

The Express Scripts -- Medco Merger: What it Means for Competition



David Balto

Law Offices of David Balto
202-789-5424

David.Balto@dcantitrustlaw.com

The Proposed Acquisition

- On July 21, 2011, in a joint statement released by the two companies, Express Scripts' proposed acquisition of Medco Health Solutions was announced.
- Merger raises severe concerns of higher prices and less choice.



The Facts

- CVS Caremark, Express Scripts and Medco control over 80 percent of the large employer market.
- The PBM market is a market plagued by deceptive and egregious anticompetitive conduct. A coalition of 30 state Attorneys General have brought cases against the “big three” PBMs securing **over \$370 million** in damages and penalties.
 - *United States v. Merck & Co., Inc., [et.al](#)*
 - *United States v. AdvancePCS* (now part of CVS/Caremark)
 - *United States v. Caremark, Inc.*
 - *State Attorneys General v. Caremark, Inc.*
 - *State Attorneys General v. Express Scripts*
- The profits of the “big three” have only continued to rise—skyrocketing from \$900 million to over \$3.5 billion in the past 5 years.
- **The merger will shift this already tight oligopoly into a duopoly. It will give Express Scripts almost a 50% market share in large employer market.**

Merger Enforcement: Section 7 – Clayton Act

- Prohibits the acquisition of assets *“in any line of commerce or in any activity affecting commerce in any section of the country, [where] the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”* 15 U.S.C. § 18.

Notable Challenged Mergers

- FTC v. Cardinal Health, Inc- 2000
 - Two mergers of 4 largest wholesalers
- Staples-Office Depot- 1997



FTC Merger Review Process

- Initial 30-day Period:
 - Reviews of merger filing
 - Identifies key issues and potential competitive concerns
 - Focus on large employer groups and plans.
 - **Critical time of influence**
- Potential Second Request:
 - Broad investigative authority
 - No time limit, though typically 4-9 months
- **Confidential**
- **Broad FTC Powers: Block or restructure merger; prevent other anticompetitive conduct**

Impact on Payors-Bidding Process

- Focus on integrated models, total covered lives, and reputation, for most large payors, *the big three are the only three real alternatives.*
- Without Medco as a player in the bidding process, there would be a significant loss of competitive pressure on the other two to lower offered price.

NCCMP Letter to House Judiciary

- Concerns over merger of 2 of the three largest PBMs
- These integrated PBMs have greater buying power, technological capability, mail order and specialty
- Reduction in rivalry can lead to higher costs

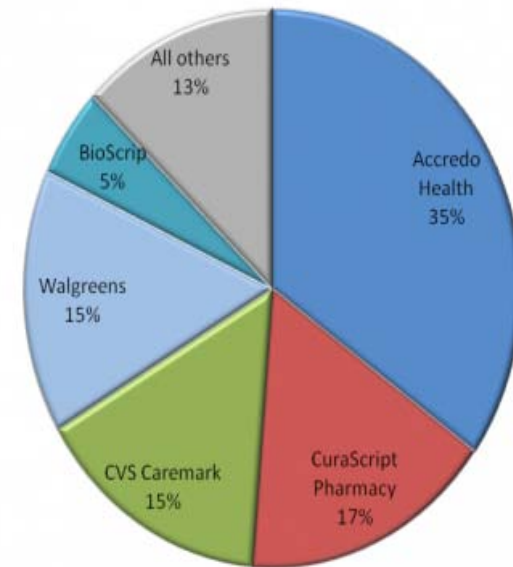
Skepticism of Express Scripts' Argument

- “Aggregating buying power will allow us to achieve deeper discounts, thus lowering costs to payors.”
- Why should we be skeptical?
 - With reduced rivalry among PBMs, the two remaining players will be better positioned to **charge more for their services**, as well as much **less inclined to pass along savings to the payor.**

Impact on Payors – Decreased Competition in Specialty Area

- Both ESI and Medco have substantial specialty pharmacy operations- CuraScript and Accredo.
- The merger would secure ESI a **52% market share** in the specialty market.

Exhibit 3: Share of Specialty Pharmacy Revenues by Company, 2009



Source: *The 2010-11 Economic Report on Retail and Specialty Pharmacies*, Pembroke Consulting, Inc. (December 2010)

Available at <http://www.pembrokeconsulting.com/pharmacy.html>

Questions?

- Concerned about the merger?
- Guidance in dealing with the FTC?

David Balto

Law Offices of David
Balto

1350 I Street, NW –
Washington, DC 20002

202-789-5424

David.Balto@

dcantitrustlaw.com

