U.S. DISTRICT COURT BLOCKS $37 BILLION AETNA/HUMANA MERGER; DECISION LOOMING IN ANTHEM/CIGNA

On January 23, 2017, following a 13-day trial, the U.S. District Court for the District of Columbia (the "Court") ruled in favor of the U.S. Department of Justice ("DOJ") in the government's suit to block the $37 billion insurance mega merger between Aetna Inc. ("Aetna") and Humana Inc. ("Humana"). It is expected that a decision will soon be reached in a similar proposed merger case between Anthem, Inc. and Cigna Corp.

Background

On July 21, 2016, the Antitrust Division of the DOJ, eight states and the District of Columbia challenged Aetna's acquisition of Humana, two of the nation's largest providers of Medicare Advantage plans and two major competitors on the health insurance exchanges established by the Affordable Care Act.

The government alleged that Aetna's acquisition of Humana would substantially harm consumers in 364 counties across the United States and would "enhance Aetna's power to profit at the expense of seniors who rely on Medicare Advantage and individuals and families who rely on the public exchanges for affordable health insurance." The DOJ differentiated Medicare Advantage plans as a distinct product market from traditional Medicare, distinguishing the two programs based on the provision of additional benefits - such as prescription drug, dental, vision and hearing coverage, as well as care management and wellness programs - at a reduced cost under Medicare Advantage plans. In 70 of the 364 counties identified as the relevant geographic market, the government alleged that the proposed merger would give Aetna and Humana a monopoly over the Medicare Advantage market. In approximately 100 additional counties, Aetna and Humana are the two largest competitors in those markets. Additionally, the proposed merger would stunt expansion plans by the two companies that would otherwise generate competition in additional markets.

Aetna proposed to divest limited pieces of its or Humana's Medicare Advantage plans in counties throughout the United States where the Court believed the merger would have an anticompetitive effect. The government argued that this plan would fail to replicate the competition between Aetna and Humana and would result in lower sales volume and market shares, be less efficient and of lower quality and provide fewer opportunities for innovation. Additionally, the proposed divestiture would require significant additional government oversight to ensure compliance with the divestiture and to maintain the competitive balance in the relevant geographic markets.

The DOJ identified public health insurance exchanges as a relevant product market in 17 geographic markets located across three states: Florida; Georgia; and Missouri. The DOJ argued that the further consolidation of the market would harm patients and increase the burden on taxpayers as additional funding would be required to supplement the exchanges.

Analysis

The Court's analysis of the Aetna/Humana merger centered on three distinct issues: 1) Medicare Advantage; 2) the public Health Insurance Exchanges formed under the Affordable Care Act; and 3) potential efficiencies resulting from the merger.

Medicare Advantage. The Court concluded that the proper product and geographic markets for evaluating this merger were the individual Medicare Advantage plans in the 364 counties identified by the government. Using the Herfindahl-Hirschman Index ("HHI") metric to measure market concentration, the government argued, and the Court found, that the merger would create "364 (very) highly concentrated markets, including 70 county-level monopolies" and was, therefore, presumptively anticompetitive. Additionally, the Court determined that neither government regulation nor new entry by competitors into the relevant product and geographic markets would offset the loss of competition resulting from the merger.

Additionally, one of the defendant's key arguments was that the proposed divestiture of certain assets to Molina Healthcare would counteract any anticompetitive effects of the merger. Relying on arguments advanced by the government, historical analysis of Molina's attempts to expand into the Medicare Advantage market, and the internal comments made by the Molina leadership, the Court found that

Molina would struggle to put together a competitive provider network in the available time frame and that the divestiture of those certain assets would not counteract the anticompetitive effects of the merger.

The Public Exchanges. The government also alleged that the effect of the merger would be to substantially lessen competition in the public exchange markets in 17 counties across the United States, and specifically, in three contested counties in Florida. However, shortly after the complaint was filed, Aetna, making headlines nationwide, announced that it would no longer offer exchange plans in any of those 17 counties, citing financial losses. The government contested this position and the Court, expressing skepticism, stated that they would grant the evidence the weight it deserved - "less if Aetna withdrew for the purpose of improving its litigation position; more if Aetna withdrew for sound business reasons." Troublingly, the Court reviewed the evidence and determined that Aetna had in fact withdrawn from the 17 counties to improve its litigation position and chose to disregard this action and instead to analyze the competitive landscape as it existed in 2016.

The Court concluded that the merger would substantially lessen competition in the public exchange markets in the three counties in Florida.[1] Using the same HHI metric used to analyze the Medicare Advantage product markets, the Court determined that the proposed merger would lead to presumptively anticompetitive levels of market concentration. Additionally, the government presented evidence that Aetna and Humana compete head-to-head in Florida on prices and product design and that the merger would hurt competition following the removal of a key competitor in the respective markets.

Efficiencies. Aetna and Humana sought to defend the merger on the grounds that it would create substantial, procompetitive efficiencies, including efficiencies that would accrue directly to the consumer. In particular, Aetna and Humana asserted that the proposed merger would result in: (1) savings associated with moving Aetna's Medicare Advantage business onto Humana's more cost-efficient Medicare Advantage business; (2) pharmacy cost reductions through the consolidation of contracts, pharmacy rebate maximization and moving Aetna's outsourced pharmacy to Humana's in-house pharmacy; (3) network medical cost savings associated with the selection of the most favorable provider contracts; and (4) clinical cost savings, including the benefits of moving Humana's claims review process to Aetna's proprietary technology. Aetna and Humana alleged that the proposed merger would produce $2 billion in annual efficiencies to the combined company every year after 2020 and an additional $300 million in cognizable efficiencies that would flow directly to the government and consumers.

The Court, mirroring recent decisions in provider cases,[2] was unpersuaded by these efficiency arguments, stating that the defendants must present "extraordinary efficiencies" to rebut the presumption of illegality resulting from the merger's high market concentration measures - a standard, in the Court's view, they failed to meet. The Court stated that "Aetna and Humana put forward very little evidence that would tempt a consumer in one of the challenged markets to choose the merger over continued competition."

Given the importance of this line of cases to the provider community, Hall Render will continue to closely monitor the issue.

If you have any questions or would like additional information about this topic, please contact one of the following members of Hall Render's Antitrust Practice Group or Managed Care Group:

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[1] The Court conducted a similar analysis on Aetna's decision to withdraw from counties in Georgia and Missouri but determined that, because of the financial unprofitability of these counties, Aetna was unlikely to compete in these counties in the future.

[2] The Ninth Circuit in Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health System stated, "However, none of the reported appellate decisions have actually held that a § 7 defendant has rebutted a prima facie case with an efficiencies defense; thus, even in those circuits that recognize it, the parameters of the defense remain imprecise." *Saint Alphonsus Medical Center-Nampa, Inc. v. St. Luke's Health System*, 778 F.3d 775, 789 (9th Cir. 2015).