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Health Insurers Announce Merger Plans; Congress Announces Intention to Review

By James M. Burns

In the last few months, several of the largest commercial health insurers in the nation have announced their intentions to merge. First, Aetna (currently the nation's third largest health insurer by revenue) announced its intention to combine with Humana (the fourth largest) in a deal reportedly valued at more than $35 billion. Shortly thereafter, Anthem (the second largest) announced a merger with Cigna (the fifth largest) in a $54 billion deal. If these transactions are consummated, the current "big five" national health insurers will become a new "big three" (with United Healthcare, currently the nation's largest health insurer, being the third).

Given the size and scope of these mergers, federal and state antitrust regulators can be expected to review these proposed transactions carefully to assess the competitive implications of the deals. As has been the case in prior health insurer transactions (Wellpoint/Anthem, Aetna/Prudential, etc.), the regulators are likely to focus on overlaps in service by the merging parties both geographically and with respect to the insurance products they offer (large and small group products, individual products, Medicare Advantage products, etc.) At the same time, state insurance departments will also be reviewing the transactions for non-antitrust issues. For all of these reasons, it is not surprising that the parties have announced that they don't anticipate being able to close the deals until sometime in 2016.

As expected, the merging parties followed the announcement of the deals with statements explaining how the combinations would enhance competition and benefit consumers. Cigna CEO David Cordani, for example, stated to the national media that – referring to Cigna's deal with Anthem – the transaction should be approved because the two companies are "largely

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complementary" in their scope of operations and that the combined entity will be "focused on partnering with physicians and individuals to improve health quality and improve health costs." Cordani also stated that, as a result of the Affordable Care Act, "the market works differently than it did a half-dozen years ago," and that many employers now operate with self-funded plans, rather than insurer-funded plans, adding greater "transparency" to the process. On the other hand, both the American Hospital Association and the American Medical Association denounced the mergers, with AMA President Steven Stack expressing the view that "the recently proposed mergers threaten to increase health insurer concentration, reduce competition and decrease choice."

Ultimately, the Department of Justice (DOJ) Antitrust Division will be reaching its own conclusions on the potential competitive implications of the proposed deals. And, in circumstances where the DOJ (and/or state antitrust enforcers) believe that the transactions present significant anticompetitive concerns, they are likely to engage in extended discussions with the insurers on these issues before approving them to proceed. Typically, if the merging parties cannot persuade the regulators that their concerns are misplaced, the parties will be asked to commit to the divestiture of some assets to obtain regulatory approval. For example, when Anthem acquired Amerigroup in 2013, Anthem agreed to divest Amerigroup's Northern Virginia Medicaid operations to gain regulatory approval from the DOJ. Where divestitures are not possible, or agreeable to the merging parties, the potential results include litigation in federal court or the parties' abandonment of the deal. Notably, however, given that the parties' agreements reportedly included hefty "busted deal" payments by the buyer to the seller if the deal can't be consummated, it appears – at least at this point – that the insurers are confident that the deals will ultimately be consummated, in some form or fashion.

Given the importance of health care to the U.S. economy, it was not surprising that within weeks of the announcement of the deals both House and Senate representatives announced their intentions to hold hearings on the proposed deals. On July 31, Senators Mike Lee (R-UT) and Amy Klobuchar (D-MN) announced that the Senate Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights would hold a hearing to consider the mergers on September 22, and invited the CEOs of the merging parties to testify before them at the hearing.

> ***…the recently proposed mergers threaten to increase health insurer concentration, reduce competition and decrease choice.***

House Judiciary Committee Chairman Bob Goodlatte (R-VA) also announced that a hearing would be held on the mergers by the House, indicating that the mergers would be addressed in the second of a series of four hearings on health care scheduled for later this year. The dates for those hearings have not yet been announced.

While Congress plays no formal role in the antitrust approval process, its ability to draw attention to the issues raised by the mergers and to compel testimony from the merging parties ensures that these mergers will be the subject of significant attention over the next few months. Stay tuned.

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Auto Insurers Score Another Victory in the *Auto Body Shop Antitrust Litigation*

By James M. Burns

On August 17, United States District Judge Greg Presnell (M.D. Fla.) handed the auto insurer defendants in the In re *Auto Body Antitrust Litigation* another significant victory, confirming a "Report and Recommendation" by Magistrate Judge Thomas Smith that recommended that plaintiffs' antitrust claims be dismissed. And, while the plaintiffs have been granted leave to amend their antitrust claims, the plaintiffs' decision not to object to Magistrate Smith's recommendation that the antitrust claims be dismissed (albeit without prejudice) certainly suggests that the plaintiffs may be losing enthusiasm for their antitrust claims and may have decided to focus going forward on the non-antitrust claims that they have also raised in the litigation.

For those unfamiliar with the litigation, the action was commenced by the filing of a single action by A&E Auto Body in federal court in the Middle District of Florida (*A&E Auto Body v. 21st Century Centennial Insurance Co.*), but was quickly transformed into a multi-district litigation proceeding after similar actions were filed by auto body shops in several states. The actions all center upon the claim that many of the nation's leading auto insurers conspired to reduce rates for the repair of damaged vehicles and to steer insureds away from plaintiffs' shops, after plaintiffs refused to accept lower reimbursement rates for their services. All of the cases were consolidated before Judge Presnell in late 2014, and in early 2015 the court dismissed the plaintiffs' claims in the A&E case, with leave to amend.

In February of 2015, plaintiffs in the consolidated cases filed an omnibus Amended Complaint, seeking to address the deficiencies in the A&E complaint that Judge Presnell had identified in dismissing that initial complaint. The auto insurers moved to dismiss the Amended Complaint as well, arguing that the new complaint was no less infirm than the A&E complaint had been.

In June, Magistrate Judge Thomas Smith issued a "Report and Recommendation" in the case, recommending to Judge Presnell that plaintiffs' antitrust claims (and many of their other claims as well) should be dismissed without prejudice. Magistrate Smith noted that the plaintiffs' allegations were quite similar to those in the A&E case, and that they failed for the same reasons. With respect to the antitrust allegations, Magistrate Smith concluded that the plaintiffs had again failed to allege sufficient facts to support their claim of unlawful agreement, principally relying upon unacceptable "group pleading" allegations and conclusory allegations rather than facts to support their claims. Specifically, in recommending dismissal of the antitrust claims, Magistrate Smith stated, "The Court's reasoning in dismissing the antitrust claims in [A&E] applies with equal force here. Therefore, I recommend that plaintiffs' claims for price fixing and group boycotts in violation of the Sherman Act be dismissed."

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While the plaintiffs filed a 45-page brief objecting to Magistrate Smith's "Report," they did not challenge Magistrate Smith's recommendation that their antitrust claims be dismissed. Under the circumstances, Judge Presnell's adoption of Magistrate Smith's Report on the antitrust issue was unsurprising, but welcome news for the auto insurer defendants. Judge Presnell did, however, provide the plaintiffs with leave to amend their antitrust claims and refile them when they again amend their complaint. Whether the plaintiffs will accept that invitation, or move forward only with their various tort claims, remains to be seen. However, as of now, it certainly appears that the insurers have defeated the plaintiffs' antitrust claims, in a series of rulings that insurers across the country are likely applauding.

Senate Passes Antitrust Whistleblower Legislation

By James M. Burns

On July 22, the Senate passed the "Criminal Antitrust Anti-Retaliation Act of 2015," (S.1599), by unanimous consent. The bill, a bipartisan measure jointly introduced by Senators Patrick Leahy (D-VT) and Chuck Grassley (R-IA), prohibits employers from retaliating against employees who provide information to the DOJ about potential antitrust violations by their employers. Similar legislation was also introduced by Senators Leahy and Grassley during the last Congress, but the House did not take up the bill before the end of the legislative session.

In introducing S.1599, Senator Leahy explained that "this legislation is modeled on whistleblower protections that Senator Grassley and I authored as part of the Sarbanes-Oxley Act in 2002." Senator Leahy further noted that the protections in the bill build on recommendations contained in a Government Accountability Office report to Congress in 2011. Senator Grassley stated, "Congress should encourage employees with information about criminal antitrust activity to report this information. The Criminal Antitrust Anti-Retaliation Act does exactly that by offering meaningful protections to those who blow the whistle on illegal behavior such as price fixing. I hope that Congress will finally enact this legislation this year."

The legislation specifically provides that "no employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate" against an employee for reporting an antitrust violation, or any action that the employee "reasonably believes" to be an antitrust violation. An aggrieved employee may file a complaint with the Secretary of Labor or in federal district court, and the remedies for a prevailing employee include reinstatement, back pay, compensatory damages and attorney fees.

At present, the legislation is being "held at the desk" in the House, awaiting either a committee referral or action by the full House. The legislation is expected to be acted upon by the House upon its return from its August recess, and could well be signed into law by President Obama before the end of the year.

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FTC Announces Increase in Merger Filings by Insurers and Overall

By James M. Burns

On August 12, the Federal Trade Commission (FTC) and DOJ released the agencies' 37th Annual Hart-Scott-Rodino (HSR) Act Report, highlighting the 33 merger enforcement actions brought by the agencies over the federal government's most recently completed fiscal year (covering October 2013 – September 2014). The report also provides details on the number of transactions submitted for pre-merger approval under the HSR Act by industry, and the number of "Second Requests" for additional information issued by the agencies in response to such filings.

The report notes that 1,633 transactions were reported to the FTC/DOJ in fiscal year 2014, which was the highest number of transactions since 2008. This was also a 25 percent increase over the number reported for fiscal year 2013. The percentage of "Second Requests" was slightly over three percent, a number that is within the 2.5 to 4.5 percent range that has been consistently reported by the agencies for this statistic over the last 10 years.

With respect to the insurance industry, the report indicates that 61 pre-merger notification filings were made over the course of the year, a slight increase over the prior year (typically, absent an exemption, any deal valued at approximately $75 million must be reported and obtain pre-approval before it can be consummated). In addition, two Second Requests were issued in insurance matters – one by the FTC and one by the DOJ Antitrust Division. Given the significant increase in insurer transactions over the last six months, it would not be surprising if the insurer statistics rise again when the FTC/DOJ issue their 38th report next year.

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