For Antitrust Division, One Health Insurance Industry Merger Blocked, One More to Go

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Last July, the Department of Justice Antitrust Division filed two actions, challenging proposed mergers that would have reduced the country's "big five" health insurers to three. Bench trials have been held in these matters. On Monday, Judge John Bates of the federal district court in Washington, D.C. preliminary enjoined Aetna Inc.'s $37 billion attempt to buy Humana Inc. Meanwhile, the parties to the other, larger merger between Anthem, Inc. and Cigna Corp., as well as the Justice Department, the District of Columbia and the 11 states that challenged that deal, are awaiting a decision from Judge Amy Berman Jackson of the District of Columbia federal district court. A ruling could come any day.

Aetna-Humana merger. In the Aetna-Humana case, the government alleged that, if allowed to proceed, the acquisition by Aetna—the nation's third-largest health-insurance company—of Humana—the fifth-largest health insurer—would enhance Aetna's power to profit at the expense of seniors who rely on Medicare Advantage and individuals and families who rely on the public exchanges for health insurance. After hearing evidence at a 13-day trial in December, the court mostly agreed.

In a 158-page decision, the court held that the Aetna-Humana transaction would

likely substantially lessen competition in the market for individual Medicare Advantage plans in all 364 counties identified in the government's complaint. Moreover, the deal was likely to substantially lessen competition on the public exchanges in three Florida counties in which Aetna was likely to offer plans on the exchanges in 2018 and beyond. Efficiencies arguments raised by the merging parties were rejected.

The primary focus of the complaint against Aetna and Humana was the proposed transaction's impact on the Medicare Advantage product market. The court held that the proposed deal was presumptively unlawful in that market. The Department of Justice, joined by eight states and the District of Columbia, alleged that the effect of the transaction "may be to substantially lessen competition" the market for individual Medicare Advantage plans in 364 counties across 21 states.

The court rejected the defendants' efforts to expand the market definition to include both Original Medicare (Medicare benefits offered directly by the government) as well as Medicare Advantage (Medicare benefits offered by private insurance entities). Medicare Advantage plans compete with Original Medicare to a certain extent, the court pointed out. However, "Aetna's and Humana's focus on competition within Medicare Advantage, along with seniors' observed strong tendency to switch from one Medicare Advantage plan to another when faced with a plan cancellation or price increase, make it unlikely that competition from Original Medicare options will suffice to discipline Medicare Advantage pricing that Aetna and Humana focused on competition with other Medicare Advantage organizations," the court held.

Based on market concentration figures, the government was entitled to a presumption that the merger would substantially lessen competition in the sale of individual Medicare Advantage plans in all 364 complaint counties. Among other things, the court pointed out that in 70 counties where Aetna and Humana are the only Medicare Advantage organizations or MAOs currently in the market, the post-merger HHI would reflect a merger to monopoly.

The merging parties failed to rebut the presumption of anticompetitive effects. They unsuccessfully argued that regulation by the Center for Medicare and Medicaid Services, an office within the Department of Health and Human Services, would prevent the merged firm from increasing its prices or reducing benefits. The merging parties did not contend that the government regulation created antitrust

immunity. Instead, the argued that federal regulation of Medicare Advantage leaves "no opening for the anticompetitive effects that the Government posits." The court disagreed.

The proposed divestiture of certain assets to Molina Healthcare, Inc. offered by the parties to resolve antitrust concerns would not counteract any anticompetitive effects of the merger, in the court's view. Aetna and Humana each entered into a separate agreement with Molina Healthcare, under which they agreed to sell Molina some of their Medicare Advantage plans if their merger was consummated and if the court decided that the divestiture was necessary to counteract the merger's anticompetitive effects. The proposed divestiture would have transferred responsibility for approximately 290,000 seniors from Aetna or Humana to Molina, and would include seniors in all 364 complaint counties. The evidence did not show that the divestitures to Molina, primarily a Medicaid company, would counteract the anticompetitive effects of the merger, according to the court. Further, the prospect of other new entrants also did not sway the court.

The government also challenged the merger between Aetna and Humana on the ground that it might harm competition in the market for individual insurance sold on the public exchanges in 17 counties across three states (Florida, Georgia, and Missouri). Created by the Affordable Care Act, public exchanges are online marketplaces where consumers can purchase health insurance.

In an apparent effort to "improve its litigation position," Aetna announced after the complaint was filed that it would no longer offer plans on the public exchanges in 11 states where it had offered plans in 2016, including those that covered all 17 counties in the complaint. The court noted that the fact that Aetna withdrew from the 17 counties for the 2017 plan year was weak evidence of its future behavior. However, because it was unlikely that the merging firms would compete on the public exchanges in the 14 counties in Missouri and Georgia, there would be no substantial lessening of competition on the public exchanges in the 14 counties in those two states.

Because the court found that Aetna was likely to offer on-exchange plans in Florida after 2017, the court considered the deal's anticompetitive effects in that area. The government "made a very strong prima facie case that the proposed merger may substantially lessen competition in on-exchange health plans in the three complaint counties in Florida, relying on both the presumption based on market

competition and on direct evidence of head-to-head competition," the court decided. Aetna and Humana failed to offer evidence of "extraordinary efficiencies" in rebuttal to overcome that presumption.

News reports suggest that Aetna and Humana might be considering an appeal.

Anthem's acquisition of Cigna. In the second suit, the government challenges Anthem's proposed $54 billion acquisition of Cigna, which would be the largest merger in the history of the health insurance industry. While there are some similarities between the cases, the suit against Anthem and Cigna has a different focus.

Anthem, the largest member of the Blue Cross and Blue Shield Association, competes in 14 states as the Blue licensee and partners with other Blue plans to compete throughout the country. Cigna is another commercial health-insurance option for businesses and individuals in markets throughout the country. There is concern that the combination of these firms would limit choice for employers in some of the biggest cities in the country, such as New York, Los Angeles and Atlanta, where Anthem and Cigna are two of just a handful of options for employee health insurance.

According to the complaint, the combination of Anthem and Cigna would substantially lessen competition for the sale of health insurance to national accounts in the parts of the 14 states where Anthem sells under a Blue license and in the United States generally. Based on market concentration, the transaction is presumptively unlawful in those markets, it was alleged. The government also contended that the transaction would substantially lessen competition for the sale of health insurance to large-group employers in 35 metropolitan areas, and would be presumptively unlawful in 20 of those markets.

As in the Aetna-Humana case, the Justice Department also identified potential anticompetitive effects in the sale of health insurance on the public exchanges. In this case, the government is concerned about the public exchanges in Colorado and Missouri. Lastly, the government alleged that the proposed merger would eliminate competition between Anthem and Cigna for the purchase of health care services in 35 metropolitan areas. Anthem's leverage over physician practices that receive "take-it-or-leave-it" terms and over hospitals and physician groups that individually negotiate their contracts and rates with Anthem would purportedly be

enhanced by the deal.

[**UPDATE:** On February 8, 2017, the federal district court enjoined Anthem's acquisition of Cigna. The decision was filed under seal, but an order, summarizing the decision was released.]