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# Client Alert

Antitrust Practice Group

February 9, 2017

## DOJ Wins Again, Blocks Anthem/Cigna Merger

On February 8, 2017, the United States District Court for the District of Columbia granted the Department of Justice, Antitrust Division's (the "DOJ") request for an injunction blocking Anthem's proposed $54 billion acquisition of Cigna. A few weeks earlier, the DOJ successfully blocked Aetna's proposed $37 billion acquisition of Humana. According to then-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." Anthem has stated that it "[p]romptly intends to file a notice of appeal and request an expedited hearing of its appeal to reverse the Court's decision so that Anthem may move forward with the merger."

According to the DOJ, Anthem's proposed acquisition of Cigna – the largest merger in the history of the health insurance industry – would substantially lessen competition in a number of markets, including: (1) national accounts; (2) large group employers in certain local commercial markets; (3) insurance exchanges; and (4) the purchase of healthcare services by commercial insurers, though the DOJ subsequently dropped its claim regarding individual exchanges. The DOJ's complaint was joined by 11 states – California, Colorado, Connecticut, Georgia, Iowa, Maine, Maryland, New Hampshire, New York, Tennessee, Virginia, – and the District of Columbia ("State Plaintiffs").

In a summary opinion authored by Judge Amy Berman Jackson (the full opinion remains under seal), the court held that the combination of Anthem and Cigna would likely substantially lessen competition for national accounts, or "customers with more than 5,000 employees, usually spread over at least two states, within the fourteen states where Anthem operates as a Blue Cross Blue Shield licensee." Importantly, the court declined to rule on the DOJ's remaining claims, because deciding the first claim in favor of DOJ was sufficient to enjoin the merger, though the court noted that the transaction would have an anticompetitive effect on the sale of large groups in at least one market.

With respect to national accounts, the court held that large, national employers comprise an antitrust product market, because they have "a unique set of characteristics that drive their purchasing processes and decisions, and that the industry as a whole recognizes national accounts as a distinct market." Specifically, both Anthem and Cigna have business units devoted to national accounts and witnesses confirmed that only the four national carriers

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have the provider networks and management capabilities that can service national accounts. The court also held that the national accounts market was highly concentrated, and the transaction would "eliminate the two firms' vigorous competition against each other for national accounts, reduce the number of national carriers available to respond to solicitations in the future, and diminish the prospects for innovation in the market," specifically rejecting the parties' arguments that there was sufficient competition from the presence of third party administrators and provider-sponsored insurance plans. These anticompetitive effects could not be overcome by the parties' alleged efficiencies, because the parties could not show that the cost savings could not be obtained by either party without the merger. The court also dismissed the parties' claims that the merger would improve quality, because "there is nothing stopping Anthem from improving its wellness programs or any offering that Cigna does better, on its own."

**Implications**

Although only a summary opinion from the court is available at this time, there are noteworthy findings. For one, it is the second time a federal judge has agreed with a product market definition that hinged mostly on size and scale. In May 2016, Judge Emmet Sullivan in the same court upheld the FTC's challenge to Staples' proposed acquisition of Office Depot, in part on the grounds that it would substantially lessen competition in the market of office supplies sold to large business customers.

Furthermore, the court addressed what it calls "the elephant in the courtroom": Cigna did not want the merger to be consummated and thus actively undermined Anthem's case, including testifying against Anthem's efficiency claims and refusing to sign Anthem's Findings of Fact and Conclusions of Law. Anthem asked the court to ignore these actions as a "side issue," but the court held that it could not ignore them. The merger agreement provides that Anthem would owe Cigna $1.85 billion should the transaction fail to close for antitrust reasons.

Finally, it is disappointing that the court declined to rule on the DOJ's other claims. In particular, a significant part of the DOJ and State Plaintiffs' challenge to the Anthem/Cigna transaction was that the newly acquired leverage that the combined firm would use to further reduce providers' rates would be unlawful monopsony power. That said, the court was skeptical about whether Anthem's ability to reduce providers' rates "can be characterized as an efficiency at all," because these savings would not arise from what the companies actually produce.

The DOJ has achieved another substantial antitrust victory, just weeks after successfully challenging Aetna's proposed acquisition of Humana. There are also signs, including statements from the Trump administration and the recent appointment of Acting FTC Chairman Maureen Ohlhausen, that neither the DOJ or FTC will reduce their decades-long focus on healthcare antitrust, and thus healthcare companies should continue to carefully assess whether contemplated transactions or business practices may raise antitrust concerns.

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King & Spalding's antitrust lawyers provide sophisticated, solution-oriented advice to healthcare companies on all aspects of antitrust law, from civil and criminal litigation and government investigations to antitrust counseling and government review of transactions. We will be providing a more detailed analysis of the court's full opinion when it is available. In the meantime, please reach out to any members of our team should you have any questions.