

Client Alert

Antitrust Practice Group

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DOJ Challenges Health Insurance Mergers

On July 21, 2016, the Department of Justice, Antitrust Division (the “DOJ”) announced that it, along with several state attorneys general, would sue to block two multi-billion dollar health insurance mergers between Aetna and Humana and Anthem and Cigna. According to U.S. Attorney General Loretta Lynch, those transactions would “fundamentally reshape the health insurance industry” and would “leave much of the multitrillion dollar industry in the hands of three mammoth insurance companies.” Specifically, the DOJ alleges that the insurance industry is highly concentrated, with only five major players and a number of small, limited players that could not “fill the void” left by either merger, making both transactions “presumptively unlawful.”

According to the DOJ, Anthem’s proposed \$54 billion acquisition of Cigna – the largest merger in the history of the health insurance industry – would substantially lessen competition in a number of antitrust product markets, including:

1. **National accounts**, where four insurers offer a nationwide commercial network sufficient to serve the country’s largest employers and for which Anthem and Cigna view each other as close competitors.
2. **Local commercial markets**, where Anthem and Cigna are two of few remaining options for large-group employers in at least 35 metropolitan areas.
3. **Individual exchanges**, where in at least two areas (St. Louis and Denver) Anthem and Cigna are key competitors that sell policies to individuals and families on the public exchanges.
4. **Purchase of healthcare services by commercial health insurers**, where the transaction would substantially increase Anthem’s ability to influence the reimbursement rates it pays providers, which threatens the availability and quality of medical care.

Notably, the DOJ is also concerned about Anthem’s membership in the Blue Cross and Blue Shield Association, alleging that Anthem “works closely with them to win national accounts from Cigna and other insurers,” and, post-transaction “Anthem would thus be competing with—and against—its fellow “Blues Brethren” for the same national accounts.” DOJ also voiced skepticism regarding the parties’ efficiencies claims, as well as any possible settlement, stating that “The Defendants have not proposed any remedy that

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would negate the anticompetitive effects of this merger.” In the DOJ’s press conference announcing its actions to prevent these transactions from occurring, Principal Deputy Associate Attorney General Bill Baer added that “there are mergers that can be solved through divestitures. These cannot.” When responding to a reporter’s question about whether the merging parties could do anything to assuage the DOJ’s concerns, Baer replied “we have seen nothing to suggest that.”

In addition, the DOJ alleges in a separate complaint that Aetna’s proposed \$37 billion acquisition of Humana would lead to higher health insurance prices, reduced benefits, less innovation, and worse service for over a million Americans. The DOJ specifically alleges that the transaction would substantially lessen competition in two product markets (1) Medicare Advantage plans and (2) Individual Exchanges. For Medicare Advantage plans, the DOJ claims that both companies are significant players that continue to grow, and that Aetna in particular has been expanding aggressively. The DOJ also alleges that the transaction would harm “those who rely on the public exchanges to buy health insurance, particularly in Florida, Georgia, and Missouri” by combining two of the major players in those markets.

The DOJ’s complaint in Aetna/Humana contains more details regarding their rejection of Aetna’s proposed settlement to divest limited pieces of its or Humana’s Medicare Advantage business. According to the DOJ’s complaint, the proposed divestiture would not replace the competition lost as a result of the merger, because it would fail to put the potential buyer in a position to succeed, by, among other things, limiting the assets and contracts the buyer would receive.

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The DOJ decision to challenge these transactions is extraordinary. For one, it is the first time that the DOJ has sought to block a health insurance merger, let alone two at the same time with a combined value of \$91 billion. As is the case with the recent DOJ challenges to the merger between Baker Hughes and Halliburton and the sale of GE Appliances to Electrolux, these actions show that the DOJ will closely scrutinize any proposed divestitures and will not hesitate to litigate if it considers the proposed settlement to be inadequate. These actions also show that both Agencies continue to focus on the healthcare industry. The DOJ’s challenges could be considered a complement to the FTC’s recent challenges to hospital mergers, as the FTC’s challenges were centered on the ability of hospitals to *raise* prices to insurance companies, while a significant part of the DOJ’s challenge to the Anthem/Cigna transaction concerned the anticompetitive effects of those companies’ extracting prices *below* competitive levels. In fact, the DOJ reinforces what providers already know: that Anthem currently has “substantial bargaining leverage” when negotiating with providers. Finally, as with other challenges, the DOJ’s complaints are replete with references to “hot” documents regarding “dominance” of markets, pricing power, and competition, reminding us that the Agencies closely scrutinize companies’ ordinary course business documents when investigating transactions.

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