DOJ Continues Streak of Successful Merger Challenges With Blocked Aetna-Humana, Anthem-Cigna Deals

02/13/17

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Clifford H. Aronson
New York
212.735.2644
clifford.aronson@skadden.com

Matthew P. Hendrickson
New York
212.735.2066
matthew.hendrickson@skadden.com

Maria Raptis
New York
212.735.2425
maria.raptis@skadden.com

Kenneth B. Schwartz
New York
212.735.2731
ken.schwartz@skadden.com

Steven C. Sunshine
Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

In a continuation of recent Department of Justice (DOJ) successes challenging mergers, the U.S. District Court for the District of Columbia recently enjoined two more proposed mergers brought and litigated under the Obama administration. Aetna's $37 billion proposed acquisition of Humana was blocked on January 23, 2017, followed by a similar outcome for Anthem's $54 billion acquisition of Cigna on February 8, 2017. As the culmination of transactions announced and investigated under the previous president, these decisions do not provide any insight into the Trump administration's approach to merger activity. Nonetheless, they show the continued vitality of the merger guidelines methodology in front of the federal courts.

While both cases involved major national insurance companies, the specific product and geographic markets, and the key issues under dispute, were quite different. Consistent with other recent merger litigations brought by the DOJ and Federal Trade Commission (FTC), however, the court decisions highlight yet again the evidentiary importance of ordinary course business documents, the high bar to prove claimed efficiencies, the importance of a robust divestiture package with a credible buyer if divestitures are proposed as remedies to cure potential competition concerns, and the focus by antitrust authorities on the effect of transactions in narrow market segments that can be served by only a limited number of firms.

Aetna-Humana

In the Aetna-Humana decision, the key issues were concerns over decreased competition for (1) Medicare Advantage (MA) plans in 364 counties across 21 states and (2) public exchanges under the Affordable Care Act (ACA) in three Florida counties. The defendants argued that MA was too narrow a market because it excluded Original Medicare, that government regulations for Medicare administration would serve as a check on price increases or benefit reductions and that new entry could occur to prevent potentially anti-competitive behavior. They also proposed divesting a number of assets to Molina Healthcare and argued that such a divestiture would restore any competition that otherwise would be lost as a result of the merger. On the public exchange side, Aetna pointed to its withdrawal from more than 500 marketplaces in late 2016 due to financial losses as evidence of lack of future competition between Aetna and Humana on ACA public exchanges.

Judge John D. Bates gave great weight to both companies' ordinary course business documents to conclude that MA is a standalone market. While the defendants highlighted a few documents discussing competition between Original Medicare and MA, the court found more persuasive the many documents suggesting a narrow MA-only market over what it described as "passing references" to broader competition. The court further held that, contrary to the defendants' arguments, government regulations for Medicare administration could not effectively prevent price increases or benefit reductions, and no new entry could occur in a timely enough manner to prevent potentially anti-competitive behavior.

Similar to the courts in the recent Staples-Office Depot, GE-Electrolux and Sysco-US Foods mergers, Judge Bates rejected as inadequate the divestiture remedy offered by the parties. The court found that Molina was an unsuitable buyer because it was primarily a Medicaid provider with a poor track record in its attempts to serve the MA segment and therefore would be unlikely to cure the identified competition concerns. As all of these cases demonstrate, courts will not hesitate to reject a divestiture remedy where there are doubts about a buyer's ability to replace the competition lost to the transaction.

DOJ Continues Streak of Successful Merger Challenges With Blocked Aetna-Humana, Anthem-Cigna Deals

Finally, with regard to the ACA overlap, Judge Bates was not convinced that Aetna's decision to withdraw from ACA marketplaces was entirely due to financial considerations. Although Aetna cited financial losses as the reason for withdrawal, the court concluded that Aetna's decision was made tactically to avoid "judicial scrutiny" of the merger in this area and therefore was not evidence that Aetna and Humana were unlikely to compete in 2017 and onward absent the merger.

Anthem-Cigna

The key issue in the Anthem-Cigna merger was not competition for individual insurees, but rather competition for national accounts in the 14 states where Anthem is the exclusive Blue Cross Blue Shield licensee. The merging parties argued that new entrants, regional partners and plan administrators could serve these national accounts on a piecemeal basis and, in any case, the claimed synergies from the deal would provide savings to customers post-transaction.

Judge Amy Berman Jackson found that only four national insurance carriers were equipped to service large accounts in these states, and the merger would eliminate "vigorous competition," reduce the number of providers available to bid on these national accounts and lessen the likelihood of innovation among the carriers. The evidence suggested that new entrants and regional, specialized providers could not meet the interstate needs of many national accounts, with the court writing, "[W]itness after witness agreed that there are only four national carriers offering the broad medical provider networks and account management capabilities needed to serve a typical national account." The court's reasoning was similar to that used for blocking both the Staples-Office Depot and Sysco-US Foods transactions — it emphasized the unique needs of large customers and the dangers of market segments with fewer competitors.

Further, the court rejected the alleged cost-saving efficiencies proffered by the defendants as not merger-specific and unverifiable, and was skeptical that any potential savings from the transaction would be passed on to consumers rather than captured internally. Also influencing the court's rejection of the claimed efficiencies, described as the "elephant in the courtroom," was Cigna and Anthem's stalled integration planning and public disagreements about the synergy projections, with Cigna officials undermining Anthem's assertions, cross-examining Anthem's expert, and disavowing Anthem's findings and conclusions.

On February 9, 2017, Anthem filed a notice of appeal of Judge Jackson's decision to the U.S. Court of Appeals for the District of Columbia Circuit. Representatives from Cigna have said that the company is still reviewing the judge's decision and evaluating its options. If the transaction does not close, under certain circumstances, Cigna would be entitled to receive a $1.85 billion breakup fee.

The Aetna-Humana and Anthem-Cigna mergers extend the legacy of aggressive antitrust enforcement under the Obama administration, coupled with success at trial in the relatively rare instances where the merging parties are willing to go to court to put the government to its proof. The Trump administration has yet to fill key leadership positions within the DOJ and FTC, and the aggressiveness of the agencies with respect to merger enforcement remains to be seen. To the extent the agencies choose to bring merger challenges, they have experienced trial teams with proven track records to litigate the cases.