

AntitrustConnect Blog

FTC Needs To Stop The Express Scripts-Medco Merger

David Balto (Law Offices of David A. Balto) · Thursday, November 3rd, 2011

Antitrust enforcement has certainly been revived at the Obama Justice Department. With recent cases against Comcast/NBC, health insurers and telecom firms, the DOJ has begun to demonstrate why antitrust enforcement is a critical bulwark for competitive markets.

No area is in greater need of an infusion of sound enforcement than healthcare. The healthcare debate demonstrated the dysfunction of healthcare intermediary markets — health insurer and pharmacy benefit manager (PBM) markets are highly concentrated and largely unregulated, and massive consolidation of health insurers and PBMs over the past decade has led to a long list of deceptive and anticompetitive practices.

Fortunately, the DOJ has drawn a line in the sand on health insurance mergers. Through careful enforcement actions, such as the Blue Cross Blue Shield of Michigan matter, the DOJ has taken a stand for competition and is working to prevent further consolidation of these markets.

Now it is time for the Federal Trade Commission to step up to the plate and block the Express Scripts-Medco merger.

PBMs are the quintessential middleman — they deal with drug manufacturers and pharmacies to form “pharmacy networks” that they then sell to insurers, employers and unions. Although they produce no product and undertake no risk, they are phenomenally profitable. In 2010, the three dominant PBMs made just under \$6 billion for the year. To put these dramatic profits into context, this exceeds the combined profits of five of the six largest supermarket chains in the U.S.

These disproportionately excessive profits are possible because the PBM market lacks three elements essential for a competitive market: choice, transparency and lack of conflicts of interest. Three PBMs control more than 80 percent of the large-plan market; PBM business practices are exceedingly opaque; and the industry is plagued by conflicts of interest resulting from pharmaceutical kickbacks and PBM ownership of mail order and specialty pharmaceutical operations. Each of the major PBMs has been sued by multistate attorney general coalitions for major consumer protection violations.

What is more, PBMs are the only unregulated part of the healthcare market. Unsurprisingly, the major PBMs fight with limitless energy and lobbying resources — more than \$10 million in 2010 — to keep regulators at bay.

You don't need a Ph.D. in economics to figure out the PBM market is broken.

Now, two of the three largest PBMs — Express Scripts and Medco — are seeking to join forces. This would create a PBM giant covering more than 155 million Americans, with almost 40 percent of all prescriptions and about 50 percent of the large health plans.

Express Scripts and Medco, with their well-funded lobbying army, have flooded the media with stories that this merger benefits consumers. They claim that with increased technological capabilities and mail-order operations the merged firm will be more efficient. Most important, they say, the merged firm will be a more powerful buyer and will use that clout to drive down drug prices.

This could not be more of a fallacy.

First, few, if any, consumers prefer being forced to use mail order or being relegated to an out-of-state call center for healthcare advice. Consumers want to be able to use America's most trusted professional — the community pharmacist. In many areas, a community pharmacist is the most accessible healthcare professional. They help lower drug costs by providing valuable health counseling and shifting consumers to lower-cost generics (unlike the PBMs, who direct consumers to drug brands based on kickbacks they pocket from pharmaceutical manufacturers).

Second, the antitrust laws provide important guidance as to how we should approach these cost-saving claims. Eleven years ago, the four largest drug wholesalers sought to merge in two separate deals. They made the same shallow claim that the merger was needed to lower drug costs. But the FTC and the court said no — with only two competitors left in the market, there was no guarantee those savings would end up in the pockets of consumers.

There is little reason to expect a dominant PBM to pass on savings to consumers this time around, especially given Medco's and Express Scripts's rather tainted records as model corporate citizens. Combined, the big three PBMs have paid more than \$370 million in penalties and fines for violations of consumer protection laws. Letters to the FTC from leading consumer groups, including Consumers Union and Consumer Federation, as well as 14 members of Congress, attest to the skepticism that these savings will be realized by consumers.

Competition is an essential element to controlling healthcare costs. Allowing two of the largest PBMs to carve up the market is a poor prescription for reducing costs and improving healthcare. This merger needs to be blocked.

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This op-ed, entitled “Step Up to the Plate: FTC Needs to Stop the Express Scripts-Medco Merger,” appears in the November 3 edition of *The Hill*.

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