In their words: Judges rule to block health plan mergers, citing anticompetitive effects for consumers and physicians

Excerpts from the U.S. District Court ruling to block Anthem's acquisition of Cigna

Amy Berman Jackson, United States District Judge
Feb. 8, 2017

"Anthem is asking the Court to go beyond what any court has done before: to bless this merger because **customers may end up paying less to healthcare providers for the services that *the providers* deliver even though the same customers are also likely to end up paying more for what the defendants sell.**"

"**Anthem maintains that the overriding benefit of the merger is that the new company will be able to deliver Cigna's highly regarded value-based products at the lower Anthem price. But the claimed medical cost savings are not cognizable efficiencies since they are not merger-specific, they are not verifiable, and it is questionable whether they are 'efficiencies' at all.**"

"The Court cannot fail to point out that it is bound to consider *all* of the evidence in the record in connection with the question of whether the merger will benefit competition, and in this case, that includes the **doubt sown into the record by Cigna itself.**

This brings us to the elephant in the courtroom. In this case, the Department of Justice is not the only party raising questions about Anthem's characterization of the outcome of the merger: one of the two merging parties is also actively warning against it. **Cigna officials provided compelling testimony undermining the projections of future savings,** and the disagreement runs so deep that Cigna cross-examined the defendants' own expert and refused to sign Anthem's Findings of Fact and Conclusions of Law on the grounds that they 'reflect Anthem's perspective' and that some of the findings are 'inconsistent with the testimony of Cigna witnesses.' **Anthem urges the Court to look away, and it attempts to minimize the merging parties' differences as a 'side issue,' a mere 'rift between the CEOs.' But the Court cannot properly ignore the remarkable circumstances that have unfolded both before and during the trial.**"

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Excerpts from the U.S. District Court ruling to block Aetna's acquisition of Humana

John D. Bates, United States District Judge
Jan. 23, 2017

> "The Court concludes that the proposed merger is likely to **substantially lessen competition** in Medicare Advantage in all 364 complaint counties and in the public exchanges in the three complaint counties in Florida. ... And as in the Medicare Advantage market, the Court concludes that defendants' **proffered efficiencies do not offset the anticompetitive effects of the merger.**"

> "Aetna and Humana seek to defend the merger on the ground that it will create substantial, procompetitive efficiencies. ... The Court has some serious concerns regarding the companies' efficiencies claims. ... **The Court cannot be confident that the consumers who are likely to be harmed by the merger would also share in its benefits.**

... [B]ecause they face a presumption of illegality based on very high concentration measures, they must marshal evidence of 'extraordinary efficiencies' in rebuttal. In the Court's view, they have not done so. ... **Here, Aetna and Humana have put forward very little evidence that would tempt a consumer in one of the challenged markets to choose the merger over continued competition. For that reason, their efficiency defense fails.**"

> "In the public exchanges, the Court finds that Aetna withdrew from competing in the 17 complaint counties for 2017 **specifically to evade judicial scrutiny of the merger.**"

> "This evidence shows that Aetna and its CEO, [Mark] Bertolini, viewed participation on the exchanges as closely connected to DOJ's attempt to block the merger. ... Aetna was willing to offer to expand its participation in the exchanges if DOJ did not block the merger, or conversely, was willing to threaten to limit its participation in the exchanges if DOJ did. **This is persuasive evidence that when Aetna later withdrew from the 17 counties, it did not do so for business reasons, but instead to follow through on the threat that it made earlier.**"