to coordinate their negotiations with *Omnicare* so as to ensure favorable terms for the merged entity after the merger.<sup>10</sup> But after conducting extensive discovery, *Omnicare* found no "smoking gun" evidence to that effect.<sup>11</sup>

Judge Tinder noted that *Omnicare*'s evidence was circumstantial rather than direct, characterizing *Omnicare*'s case as one "constructed out of a tissue of [ambiguous] statements and other circumstantial evidence."<sup>12</sup> Lacking for direct evidence, *Omnicare* was required to present evidence showing that "the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed' it."<sup>13</sup> The court explained that "all circumstantial evidence of conspiracy . . . is not on its own demonstrative of anticompetitive behavior, even when pricing data is what is exchanged."<sup>14</sup> The court further addressed and considered at length wide-ranging circumstantial evidence, but ultimately found it wanting:

*Omnicare*'s richly detailed narrative is complex and compelling. But *Omnicare* cannot get to trial based on the elegance of its theory alone. To survive summary judgment, it "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed" it. *Matsushita [Elec. Indus. Co. v. Zenith Radio Corp.]*, 475 U.S. [574,] 588 [(1986)]. Not only that, its "offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently." *Bell Atl. Corp. [v. Twombly]*, 550 U.S. [544,] 554 [(2007)]. When considered alongside the competing inference of independent action, the inference of conspiracy is the less reasonable of the two. Likewise, the ample evidence offered by *Omnicare* does not on the whole tend to negate the reasonable inference of independent action.<sup>15</sup>

With that, the court affirmed the district court's order granting summary judgment to defendants, and denying Omnicare's motion for summary judgment as to their affirmative defenses. *Id.* at 724.

The holdings in *Text Messaging* and *Omnicare* do not necessarily conflict. The court effectively reiterated the general rule that plaintiffs should bear a greater burden at the summary judgment stage than at the dismissal stage, and refined the law as to the role of circumstantial evidence at both stages. Both cases should serve as guideposts in their respective contexts for district courts going forward.

1. 630 F.3d 622 (7th Cir. 2010) (Posner, J.).
2. 629 F.3d 697 (7th Cir. 2011) (Tinder, J.).
3. *Text Messaging*, 630 F.3d at 628.
4. *Id.*
5. *Id.* at 629 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984); *Miles Distrib., Inc. v. Specialty Construction Brands, Inc.*, 476 F.3d 442, 449 (7th Cir. 2007); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661-62 (7th Cir. 2002); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 771 (8th Cir. 2004); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998); *Johnson v. Hospital Corp. of Am.*, 95 F.3d 383, 392 (5th Cir. 1996)).
6. *Id.*
7. *Id.*
8. *Omnicare*, 629 F.3d at 699.
9. *Id.*
10. *Id.* at 704.
11. *Id.* at 706.
12. *Id.* (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002)).
13. *Id.* at 706-07 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).
14. *Id.* at 709.
15. *Omnicare*, 629 F.3d at 720.