Multiple Choice Merger Remedies: Examining Why Federal and State Antitrust Enforcers Sometimes Disagree

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Federal and state antitrust enforcers can both sue to block mergers and acquisitions that may lessen competition under our regulatory framework. Although dualistic enforcement authority typically results in cooperation and joint enforcement, occasionally federal and state regulators adopt different enforcement strategies (*i.e.,* one settles and another litigates). In *Cabell Huntington/St. Mary's*, for example, the FTC sued to block soon after West Virginia cleared the hospital merger via settlement.

This article overviews the underlying regulatory framework, analyzes the different incentives that federal and state regulators have, and examines some recent mergers where antitrust enforcers adopted different strategies.

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Regulatory Framework

Federal antitrust laws provide the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ") with investigatory and remedial powers to address anticompetitive mergers and business practices. Merger control typically occurs through Section 7 of the Clayton Act, which prohibits mergers and acquisitions where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[1] The framework for analyzing mergers and acquisitions is memorialized in the FTC/DOJ Horizontal Merger Guidelines ("HMGs").[2]

State antitrust enforcement typically occurs through each state's attorney general (collectively, the "States"). States are able to seek injunctive relief under Section 7 of the Clayton Act[3] and under their individual state antitrust laws. State antitrust laws sometimes extend beyond the contours of their federal counterparts through either procedural or substantive differences. States coordinate amongst themselves through the National Association of Attorneys General, which facilitates cooperation on multistate antitrust investigations by providing coordination guidelines.[4]

There are protocols for coordinating interagency merger investigations.[5] These protocols address confidentiality, conducting joint investigations, and settlement discussions in order to alleviate information-sharing concerns and maximize the likelihood of securing coordinated outcomes. The protocols state that when an enforcer concludes that "circumstances require it to pursue a negotiation or settlement strategy different from that of the other investigating agencies, or decides to close its investigation, it should disclose that fact immediately."[6] The next section explores some of the reasons that can cause antitrust enforcers to adopt different strategies.

Reasons Rule

Federal and state antitrust regulators frequently coordinate in non-public merger investigations to take advantage of each other's virtues. Federal regulators have significant resources, industry acumen and merger enforcement expertise. State enforcers know the local markets, understanding how state laws can impact free market dynamics, and understand local geographic idiosyncrasies.

Certain mergers are more likely to draw state interest than others, including mergers that could: (1) significantly lessen competition within the state's boundaries; (2) create state-specific effects that differ from broader national implications; or (3) materially impact various state-level stakeholders' interests.

These conditions can occur in distinctly localized transactions as well as in nationwide mergers that involve local submarkets.[7] For interstate mergers, multiple States may become interested in investigating and/or seeking relief based on the transaction's impact in their respective states.

It is important to also understand on whose behalf States are interested in intervening. Broadly speaking, States typically have three constituency cohorts—consumers within their state, local state agencies, and the public interest.[8] While the federal regulators have similar enforcement concerns, each enforcer's geographic focus can create divergent viewpoints.

The public interest may also mean different things on a state-by-state basis, especially compared to a nationwide focus. Politics are, of course, proof positive of this dynamic.

Another reason that States may be more amenable to certain settlements has to do with their active enforcement role within their jurisdictional boundaries. State enforcers are responsible for continued oversight of their intrastate commerce and are more willing to accept conduct remedies. This is in contrast to federal enforcers who have a strong preference for structural remedies that allow them to forgo subsequent policing responsibilities.

On the other hand, States may be more willing to accept conduct remedies due to having limited resources compared to their federal counterparts (and compared amongst themselves based on their budgets). In other words, resource constraints can increase the likelihood of accepting conduct remedies instead of engaging in protracted merger litigation.

These differences sometimes lead to situations where federal and state antitrust enforcers disagree on how to best address their respective concerns.[9] Understanding why differences arise may help avoid being surprised when enforcers disagree.

To that end, the next section examines recent transactions where federal and state enforcers reached different conclusions.

Recent Divergent Outcomes

Harmonious federal and state antitrust enforcement is the norm—whether through no action, settlement or joint litigation, aligned outcomes typically occur. For example, in *Sysco/US Foods,* the FTC and multiple state attorneys general sued to block a merger that would have reduced competition for broadline foodservice distribution services nationwide and in thirty-two local markets.[10] The merger was ultimately abandoned after the district court issued a preliminary injunction – the death knell for most mergers and acquisitions.

Divergence makes headlines. Sometimes states pursue relief unilaterally due to a transaction's state-specific effects. In *Seamless/Grubhub*, New York concluded that the combination raised antitrust concerns due to Seamless' network of exclusivity agreements across Manhattan. Seamless originated and had a fortified presence in the borough, making competitive entry less likely than in other metropolitan areas.

The parties ultimately settled by agreeing to *inter alia* waive their exclusivity provisions in order to enable "alternative online food ordering platforms [to] compete with the newly combined business on a level playing field, with equal access to key Manhattan restaurants and business partners."[11] This is an example of where state-specific factors diverged from a transaction's broader national implications.

The recent *US Airways/American Airlines* merger exemplifies how public interest considerations may require federal and state regulators to adopt different strategies. Upon investigating, the DOJ and multiple states filed suit to block the proposed airlines merger.[12] Soon thereafter, Texas decided to settle because the airlines committed to maintaining their scheduled daily intrastate flight schedule and keeping DFW as a hub airport.[13]

Texas had more to risk in suing to block the merger due to American Airlines' significant presence and was able to resolve its state-centric concerns through settlement. The settlement indirectly signaled to the DOJ that the airlines wanted to settle; sure enough, the case settled soon thereafter.

Mergers that significantly lessen competition within a state's boundaries are often contested by both federal and state regulators. Two of the pending hospital merger litigations—*Advocate/North Shore*[14] and *Penn State Hershey/PinnacleHealth*[15]—are prime examples. A third pending hospital merger litigation, *Cabell Huntington/St. Mary's* is more controversial due to the FTC suing after West Virginia cleared the merger via settlement.[16]

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West Virginia's settlement requires the merging hospitals to enter into numerous conduct remedies, including price increase limitations and efficiency benchmarking requirements. While these satisfied the state's antitrust concerns, they did not assuage the FTC's concerns despite similar conduct remedies being implemented without FTC challenge in Pennsylvania[17] and New York,[18] in distressed hospital mergers.

There are numerous rationales that could help explain the divergent approach. On one hand, the FTC disfavors conduct remedies while state attorneys general are more likely to find conduct relief agreeable.

On the other hand, *Cabell Huntington/St. Mary's* might simply reflect the FTC having more resources to fully investigate and adjudicate the transaction. There are likely other differences at play here that could surface during trial.

Either way, West Virginia has effectively set the "floor" through settling; the FTC's lawsuit to block represents a heightened relief standard. West Virginia also provided the hospitals with the ultimate "litigate the fix" scenario vis-à-vis their sovereign blessing. Regardless of how this plays out, the district court's decision will be remarkable.

CONCLUSION

Federal and state antitrust enforcers will continue collaborating on merger enforcement actions going forward due to the tangible benefits cooperation creates. Although rare, situations where federal and state antitrust enforcers adopt different positions regarding remedies will undoubtedly continue. For now, all eyes are on *Cabell Huntington/St. Mary's* to see how the district court will handle federal and state enforcers taking different views on a transaction.

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[1] 15 U.S.C. § 18. In addition to Clayton Act § 7, merger enforcement can also occur under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.
[2] FTC/DOJ HORIZONTAL MERGER GUIDELINES (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.
[3] 15 U.S.C. §§ 15, 26.
[4] The National Association of Attorneys General issued its own merger guidelines in 1993. Through interagency cooperation and comity, however, federal and state merger enforcement policy has converged and is now primarily codified in the 2010 HMGs. NAT'L ASS'N OF ATTORNEYS GENERAL, HORIZONTAL MERGER GUIDELINES (1993), *available at* http://www.naag.org/assets/files/pdf/at-hmerger_guidelines.pdf.
[5] NAT'L ASS'N OF ATTORNEYS GENERAL, PROTOCOL FOR COORDINATION IIN MERGER INVESTIGATIONS BETWEEN THE FEDERAL ENFORCEMENT AGENCIES AND STATE ATTORNEYS GENERAL (1998), reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,420.
[6] *Id.*
[7] Classic examples of intrastate mergers include brick and mortar store and hospital combinations; nationwide mergers with localized submarkets are typified by telecommunications mergers and health insurer combinations. For example, the DOJ alleged in *AT&T/T-Mobile* that "mobile wireless telecommunications services are sold to consumers in local markets that are affected by nationwide competition among the dominant service providers. It is therefore appropriate both to identify local markets in which consumers purchase mobile wireless telecommunications services and to identify the nature of the nationwide competition affecting those markets." *United States v. AT&T*, 11-cv-01560 (Compl. ¶ 14, D.D.C. Aug. 31, 2011).
[8] *See* ABA ANTITRUST LAW DEVELOPMENTS, Chapter 8C (7th ed. 2012).
[9] Having multiple enforcers that are able to reach different conclusions effectively raises the antitrust enforcement bar because the merging parties need to satisfy each enforcer's concerns to avoid litigation.
[10] *FTC v. Sysco Corp.*, 113 F.Supp.3d 1, 56 (D.D.C. 2015).
[11] Press Release, Office of the New York Attorney General, *A.G. Schneiderman Announces Settlement With Seamless And Grubhub To Ensure Competition In Online Food Ordering* (Aug. 5, 2013), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-seamless-and-grubhub-ensure-competition-online.
[12] DOJ was joined by state attorneys general from Arizona, Florida, Pennsylvania, Tennessee, Texas, Virginia, and the District of Columbia. *United States v. US Airways Group, Inc.*, 13-cv-01236 (Compl., D.D.C. Aug. 13, 2013).
[13] *United States v. US Airways Group, Inc.*, Texas Settlement (Sept. 30, 2013), *available at* https://texasattorneygeneral.gov/newspubs/releases/2013/AA_Settlement_Agreement.pdf.
[14] Press Release, Office of the Illinois Attorney General, *Madigan, Federal Trade Commission Sue to Block Advocate-NorthShore Hospital Merger* (Dec. 21, 2015), *available at* http://illinoisattorneygeneral.gov/pressroom/2015_12/20151221.html.
[15] Press Release, Office of the Pennsylvania Attorney General, *FTC and Pennsylvania Office of Attorney General Challenge Penn State Hershey Medical Center's Proposed Merger with PinnacleHealth System* (Dec. 8, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/12/ftc-pennsylvania-office-attorney-general-challenge-penn-state.
[16] West Virginia settled with *Cabell Huntington/St. Mary's* on July 31, 2015 to clear Cabell Huntington Hospital's proposed acquisition of St. Mary's Medical Center.
[17] On June 27, 2012, Pennsylvania entered into a settlement agreement that allowed Geisinger Health System Foundation to acquire Bloomsburg Hospital. The settlement effectively required the hospitals to limit price increases, realize efficiencies, and other conduct remedies that preserve competition. *See Pennsylvania v. Geisinger Health Sys. Foundation*, 4:12-cv-01081 (Final Order, June 27, 2012).
[18] On December 11, 2013, New York announced a settlement with Faxton-St. Luke's Healthcare and St. Elizabeth Medical Center that allowed the hospitals to combine their operations. The settlement prohibited exclusionary conduct and provided temporary rate protection for insurers. Press Release, Office of the New York Attorney General, *A.G. Schneiderman Announces Settlement With Utica Hospitals To Address Competitive Concerns* (Dec. 11, 2013), *available at* http://www.ag.ny.gov/press-release/ag-schneiderman-announces-settlement-utica-hospitals-address-competitive-concerns.

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