Where You Stand Depends on Where You Sit: Differing Federal and State Perspectives on Merger Enforcement

BY BRUCE H. SCHNEIDER

The adage—sometimes referred to as Miles’ Law—that “where you stand depends on where you sit” has certainly been evident in how federal antitrust agencies and states’ attorneys general and regulators have looked at mergers recently. Federal antitrust agencies have a single focus in merger enforcement: maintaining competitive markets for the benefit of consumers. While that certainly is a consideration for state officials as well, it is often only one of several public policy considerations.

State attorneys general, who are generally directly elected or appointed by an elected governor, tend to be much more locally focused and seek tangible results. Although federal enforcement policy decidedly favors structural remedies that will maintain competition (e.g., divestitures, compulsory licenses of intellectual property), state enforcers are more frequently content with conduct remedies that will directly benefit local consumers and other constituencies. Protection of the local economy, and jobs in particular, is often a higher priority than maintaining a competitive marketplace for competitors and customers who may have little connection to the attorney general’s state.

When state enforcers take a more accommodating position on a merger because of local interests, they can appear to be undermining aggressive enforcement of the antitrust laws. The ambiguity of the states’ perspective has been evident in a number of recent antitrust developments.

Six states joined the Department of Justice in challenging the merger of American Airlines and US Airways. With some fanfare, the State of Texas later joined as a co-plaintiff in an amended complaint. A few short weeks later, however, Texas settled with the merging airlines in exchange for promises that the merged company would maintain (at least) daily service at 22 Texas airports, many of which are located in smaller cities. The Attorney General also obtained commitments that the merged company will maintain Dallas/Fort Worth International Airport as a “large hub airport” and will maintain its corporate headquarters in the Dallas/Fort Worth area.

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1 United States Department of Justice, Antitrust Policy Guide to Merger Remedies (June 2011), p. 3 (“Once the Division has determined that a merger is anticompetitive, the Division only considers remedies that resolve the competitive problem and effectively preserve competition.”).
Worth metropolitan area. A press release by the Texas Attorney General’s Office explained that Texas’ focus had been on “maintaining service to rural airports and protecting Texas jobs.”

Similarly, the Attorney General of Oklahoma, who had not joined the federal suit, wrote to the United States Attorney General that, after a review, his office had concluded that the merger was not a violation of the state’s antitrust law, and publicly urged DOJ to drop its lawsuit and permit the merger to proceed. He noted that the new American Airlines would have 31 daily departures from Oklahoma; that American alone employs 6,000 workers at its Tulsa maintenance facility; and that jobs had been lost since American’s bankruptcy and that there could be a further loss of 400 local jobs. Ultimately, he concluded that “[t]he merger offers the most viable path forward to secure the maintenance jobs in Tulsa and ensure the continued economic prosperity of Oklahoma.”

Because of the daunting costs, state attorneys general often have to be resourceful in finding alternatives to litigation. For example, when the DOJ declined to block the Delta-Northwest merger in 2008, the Minnesota Attorney General found another means to achieve the same local protections as Texas and Oklahoma did using the antitrust laws. She publicly encouraged the state’s Metropolitan Airports Commission and Department of Finance to strictly enforce debt covenants in loan agreements with the State, most particularly Northwest’s undertaking to prepay $230 million of the debt if Northwest moved its corporate headquarters or its hub, or if it reduced the number of Minnesota employees below 1992 levels.

Healthcare mergers are often a special concern of state enforcers because of their impact on local patients and because the state itself is the payor in programs like Medicaid. Still, state enforcers can be more willing to resolve merger concerns through conduct restrictions and public service commitments of the merged entity. Based upon conduct assurances to maintain the quality of hospital service or to provide specified charity care, states either settle antitrust cases they have brought or decline to sue. When states abandon their claims that a transaction will have anticompetitive effects, or when state enforcers publicly endorse a transaction challenged by federal antitrust agencies, they can undermine antitrust enforcement efforts. However, in many such situations, it is the opportunity for public endorsement that gives the states bargaining leverage to obtain other public goods from the merging parties.

None of this is to suggest that state enforcers cannot be effective in preventing an anticompetitive merger. Five states joined the DOJ in challenging the Comcast-NBC Universal merger, and obtained genuine antitrust relief. Seven states joined DOJ in challenging AT&T’s acquisition of Sprint, which was terminated in the face of strong antitrust and regulatory opposition. Although the AT&T – Sprint transaction had an impact on a national market, cellphone services and prices are of great concern to consumers; consequently, consumer protection in products of popular interest are likely to be higher on the agenda of state attorneys general.

As a practical matter, the competition units of states’ attorneys general offices have limited budgets, and little, if any, in-house support from economic experts. Those constraints make it difficult for state attorneys general to seek to block a mega-merger without the lead of the DOJ or the FTC. In 2011, five states reportedly considered bringing an action to block the merger of pharmacy benefit managers Express Scripts and Medco, after the FTC closed its investigation. They ultimately declined to commence an action, and, without doubt, the demands on state resources were a consideration.

Another area of federal and state differences in merger enforcement arises with respect to a state action defense that would preclude federal enforcement. In Federal Trade Commission v. Phoebe Putney Health System, Inc., a case decided last term by the United States Supreme Court, the Attorney General of Georgia was placed in an awkward position. The State of Georgia joined the FTC in the District Court in seeking to block the combination of two area hospitals. The hospitals defended, among other ways, by claiming that the active role of the local Hospital Authority to effect the combination, pursuant to Georgia’s Hospital Authorities Law, was state action that conferred immunity from challenge under federal antitrust laws. The Georgia statute granted local hospital authorities typical general corporate powers. The Attorney General then had to argue that the Act did not articulate a state policy displacing competition, nor did it confer the supervisory authority necessary for state action immunity. When plaintiffs were denied a preliminary injunction by the District Court, Georgia decided not to appeal, even though the FTC pressed on to the Eleventh Circuit Court of Appeals and, ultimately, to the Supreme Court. Twenty states (not including Georgia) filed an amicus brief in support of the FTC, arguing that (1) states have an interest in maintaining competitive markets; (2) to have immunity, state legislation must clearly articulate a legislative intention to supplant competition with state regulation; and (3) courts should not infer a legislative intent to supplant competition where that objective is not clearly articulated.

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8 133 S. Ct. 28 (2012).

9 FTC v. Phoebe Putney Health System, Inc., Brief of Amici Curiae States of Illinois, etc. in Support of Petitioner, available at http://www.americanbar.org/publications/preview_home/2012-2013.html. Interestingly, however, after the Supreme Court denied the hospitals state action immunity, the FTC settled with the hospitals on terms which the FTC went to great lengths to state were unique. The sole operative portion of the relief was that the merged hospital would not oppose
In addition to federal-state differences, individual states sometimes have different outlooks on acquisitions. The Affordable Care Act (ACA) encourages groups of healthcare providers to work together through accountable care organizations (ACO). The ACA defines an ACO as a group “of providers who are jointly held accountable for achieving measured quality improvements and reductions in the rate of spending growth.”

Rising medical costs and the ACA’s encouragement of collaboration have been impetus to a new round of hospital and physician group consolidations. In 2011, to provide guidance of general applicability, the FTC and DOJ jointly issued an ACO Antitrust Policy Statement that, among other things, created a “safe harbor” from enforcement for ACOs having 30% or less of each medical service within its primary service area, with certain leniencies for rural areas. In addition, the Policy Statement provides a procedure for voluntary expedited review by the antitrust agencies.

More recently, the State of Idaho has joined the federal effort to police the acquisition of physician practices through the antitrust laws. In a suit currently pending, the State of Idaho joined the FTC and private plaintiffs to challenge Saint Luke’s Health System’s acquisition of Seltzer Medical Group, a large, physician-owned multispecialty group, many of whose doctors admitted patients to Saint Alphonsus Medical Center, one of the private plaintiffs. Saint Luke’s had previously acquired other physician practices and surgical facilities in the area. The private and governmental plaintiffs maintain that the acquisition would result in Saint Luke’s having monopoly power that would lessen competition in southern Idaho. Saint Luke’s, on the other hand, contends that integrated healthcare delivery systems enable greater investment in medical technology and permit innovative risk-sharing and compensation systems. The Court will be asked to evaluate the extent to which St. Luke’s addition of Seltzer to its integrated delivery system would deliver efficiencies, not otherwise available, that would outweigh any anticompetitive effects.

New York, which has had a wave of healthcare consolidations, and anticipates more, has adopted a different and independent regime for dealing with collaborating healthcare organizations—one that intentionally precludes federal involvement. In 2011, Section 2999-aa of New York’s Public Health Law was enacted with a clear state policy to immunize certain healthcare transactions. The regulations would permit the Attorney General, in consultation with the Attorney General, to determine whether particular collaborations with public or private entities or individuals further the interest of the State and whether the parties’ conduct or business arrangement out-weighs the benefits of the arrangement.”

New York also amended its Public Authorities Law to permit the Attorney General, after providing parties “a reasonable opportunity to modify their conduct and the agreement, if the challenged conduct is inconsistent with or beyond the scope of the certificate of public advantage, or if the Attorney General determines that the anticompetitive effect of the parties’ conduct or business arrangement outweighs the benefits of the arrangement.”

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Conclusion

There are areas, such as healthcare consolidations which affect one or more local areas and not a national market, where the state has the most significant interest. Public policy considerations, beyond maintaining a competitive marketplace, appropriately enter into the mix and any countervailing concerns can be assessed locally. In those situations, to quote Justice Brandeis, “a single courageous state may . . . serve as a laboratory, and try novel social and economic experiments without risk to the rest of the country.” At the end of the day, though, any judgment as to whether the independent posture taken by state attorneys general on merger issues affecting a national or global market is good public policy depends on “where you sit.”

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any application for a state Certificate of Need by another hospital in the area so as not to obstruct new entry. 
11 St. Adolphus Medical Center v. St. Luke’s Health System, Ltd., D. Idaho, 12 CV 00560-BLW.
13 A. 7993, New York State Assembly 2013-2014 Regular Sessions authorizes various collaborative activities, specifically including “joint negotiations with physicians, hospitals and payors, whether such negotiations result in separate or combined agreements,” and further empowers the Nassau Health Care Corp. to “exercise state oversight by determining whether particular collaborations with public or private entities or individuals further the interest of the State” and provides that those collaborating parties “shall be immunized under the federal and state antitrust laws.” Available at http://assembly.state.ny.us/leg.