

# PUBLICATION

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## DOJ Prevails in Both the Anthem and Aetna Merger Trials

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**During the summer of 2015, within a matter of days, Aetna announced an intention to merge with Humana and Anthem announced an intention to merge with Cigna. The deals, among the largest insurance industry combinations ever announced, had the potential to transform the "big five" national health insurers (the fifth being United Healthcare, which is the largest) into a "big three." However, after almost 18 months seeking to gain regulatory approval for the deals from federal and state regulators, it appears that the parties' efforts to merge have been derailed on antitrust grounds by two rulings in the District of Columbia District Court.**

The first decision, issued by District Judge John Bates on January 23, followed a December trial in which the DOJ Antitrust Division (and several states) sought to have Aetna's merger with Humana enjoined on antitrust grounds. In a 158 page opinion, Judge Bates ruled for the DOJ, finding that the merger would substantially reduce competition for the sale of Medicare Advantage products and cause harm to consumers in 364 counties that the DOJ had identified in their complaint. Judge Bates also rejected Aetna's claim that a proposed divestiture of a portion of Aetna's Medicare Advantage business to another insurer, Molina, would be sufficient to protect against any potential anticompetitive harm. Judge Bates also ruled that the merger would have anticompetitive effects in the insurance exchange markets in several states.

Upon the release of Judge Bates's decision, the DOJ's Acting Assistant Attorney General for Antitrust, Brent Snyder, issued a press statement claiming that the Court's decision was "a victory for American consumers" and that, as a result of the ruling, "millions of consumers will continue to benefit from competition between Aetna and Humana." While Aetna announced its disappointment and disagreement with the Court's ruling, shortly thereafter it announced that it would not appeal the decision and that it was discontinuing its efforts to merge with Humana. Notably, the decision triggers Aetna's obligation to pay Humana a "break-up fee" of \$1 billion for failing to succeed in getting the deal approved.

While the Aetna case was being tried, the DOJ was also seeking to have the Anthem/Cigna transaction – an even bigger deal – enjoined in a courtroom down the hall from the Aetna courtroom, before another D.C. District Court Judge. The Anthem merger was tried before Judge Amy Berman Jackson and included even more issues than the Aetna case; as a consequence, Judge Jackson did not issue her ruling until February 8. However, when she did, Judge Jackson ultimately sided with the DOJ as well, ruling that the proposed transaction should be enjoined on antitrust grounds. Echoing words he had used only two weeks earlier, Acting Assistant Attorney General Brent Snyder declared that Judge Jackson's ruling was another "victory for American consumers." In addition, while 140 pages in length, Judge Jackson's opinion addressed only one of several claims that the DOJ had advanced, as she concluded that the DOJ had succeeded in showing the proposed combination would likely have anticompetitive effects "in the market for the sale of health insurance to 'national accounts' – customers with more than 5,000 employees, usually spread over at least two states – within the 14 states where Anthem operates as a Blue Cross Blue Shield licensee." In reaching this decision, Judge Jackson also found that the "efficiency" benefits that Anthem argued would be created by the deal were not sufficient, in scope or type, to offset the harm she identified. In light of Judge Jackson's decision on the DOJ's first claim, she stated that it was not necessary for her to reach a decision as to whether the transaction would also harm competition in 35 local markets that DOJ had asserted would be harmed (which was a second claim by the DOJ). Judge Jackson did, however, include in her opinion a discussion as to at least one of these

markets – Richmond, Virginia – and suggested that the DOJ's argument as to this claim was meritorious as well.

Anthem, like Aetna, expressed disappointment and disagreement with the Court's ruling; however, unlike Aetna, Anthem swiftly announced an intention to appeal the decision to the D.C. Circuit and filed a motion seeking an expedited appeal only five days after the issuance of Judge Jackson's decision. However, Cigna subsequently announced that it was no longer interested in pursuing the deal and filed an action in the Delaware Chancery Court seeking to have that court declare that it was no longer bound to support the merger effort (and seeking \$14 billion in damages from Anthem, including the \$1.85 billion "break-up fee" that the parties had negotiated back in 2015). In response, Anthem cross-sued, contending that Cigna had breached the merger agreement and Anthem sought, and ultimately obtained, an order from the Delaware court requiring that, at least for now, Cigna continue with the merger effort.

As a result of the Delaware ruling, the possibility that the Anthem/Cigna deal could be completed has not been *completely* extinguished; however, for the deal to close, it would likely require (1) a reversal by the D.C. Circuit; (2) subsequent rulings in Anthem's favor on *all* of the claims in the DOJ complaint; *and* (3) state regulatory approvals for all of the remaining states that had not yet granted their approval to the deal. And, with the merger deal set to expire in April, all of these steps would need to be accomplished on an expedited schedule and with a less than eager merger partner in Cigna. Can Anthem accomplish this nearly herculean task? Only time will tell. Stay tuned.