Several States Contemplating Lawsuits to Prevent Express-Scripts/Medco Merger

by Dan Brecher on April 11, 2012

Several states, including New York, are said to be contemplating legal action to prevent Express Scripts Inc.'s proposed acquisition of Medco Health Solutions Inc. The $29.1 billion deal would create the largest U.S. pharmacy-benefits manager.

Section 7 of the Clayton Act specifically prohibits mergers and acquisitions when the effect "may be substantially to lessen competition, or to tend to create a monopoly." The key question is whether the proposed merger is likely to create or enhance market power or facilitate its exercise. Issues like higher prices, fewer or lower-quality goods or services, or less innovation are often considered as well.

Due to their potential impact on the marketplace, proposed mergers between direct competitors (horizontal mergers) often get the closest examination. The Federal Trade Commission is already evaluating the Medco acquisition for possible anti-trust violations. Critics of the deal argue that it could lead to rising prescription prices and fewer pharmacy services for consumers.

However, many believe that the FTC will ultimately give the merger the green light, with conditions aimed to address concerns about competition. If the FTC consent agreement does not adequately address competitive and consumer concerns, several states may file suit.

Under *California v. American Stores Co.*, states are authorized to challenge acquisitions that federal antitrust regulators have approved. In that case, the Supreme Court sided with the State of California, which had filed a lawsuit to stop a merger between American Stores and Lucky Stores Inc. The FTC had approved the acquisition after American Stores consented to sell several supermarkets.

In the current case, Attorneys General in New York, Pennsylvania, Ohio, Texas and California may seek a temporary or permanent injunction to either delay or permanently prevent the merger. The courts would then consider whether the FTC has adequately addressed the anti-competitive aspects of the proposed merger.

The Message For New York and New Jersey Businesses: The federal government has recently stepped up its scrutiny of proposed mergers, particularly when it comes to deals between competitors. As the Medco acquisition highlights, the FTC is not always the only potential roadblock. Large states like California and New York are increasingly investigating these deals as well.

While mergers can be an effective way for businesses to grow and expand into new areas, it is always important to carefully consider the potential regulatory and legal hurdles. Our experienced business attorneys can guide you through the merger process and minimize any potential roadblocks you may face along the way.