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DOJ's Challenge to Anthem/Cigna and Aetna/Humana

By Anthony Swisher*

On July 21, the U.S. Department of Justice Antitrust Division (DOJ) and multiple state attorneys general filed lawsuits to block two proposed blockbuster health plan mergers: Anthem's acquisition of Cigna, and Aetna's acquisition of Humana. Below are short summaries of the claims brought by DOJ, and a few interesting points that bear further watching as the cases potentially proceed into litigation.

Anthem/Cigna

DOJ alleged that the combination of Anthem and Cigna would have led to significant reductions in competition in four markets: "national accounts," consisting of multi-state employers who need nationwide network coverage for their employees in multiple locations; large-group employers who have more than 50 employees; public individual health insurance exchanges; and a monopsony claim directed at the combined firm's alleged purchasing power over health care providers.

In the national accounts market, DOJ cast the merger as the combination of two of only four firms currently able to serve that segment, with the combined firm having a share exceeding 40% of the defined market in the 14 states in which Anthem operates through its Blues license, and exceeding 30% in the United States as a whole. In the large-group employers market, DOJ alleged that the merger would substantially lessen competition in 35 metropolitan areas. In the market for public individual exchanges, DOJ alleged a reduction in competition in 22 counties in Colorado and Missouri. Finally, the monopsony claim covered the same 35 metropolitan areas as the large-group claim, but alleged that the merger would substantially increase the merged firm's "ability to dictate the reimbursement rates it pays providers."

Aetna/Humana

In challenging the proposed Aetna/Humana transaction, DOJ focused principally on the Medicare Advantage (MA) space, alleging that the merger would combine two of the largest MA payers in the country. As with its Anthem/Cigna challenge, DOJ also alleged competitive harm in a relevant market consisting of public individual exchanges.

In MA, DOJ alleged that the transaction would result in a loss of competition in at least 364 counties across the country, and would create a "merger to monopoly" in at least 70 of those counties. In DOJ's public individual exchange market, the complaint alleged that the merger would substantially lessen exchange competition in 17 counties in Florida, Georgia, and Missouri.

Points of Interest

The two complaints contain several points of interest to health care antitrust practitioners and their clients. These provide new insights into DOJ's enforcement philosophy as it relates to health plan mergers, and may be developed further if the cases proceed to litigation.

The Importance of the Blues. In the Anthem/Cigna complaint, Anthem's status as a Blue Cross Blue Shield licensee played a significant role. DOJ did not limit its allegations of competitive harm to the 14 states in which Anthem operates under a Blues license, but included allegations of competitive harm nationwide stemming from Anthem's relationship with other Blues plans. At one point DOJ alleged that "the Blue plans effectively compete as a single entity." At the same time, DOJ suggested that even the parties to the merger were unsure what effect Anthem's status as a Blues plan might have on the merger going forward, alleging that, "Anthem has been unable to explain how the combined company would address problems created by Anthem's membership in the Blue Cross and Blue Shield Association."

Medicare vs. Medicare Advantage. Much of the press coverage in advance of DOJ's complaint against the Aetna/Humana transaction speculated on the position DOJ might take with respect to competition between MA plans and traditional fee-for-service Medicare. DOJ answered the question by alleging a relevant product market limited to MA plans. According to DOJ, "[M]any seniors using Medicare Advantage are unlikely to consider any of the traditional Medicare products to be adequate alternatives for Medicare Advantage."

Public Health Care Exchanges as a Relevant Market. In both merger challenges, DOJ alleged a reduction in competition on public individual health care exchanges, notwithstanding the fact that individual health insurance is widely available outside of the exchanges. DOJ alleged an industry recognition of exchange purchasers as "a separate group" of customers, and alleged a number of "distinct characteristics" that set them apart from other purchasers, most notably their receipt of financial assistance when purchasing through an exchange.

The Importance of Innovation. In both complaints DOJ emphasized the importance of innovation in analyzing the competitive effects of a merger. In Anthem/Cigna, DOJ cast Cigna as a firm that offered high customer service and "innovative wellness programs," and suggested that innovation would be stifled by the "far less innovative" Anthem. In Aetna/Humana, DOJ recognized, among other things, that Humana and Aetna are "leaders in collaborating with doctors and hospitals to improve quality of care and reduce costs by improving patients' health," and that both firms are "leaders in star ratings" used to rate MA plans. DOJ expressed concern that competition between the two had spurred innovation, and that such innovation would be put at risk if they were to combine.

DOJ's Rejection of Defenses and Remedies. DOJ was unpersuaded by potential merger defenses and proposed divestiture remedies offered by the merging parties. In Anthem/Cigna, DOJ rejected lower reimbursement rates as an efficiency gain from the merger, commenting that, "To the extent the merging parties anticipate cutting the reimbursement rates paid to doctors and hospitals for their services as a result of the merger, these reductions stem from a reduction in competition and may not be treated as efficiencies." In Aetna/Humana, the merging parties offered a divestiture package as a proposed remedy, which DOJ rejected. DOJ alleged that a divestiture buyer might be unable to compete effectively going forward, leading the divested members to switch back to the merged firm.

**We would like to thank Anthony W. Swisher (Squire Patton Boggs LLP, Washington, DC) for authoring this email alert.*

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