January 24, 2017

DOJ Successfully Blocks Aetna-Humana Merger

On January 23, 2017, United States District Court for the District of Columbia granted the Department of Justice, Antitrust Division (the "DOJ"), request for an injunction blocking Aetna's proposed $37 billion acquisition of Humana. The DOJ sought to block the transaction on the grounds that it would lead to higher health insurance prices, reduced benefits, less innovation, and worse service for over a million Americans. The DOJ specifically alleged that the transaction would substantially lessen competition in Medicare Advantage plans and in certain public exchanges, and their complaint was joined by eight states – Delaware, Florida, Georgia, Iowa, Illinois, Ohio, Pennsylvania and Virginia – and the District of Columbia.

The court held, in a 156 page opinion authored by Judge John D. Bates, a President George W. Bush appointee, that the combination of Aetna and Humana would "likely substantially lessen competition in Medicare Advantage in all 364 complaint counties and in the public exchanges in the three complaint counties in Florida." Importantly, the court rejected Aetna/Humana's arguments that the Medicare Advantage is in the same antitrust product market as "Original Medicare" because the parties' documents and the econometric evidence showed that Original Medicare was not a sufficiently close substitute such that it would constrain the parties' pricing in Medicare Advantage plans post-merger. Also, the court rejected the parties' arguments that the coordination and efficiency incentives created by the Affordable Care Act would transform Original Medicare into a model more similar to that of Medicare Advantage. According to the court, the parties have significant share of, and are especially close competitors in, the Medicare Advantage market, with Aetna's having plans for "rapid growth" in the market absent the merger. Thus, the merger created significant potential anticompetitive harm in that market, which would not be sufficiently mitigated by the parties' proposed divestiture to Molina Healthcare, federal regulation of Medicare Advantage, or outweighed by the deal's efficiencies.

The court also held that the merger would lessen competition in certain public exchanges, rejecting Aetna/Humana's argument that because Aetna had withdrawn from the exchanges in 2017, it should not be considered a competitor to Humana in those markets and pointing out that Aetna appeared to have made that decision not for business reasons, but for political and "litigation-related" reasons, namely to attempt to "improve its litigation

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position" and punish the Obama administration for challenging the merger. The court also criticized Aetna's "repeated efforts to conceal a paper trail about decision-making related to the ACA exchanges." That said, the court did not accept the government's view that it should be assumed that Aetna would continue to compete everywhere. Instead, the court found that Aetna likely would offer plans on the exchanges only in three complaint counties in Florida, and that the merger is likely to substantially lessen competition in those counties.

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The DOJ has achieved a substantial victory with deep and wide-ranging implications. It is the first time that the DOJ has blocked a health insurance merger, with another federal court decision regarding the DOJ's challenge to the Anthem/Cigna merger looming. The decision, along with recent FTC victories in blocking hospital mergers, likely will continue to bolster the Agencies' healthcare antitrust enforcement, which is unlikely to recede anytime soon. The Agencies' healthcare antitrust enforcement has been aggressive under Presidents Clinton, Bush and Obama, and there are no indications that this will change under President Trump, whose election Forbes Magazine recently pointed out "Isn't going to mean the end of scrutiny of healthcare mergers." Bruce Japsen, *Sorry, Aetna And Anthem: Trump Won't Stop Antitrust Scrutiny of Healthcare*, Forbes.com, Nov. 18, 2016.

The court's decision itself is also notable. For one, the court was skeptical of the parties' argument that because competition in health insurance was, and would continue to be, highly dynamic, the parties' current market shares were not the appropriate tool to evaluate competitive effects, holding that merging parties cannot simply point to "volatility" in their industry to have their combined high market shares dismissed. In addition to noting that the Supreme Court has never formally recognized an efficiencies defense to an anticompetitive merger, the court expressed skepticism of one of the parties' key efficiencies defenses, that the merger would reduce costs by Aetna/Humana's taking advantage of the each company's lower provider reimbursement rate, because Aetna and Humana's business people had "sounded a pessimistic note about the willingness of providers to switch" in their testimony. In addition, the court's strong criticism of Aetna's efforts to hide evidence of its motives for withdrawing from the exchanges stands out, as the court characterized Aetna's actions as "bordering on malfeasance." Finally, as with other decisions upholding DOJ or FTC merger challenges, the decision is replete with references to the parties' "hot" documents regarding market definition, pricing power, and competition, reminding us that the courts often rely on companies' ordinary course business documents when assessing the government's challenges to transactions.

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