NEWS

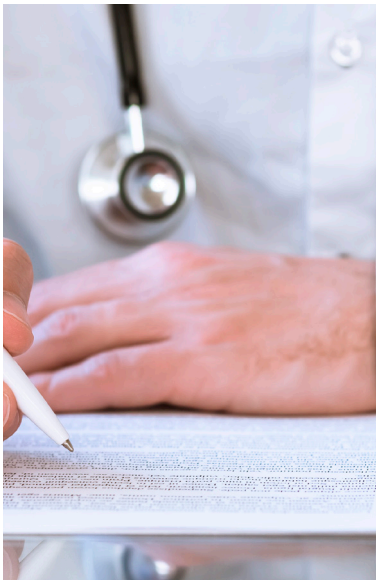
BAKER DONELSON

Insurance Antitrust

EXPAND YOUR EXPECTATIONS℠

September 2016

This is an advertisement.



# DOJ and States Challenge Health Insurer Mergers

By James M. Burns

Following more than a year of regulatory review, in late July 2016 the Department of Justice (DOJ) Antitrust Division and a number of states filed actions seeking to derail both the Anthem/Cigna and Aetna/Humana mergers. In announcing the filing of the cases (*United States v. Anthem and Cigna and United States v. Aetna and Humana*), United States Attorney General Loretta Lynch claimed that the actions were necessary because the deals "would leave much of the multi-trillion dollar health insurance industry in the hands of three mammoth insurance companies [Anthem, Aetna and United Healthcare]" and that "the competition among insurers that pushed them to provide lower premiums, higher quality care and better benefits would be eliminated."

Both cases were filed by the DOJ in the United States District Court for the District of Columbia, and both were originally assigned to Senior Judge John Bates. In the *Anthem* case, the DOJ contends that the proposed transaction, if completed, will cause competitive harm in the following markets:

1. commercial insurance products sold on a nationwide basis to the country's largest employers;
2. commercial insurance products sold to large group employers in 35 local markets, including New York, Los Angeles and Indianapolis;
3. insurance sold to individuals on the insurance exchanges in a few select local markets; and
4. the market for the purchase of provider services in the 35 local markets described above.



*Continue on next page*

# DOJ and States Challenge Health Insurer Mergers,

*continued*

In the *Aetna* matter, the DOJ contends that the proposed transaction would have anticompetitive effects in:

1. hundreds of local markets in which Aetna and Humana currently offer Medicare Advantage products; and
2. in the insurance exchange markets in which individuals purchase those products in several counties in Florida, Georgia and Missouri.

Two additional issues likely to be addressed in the *Aetna* matter include:

1. whether Aetna's proposed divestiture of some Medicare Advantage business to Molina Healthcare (which Aetna announced at about the time of the DOJ's filing of the action) would be sufficient to remedy any potential anticompetitive effects of the transaction, thus rendering the DOJ challenge moot; and
2. the effect of Aetna's announcement that it intends to withdraw from several of the insurance exchanges in 2017.

Only days after the filing, both Anthem and Aetna urged the Court to set their cases for the earliest possible trial date, claiming that swift action was necessary because the current deadlines for closing contained in their respective merger agreements was rapidly approaching. After Judge Bates concluded that he could not possibly hear and decide both matters before the end of the year (which is what the insurers sought), Judge Bates directed that the *Anthem* case be reassigned to another judge. Subsequently, the *Anthem* case was assigned to Judge Amy Berman Jackson for all subsequent proceedings.

At hearings in early August 2016, Judge Bates and Judge Berman each set discovery and trial schedules for the cases they will hear. Judge Jackson announced that she would try the *Anthem* case beginning on November 21, but she still did not anticipate that she would be able to issue a decision in the matter until sometime in January 2017. Notably, while the Anthem/Cigna merger agreement is not set to expire until April 2017, Anthem had maintained that a ruling by the end of the year was necessary because Anthem has not yet received regulatory approval from several key states, and the states having indicated that they will not consider the merger until after the lawsuit is resolved.

Judge Bates subsequently announced that he would try the *Aetna* case beginning on December 5, and that his decision was also unlikely to issue until January 2017. This timetable presents challenges for Aetna because, while Aetna has already received regulatory approval from most states, the current deadline for closing in the Aetna/Humana merger agreement is December 31, 2016.

Since early August 2016, both the merging parties and the DOJ have embarked on quick-paced and extensive third party discovery, sending subpoenas for documents to health care providers and insurers all across the country. In addition, both Judge Bates and Judge Jackson appointed a Special Master (Richard Levie, a former District of Columbia Superior Court Judge) to address any potential discovery disputes among the parties (and the third parties from whom the parties are seeking information). Among the Special Master's first decisions was one granting the parties the right



*Continue on next page*

# DOJ and States Challenge Health Insurer Mergers,

*continued*

to take hundreds of hours of depositions of third parties. Accordingly, these cases will likely be a significant focus of attention not only for the merging parties over the next few months, but also for the many health care providers and other insurers industry that have been asked to provide information for the case in discovery. Stay tuned.

# DOJ/FTC Issue Their Annual "Hart-Scott-Rodino Report" – Insurance Industry Spotlight

By James M. Burns

In early August 2016, the DOJ Antitrust Division and the Federal Trade Commission (FTC) issued their 38th annual Hart-Scott-Rodino (HSR) report. The report presents data on the agencies' merger review and enforcement activities in the federal government's prior fiscal year, which ended on September 30, 2015.

Among its highlights, the report notes that 1,801 transactions were reported to the antitrust agencies for premerger notification and approval in fiscal year 2015, an 8.3 percent increase over the prior year (the reporting threshold for transactions in 2015 was $76.3 million). In addition, the number of times the FTC or DOJ issued requests for additional information from the parties (Second Requests), which require the parties to delay the closing of their proposed transaction until the agencies can take a closer look at the proposed transaction (typically delaying the closing for several months, at the very least), decreased from 51 to 47. The data also reflects, not surprisingly, that the largest deals were most likely to be the greatest focus of agency attention.

The report also discloses that 78 insurance industry transactions were reported for premerger approval in fiscal year 2015. This was a significant increase in filings from 2014 when the total was only 61. The FTC and DOJ also sought "clearance" to conduct an initial examination of insurance industry transactions – the initial step toward a potential Second Request – seven times in 2015 (an increase from six in 2014), and in two transactions in 2015, the FTC and DOJ issued a Second Request to insurers proposing to merge (the same as in 2014).



*Continue on next page*

# DOJ/FTC Issue Their Annual "Hart-Scott-Rodino Report" – Insurance Industry Spotlight, *continued*

In addition, the report also highlights the merger challenges brought by the FTC and DOJ in fiscal year 2015. A total of 42 such challenges were brought during the year (22 by the FTC and 20 by the DOJ). For the insurance industry, the most notable such challenge was brought by the FTC in the proposed $650 million acquisition of Eagleview Technology by Verisk Analytics.

As detailed in the report, in the *Verisk* matter, the FTC alleged that Verisk's acquisition of Eagleview would likely reduce competition in the market for rooftop aerial measurement products used by the property insurance industry to assess property damage claims. Specifically, the FTC contended that Verisk's roof measurement products posed the only meaningful competition to Eagleview's roof measurement product, and thus a merger between the two companies would be anticompetitive. Shortly after the FTC filed their action, the parties abandoned their proposed transaction.

# *In re Auto Body Shop Antitrust Litigation* Heads to the 11th Circuit

By James M. Burns

Having succeeded in having class-action antitrust claims brought by auto body shops in several states dismissed by the district court in the *In re Auto Body Shop Antitrust Litigation*, the auto insurer defendants in those cases will now seek to have those rulings affirmed by the 11th Circuit.

The cases, commenced in early 2014 and consolidated by the Multidistrict Panel for Litigation before Judge Presnell (Middle District of Florida) later that year, all alleged that some of the largest auto insurers in the country (including State Farm, Allstate, Nationwide, Progressive and Farmers) engaged in antitrust conspiracies intended to suppress the payments that the auto body shops received from the insurers for auto repairs. In a series of rulings over the last six to nine months, Judge Presnell repeatedly held that the plaintiffs had failed to allege any cognizable antitrust claim against the insurers and dismissed them on that basis.

In the appeal, styled *Automotive Alignment & Body Service v. State Farm Mutual Automobile Insurance et al.*, the appellant auto body shops maintain that Judge Presnell acted too quickly in dismissing their antitrust claims. Specifically, they assert that Judge Presnell applied a higher pleading standard to their claims than permitted under *Twombly*, "disregarding or discrediting facts alleged in the



*Continue on next page*

# *In re Auto Body Shop Antitrust Litigation* Heads to the 11th Circuit, *continued*

complaint, mischaracterizing factual allegations as conclusory statements, applying affirmative defenses to causes of action and requiring appellants to plead specific facts beyond that required by Rule 8 of the Federal Rules of Civil Procedure." They seek a reversal of the lower court's ruling, returning the case for discovery on the claims to commence.

In a response filed at the end of August 2016, the insurers contend that the appellants failed to appeal the correct order in the case, potentially divesting the appellate court of jurisdiction to hear the substance of appellants' appeal. They point to the fact that the auto body shop's appeal was only to Judge Presnell's order denying their motion for reconsideration of his dismissal of their antitrust claims, and not the order dismissing the claims themselves. In addition, as to the substance of the auto body shops' argument, the insurers maintain that Judge Presnell got it just right, recognizing that the appellants had alleged nothing more than parallel conduct that has repeatedly been found to be insufficient to assert a claim of conspiracy.

The cases have been carefully watched by the entire auto insurance industry since they were commenced, now more than two years ago, and the appeal will undoubtedly be closely watched as well. A decision by the 11th Circuit is likely in the next few months. Stay tuned.