Court blocks proposed merger of insurance giants

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The United States District Court for the District of Columbia issued an order on January 23, 2017, blocking the proposed merger of Aetna Inc. and Humana Inc. The proposed $37 billion transaction involved two of the largest insurance companies in the country. Following the announcement of the proposed merger, the government initiated an investigation that resulted in the Department of Justice (DOJ), eight states (including Ohio) and the District of Columbia challenging the proposed merger under Section 7 of the Clayton Act. More specifically, the complaint alleged that the merger "is likely to substantially lessen competition" in two distinct product markets: individual Medicare Advantage plans and individual commercial health insurance plans offered on the public exchange.

Prior to the trial, the parties exchanged millions of documents, conducted dozens of depositions and submitted 16 expert reports (totaling more than 1,000 pages). The trial itself lasted for 13 days and saw more than 30 witnesses called to testify and hundreds of exhibits introduced into evidence.

With respect to the Medicare Advantage product, central to the Court's conclusion was its finding that the sale of individual Medicare Advantage plans constituted an appropriate product market. The defendants had argued that traditional Medicare served as a competitor to Medicare Advantage plans and should have been included in the analysis. However, the Court determined that successful Medicare Advantage plans often created products that were different from traditional Medicare. Those differences include the fact that Medicare Advantage plans offered a limited network, capped out-of-pocket spending, coordinated care and, oftentimes, offered supplemental benefits. The Court seemed persuaded by Aetna and Humana's own "ordinary course of business documents" that demonstrated the parties tended to focus their competitive efforts on other Medicare Advantage plans, as opposed to traditional Medicare.

Once the Court determined that the Medicare Advantage plans constituted a separate product market, the potential competitive effects of the proposed merger demonstrated a concentrated market. Indeed, in all 364 individual counties analyzed, the potential merger would result in a highly concentrated market reflecting the presumption of enhanced market power in violation of the antitrust enforcement agencies' horizontal merger guidelines. In fact, 70 of the 364 counties reflect a merger to a monopoly. The Court also rejected the defendants' arguments that government regulation, potential new entrants into the market and the potential divestiture of certain assets would offset these potential anticompetitive effects. As a result, the Court concluded the proposed merger would likely substantially lessen competition in the Medicare Advantage market.

Turning to the market for individual commercial health insurance plans offered on the public exchanges in 17 counties in Florida, Georgia and Missouri, the Court was initially forced to evaluate whether Aetna was a competitor of Humana in these counties. This exercise was necessitated due to Aetna's decision to withdraw from the public exchange markets in these counties following the filing of the action to block the transaction. The defendants argued that because Aetna did not offer a product on the public exchanges in these counties in 2017, the proposed merger could not substantially lessen competition. However, the Court concluded that "[b]ased on the facts presented at trial, the Court finds that Aetna withdrew from the 17 complaint counties for 2017 at least in part for the purpose of improving its litigation position." After making this finding, the Court evaluated whether Aetna was likely to compete in any of those 17 counties in 2018 and beyond. Ultimately, the Court concluded that Aetna was likely to offer exchange plans after 2017, and, therefore, it was appropriate to consider the potential merger's impact on competition in

this market. Once again, the Court held that the analysis of the proposed merger demonstrated the likelihood of a substantial lessening of competition in relevant counties.

Although the Court pointed out that the Supreme Court has never recognized an "efficiencies defense" in a merger case, the Court considered these arguments noting that the horizontal merger guidelines stated that, in some instances, efficiencies resulting from the merger could be considered. The Court heard the competing positions in this regard and was "unpersuaded that the efficiencies generated by the merger will be sufficient to mitigate the transaction's anticompetitive effects for consumers in the challenged markets." Thus, the Court's conclusion was not altered by the "efficiencies defense" that was presented, and it issued an injunction blocking the proposed merger between Aetna and Humana.

At this time, it is unclear whether the Court's decision will bring this matter to a close or whether this will be the first decision of many. The defendants have options. First, the defendants could appeal the Court's decision. Second, the defendants could attempt to restructure the proposed transaction in a way that attempts to alleviate the Court's concerns. Third, the parties could abandon the deal and continue to operate as separate companies.

Authors