

PUBLICATION

DOJ and States Challenge Health Insurer Mergers

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Following more than a year of regulatory review, in late July 2016 the Department of Justice (DOJ) Antitrust Division and a number of states filed actions seeking to derail both the Anthem/Cigna and Aetna/Humana mergers. In announcing the filing of the cases (*United States v. Anthem and Cigna* and *United States v. Aetna and Humana*), United States Attorney General Loretta Lynch claimed that the actions were necessary because the deals "would leave much of the multi-trillion dollar health insurance industry in the hands of three mammoth insurance companies [Anthem, Aetna and United Healthcare]" and that "the competition among insurers that pushed them to provide lower premiums, higher quality care and better benefits would be eliminated."

Both cases were filed by the DOJ in the United States District Court for the District of Columbia, and both were originally assigned to Senior Judge John Bates. In the *Anthem* case, the DOJ contends that the proposed transaction, if completed, will cause competitive harm in the following markets:

1. commercial insurance products sold on a nationwide basis to the country's largest employers;
2. commercial insurance products sold to large group employers in 35 local markets, including New York, Los Angeles and Indianapolis;
3. insurance sold to individuals on the insurance exchanges in a few select local markets; and
4. the market for the purchase of provider services in the 35 local markets described above.

In the *Aetna* matter, the DOJ contends that the proposed transaction would have anticompetitive effects in:

5. hundreds of local markets in which Aetna and Humana currently offer Medicare Advantage products; and
6. in the insurance exchange markets in which individuals purchase those products in several counties in Florida, Georgia and Missouri.

Two additional issues likely to be addressed in the *Aetna* matter include:

7. whether Aetna's proposed divestiture of some Medicare Advantage business to Molina Healthcare (which Aetna announced at about the time of the DOJ's filing of the action) would be sufficient to remedy any potential anticompetitive effects of the transaction, thus rendering the DOJ challenge moot; and
8. the effect of Aetna's announcement that it intends to withdraw from several of the insurance exchanges in 2017.

Only days after the filing, both Anthem and Aetna urged the Court to set their cases for the earliest possible trial date, claiming that swift action was necessary because the current deadlines for closing contained in their respective merger agreements was rapidly approaching. After Judge Bates concluded that he could not possibly hear and decide both matters before the end of the year (which is what the insurers sought), Judge Bates directed that the *Anthem* case be reassigned to another judge. Subsequently, the *Anthem* case was assigned to Judge Amy Berman Jackson for all subsequent proceedings.

At hearings in early August 2016, Judge Bates and Judge Berman each set discovery and trial schedules for the cases they will hear. Judge Jackson announced that she would try the *Anthem* case beginning on November 21, but she still did not anticipate that she would be able to issue a decision in the matter until sometime in January 2017. Notably, while the Anthem/Cigna merger agreement is not set to expire until April 2017, Anthem had maintained that a ruling by the end of the year was necessary because Anthem has not yet received regulatory approval from several key states, and the states having indicated that they will not consider the merger until after the lawsuit is resolved.

Judge Bates subsequently announced that he would try the *Aetna* case beginning on December 5, and that his decision was also unlikely to issue until January 2017. This timetable presents challenges for Aetna because, while Aetna has already received regulatory approval from most states, the current deadline for closing in the Aetna/Humana merger agreement is December 31, 2016.

Since early August 2016, both the merging parties and the DOJ have embarked on quick-paced and extensive third party discovery, sending subpoenas for documents to health care providers and insurers all across the country. In addition, both Judge Bates and Judge Jackson appointed a Special Master (Richard Levie, a former District of Columbia Superior Court Judge) to address any potential discovery disputes among the parties (and the third parties from whom the parties are seeking information). Among the Special Master's first decisions was one granting the parties the right to take hundreds of hours of depositions of third parties. Accordingly, these cases will likely be a significant focus of attention not only for the merging parties over the next few months, but also for the many health care providers and other insurers industry that have been asked to provide information for the case in discovery. Stay tuned.