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.

**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 anti-competitive 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.” The framework for analyzing mergers and acquisitions is memorialized in the FTC/DOJ Horizontal Merger Guidelines (“HMGs”).

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 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.

There are protocols for coordinating interagency merger investigations. 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.” 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. 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. 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. 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. 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.” 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. 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.

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 and Penn State Hershey/PinnacleHealth—are prime examples. A third pending hospital merger litigation, Cabell Huntington/St. Mary’s, is more controversial due to the FTC’s concerns despite similar conduct remedies being implemented without FTC challenge in Pennsylvania and New York, 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.
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.

CONCLUSION

ABA ANTITRUST LAW DEVELOPMENTS, Chapter 8C (7th ed. 2012).

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