



DOJ Sues to Enjoin Two Large Health Insurer Mergers

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In July 2015, health insurer mergers were announced between Anthem and Cigna and between Aetna and Humana. The effect of these mergers would elevate Anthem/Cigna to the #1 rank in size among national health insurers. United Healthcare would drop to #2 and Aetna/Humana would rank #3. These 5 national health insurers would become 3. After investigation by its Antitrust Division, the U.S. Department of Justice (DOJ) has decided to oppose both mergers. The DOJ filed separate lawsuits to enjoin the mergers under Section 7 of the Clayton Act on July 21, 2016 in the U.S. District Court for the District of Columbia. The health insurers have asked the Court for expedited trials to accommodate the parties' contractual deadlines for completion of their respective mergers -- Aetna/Humana on December 31, 2016 and Anthem/Cigna on April 30, 2017.

This Alert will summarize the DOJ's allegations in opposition to each merger and identify Mid-Atlantic geographic markets where the DOJ alleges specific anti-competitive effects. The DOJ must prove its factual allegations and convince the Court of the soundness of its antitrust law theories in order to prevail in each case. The alleged effects from reduced competition are higher health plan prices, less incentive to innovate and lesser quality.

The DOJ is joined in the Anthem/Cigna lawsuit by the Attorneys General of the District of Columbia and of 11 states, including Virginia, Maryland and Georgia.

In the Anthem/Cigna case, the DOJ sees the elimination of one of 5 national health insurers as a competitor for the business of "national" (multi-state) and "large-group" (50 or more employees in most states, 100 or more employees in 4 states) employers who are in the market for commercial health insurance plans for their employees or for contract services in administering the employers' self-insured health plans for a fee (known as administrative services only, or ASO, contracts). The DOJ alleges that these two products are interchangeable, in that each relies upon a network of hospitals, physicians and other providers assembled by the health insurer in each geographic market and the employers' choice between insured or self-insured plan is influenced primarily by the characteristics of the provider network and the overall cost, whether premiums only or cost of care plus ASO fee.

Anthem holds the Blue Cross and Blue Shield Association license in all or a major portion of 14 states and has affiliations with the licensees in all other states through the Blue Card program. Cigna does business nationally. The DOJ alleges that Cigna is Anthem's primary competitor for the business of national accounts and large-group employers.

The DOJ also alleges monopoly power in the market for commercial health insurance and ASO services in 35 specific metropolitan areas where Anthem and Cigna currently compete, including 3 markets in

Virginia (Richmond, Tidewater and Lynchburg) and 2 markets in Georgia (Atlanta and Gainesville). And the DOJ alleges that Anthem/Cigna would have monopsony purchasing power in the same 35 markets. Those with monopsony power are able to drive down prices they pay to healthcare providers below competitive market levels, resulting in decreased access to medical care, reduced quality of service and less innovation.

Anthem and Cigna also compete for individual coverage on the public health insurance exchanges. The DOJ alleges significant anti-competitive effects of the merger on the Colorado and Missouri public exchanges.

The DOJ alleges that there is no health insurer available to effectively replace Cigna by divestiture as a competitor to Anthem. The existing national health insurers -- United Healthcare, Aetna or Humana -- are said to be the only realistic possibilities and their increase in market power from the divestiture is alleged to be anti-competitive.

The Aetna/Humana merger, aside from reducing 5 national health insurers to 4 competitors, has a unique focus from the DOJ perspective. The DOJ targets Medicare, which covers primarily age 65 and over individuals. Both Aetna and Humana compete in managed care for Medicare patients, known as the Medicare Advantage program, which covers 31% of all eligible Medicare beneficiaries. The Medicare program encourages active competition within the local Medicare Advantage markets. Aetna and Humana now compete in more than 600 counties, nearly 90% of the counties where Aetna offers Medicare Advantage. The DOJ alleges that the Aetna/Humana merger would significantly reduce competition in 364 counties, including 24 counties in Virginia, 16 counties in North Carolina and 32 counties in Georgia. The alleged anti-competitive effects of the merger would be higher premiums, less comprehensive benefits and less innovation. The federal Medicare program, as well as those Medicare-eligible beneficiaries who have the choice between Medicare Advantage insurers or between Medicare Advantage and traditional Medicare enhanced by Medicare Supplement and Part D prescription drug coverages, are alleged to be adversely affected.

Aetna has offered the DOJ a plan to transfer parts of the Aetna/Humana Medicare Advantage contracts with Medicare in numerous counties to another health insurer which Aetna claims would remedy the merger's anti-competitive effects. In its Complaint, the DOJ rejects that plan as inadequate on several specific grounds, including the fact that all Medicare Advantage enrollees have the right to switch plans periodically and -- with Aetna or Humana still in the local market -- enrollees could switch back to the Aetna or Humana plan they had originally chosen at the next opportunity following the merger.

The DOJ also alleges harmful anti-competitive effects from elimination of competition between Aetna and Humana in the public health insurance exchange markets in portions of Georgia, Florida and Missouri.

The DOJ is joined in the Aetna/Humana lawsuit by the Attorneys General of the District of Columbia and 8 states, including Virginia and Georgia.

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