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A Tough Pill to Swallow: The Merger of Express Scripts and Medco

In early April 2012, the Federal Trade Commission (FTC) approved Express Scripts, Inc.'s acquisition of Medco Health Solutions, Inc. by a 3-1 vote, allowing for the creation of one of the largest pharmacy benefit management (PBM) companies in the United States.[1] Originally announced in July 2011, the St. Louis, Missouri-based Express Scripts' $29.1 billion acquisition of the New Jersey-based Medco purportedly increased Express Scripts' customer base to more than 130 million, representing a 50 percent increase in its customer base.[2] Unlike traditional brick-and-mortar pharmacies such as Walgreens and CVS, PBMs operate as middlemen between healthcare service payors (which are generally insurance companies) and employers and patients.[3] As such, Express Scripts and other PBM companies typically leverage significant customer bases in their negotiations with pharmaceutical and drug manufacturers in order to transfer favorable rates to their customers.[4] Due to the potential antitrust issues associated with the merger, Express Scripts' newly expanded customer base has caused a debate among stakeholders in the pharmaceutical industry.

While many pharmaceutical industry participants touted the merger's positive benefits, some trade representatives sought judicial recourse based partially on the elimination of competition resulting from Express Scripts' and Medco's purchase of retail pharmacies, claiming that the merger violated Section 7 of the Clayton Act.[5] In the suit filed in the Western District of Pennsylvania on March 29th, the National Association of Chain Drug Stores (NACDS) and the National Community Pharmacists Association (NCPA) among others, claimed that the merger would create a "*dominant entity*" and would result in an anti-competitive influence over retail community pharmacy services, thereby leaving only "*two significant competitors in a highly concentrated industry*."[6] Cathy Bissoon, the U.S. District Judge presiding over the dispute, listened to three hours of oral arguments on April 10th, during which the plaintiffs asked the court to hold Medco's assets and operations separate from those of Express Scripts until its emergency request is either granted or denied.[7] To date, Judge Bissoon has yet to enter a final decision on this matter. Despite the uncertainty of this litigation, the FTC has since granted its permission for the merger to move forward.

After eight months of investigation, the FTC released a nine-page opinion on April 2, 2012, detailing its approval of the merger and noting that it was not an "*easy decision*."[8] FTC Commissioner Julie Brill disagreed with the commission's final vote and issued a separate opinion, labeling the transaction as a "*merger to duopoly*" and cited to congressional intent under Section 7 of the Clayton Act.[9] After the merger of the two largest PBMs, CVS Caremark is the sole remaining entity of what was previously referred to as the "*Big Three*" by Commissioner Brill.[10]

Despite Brill's dissent, the FTC's opinion notes that with at least ten significant competitors, the PBM industry is only moderately concentrated and will remain competitive after the proposed merger.[11] In its review, the FTC scrutinized three aspects of the merger, including: (1) its potential anticompetitive effects to employers; (2) whether the merged company is likely to have monopsony power; and, (3) any potential anticompetitive effects with respect to specialty drugs.[12] Ultimately, Chairman Jon Leibowitz and Commissioners J. Thomas Rosch and Edith Ramirez reasoned that, although the merger would result in higher market concentration, the market would still be highly competitive due to the remaining nine firms' presence, and further remarked that the merged company poses little risk of utilizing monopsony power because the PBM market does not foster coordinated interaction.[13]

Despite the FTC's approval, however, the issue seems far from settled, as dozens of Congressional members and state attorneys general are still actively opposing the merger, with the NCPA set to report any anticompetitive conduct as soon as it is observed.[15] Accordingly, the newly merged entity will be under close scrutiny as to whether it can deliver on its promised benefits.

1 "FTC Closes Eight-Month Investigation of Express Scripts, Inc.'s Proposed Acquisition of Pharmacy Benefits Manager Medco Health Solutions, Inc." Federal Trade Commission, April 2, 2012, http://www.ftc.gov/opa/2012/04/medco.shtm (Accessed 4/18/2012).
2 "Express Scripts-Medco Deal Could Fuel Other Acquisitions" By Pat Wechsler and Molly Peterson, St. Louis Post-Dispatch, July 26, 2011, http://www.stltoday.com/business/local/article_4cf9968e-5a92-5cb4-92b7-8f29b6587598.html (Accessed 4/18/2012).
3 "What is a 'Pharmacy Benefit Manager?'" By Thomas Gryta,

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The Wall Street Journal, July 21, 2011, http://professional.wsj.com/article/SB10001424053111903554904576460322664055328.html?mg=reno64-sec-wsj (Accessed 4/18/2012).

4 "Pharmacy Benefit Manager (PBM) 101" Pharmaceutical Care Management Association, http://pcmanet.org/images/stories/uploads/PBM%20101.pdf (Accessed 4/18/2012).

5 "Pharmacy Groups, Retail Pharmacies File Suit To Bar Merger of Express Scripts, Medco" By Dana A. Elfin, BNA Health Law Resource Center, Vol. 21, No. 500, April 5, 2012.

6 "National Association of Chain Drug Stores v. Express Scripts, Inc." United States District Court for the Western District of Pennsylvania, No. 2:12-cv-395, Plaintiff's Complaint, filed March 29, 2012. Retrieved from http://docs.justia.com/cases/federal/district-courts/pennsylvania/pawdce/2:2012cv00395/202195/1/0.pdf?1333139305 (Accessed 4/18/2012).

7 "Express Scripts Judge Weighs Bid to Block Medco Purchase" By Tom Schoenberg, Bloomberg Business Week, April 11, 2012, http://www.businessweek.com/news/2012-04-10/express-scripts-judge-withholds-ruling-on-medco-deal-lawsuit (Accessed 4/18/2012).

8 "Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc." The Federal Trade Commission, April 2, 2012, http://www.ftc.gov/os/2012/04/120402expressmedcostatement.pdf (Accessed 4/13/2012), p. 1.

9 "Dissenting Statement of Commissioner Julie Brill Concerning the Proposed Acquisition of Medco Health Solutions Inc. (Medco) by Express Scripts, Inc. (ESI)" By Julie Brill, Federal Trade Commission, FTC File No. 111-0210, April 2, 2012. Retrieved from http://www.ftc.gov/speeches/brill/120402medcobrillstatement.pdf (Accessed 4/18/2012).

10 Ibid.

11 FTC, April 2, 2012, p. 2.

12 Ibid., p. 2-7.

13 Ibid., p. 7.

14 "Express Scripts and Medco Health Solutions Sign Definitive Merger Agreement; Medco Shareholders to Receive $29.1 Billion" Express Scripts, July 21, 2011, http://phx.corporate-ir.net/phoenix.zhtml?c=69641&p=irol-newsArticle&ID=1587459&highlight= (Accessed 4/18/2012).

15 "NACDS, NCPA Comment on FTC Conclusion of Express Scripts-Medco Merger Review" National Community Pharmacists Association, April 2, 2012, http://www.ncpanet.org/index.php/news-releases/1302-nacds-ncpa-comment-on-ftc-conclusion-of-express-scripts-medco-merger-review (Accessed 5/16/12).

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