

PUBLICATION

Health Insurer Mergers Draw Regulatory Opposition

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In July 2015, Aetna announced its intention to acquire Humana, followed later that month by Anthem's announcement that it was acquiring Cigna. The deals are the largest insurance mergers ever proposed, and if consummated, they would turn the current "big five" health insurers into a "big three" (with United Healthcare being the other national health insurer).

Since then, the parties have slowly and meticulously gone about seeking the necessary antitrust approvals required from federal and state regulators – efforts that have also included testifying before Congress and various state regulators about the merits of the proposed transactions. Until recently, their efforts had been almost uniformly successful; indeed, Aetna has already collected approximately 15 state approvals. However, in the last two months, the parties have begun to experience a few significant "bumps in the road."

Regulatory turbulence began for Aetna in late May, when Missouri Insurance Director John Hoff issued a ruling in which he concluded that the proposed Aetna/Humana deal would "substantially lessen competition" in the State. Director Hoff further held that, should the transaction ultimately be consummated, the combined entity would be required to "cease and desist from doing business throughout the state of Missouri with respect to the Comprehensive Individual, Comprehensive Small Group and Group Medicare Advantage" markets. Director Hoff also indicated that Aetna would be prohibited from doing business in the Individual Medicare Advantage market in certain Missouri counties. Notably, however, Director Hoff's order made clear that his ruling was not yet final, and that the parties would be afforded an opportunity to "submit a plan to remedy the anticompetitive impact of the acquisition" before the ruling would be finalized. While the Missouri ruling was undoubtedly disappointing for Aetna and Humana, given its preliminary nature and the fact that the ruling was the first one declaring the transaction anticompetitive (after numerous other state approvals), it did not appear to dampen Aetna's confidence – at least publicly – that the deal would ultimately be approved. (Director Hoff has not yet issued his decision on the Anthem/Cigna transaction.)

In June, both Aetna and Anthem turned their attention to California, with the parties anxiously awaiting decisions from both the California Insurance Department and the California Department of Managed Health Care. Ultimately, neither Anthem nor Aetna was likely pleased by the developments on the west coast.

First, on June 16, California Insurance Commissioner Dave Jones publicly announced his opposition to the Anthem/Cigna deal, sending a letter to Renata Hesse, Principal Deputy Assistant Attorney General and acting head of the Antitrust Division, urging her to challenge the deal. (Because neither Anthem nor Cigna are domiciled in California, the California Insurance Department does not have authority to try to block the transaction.) Despite lacking authority over the deal, Commissioner Jones indicated that because "California is the largest insurance market in the United States," he had carefully considered the transaction (including holding a public hearing), and Commissioner Jones informed DOJ that, in his view, "it is more than reasonably probable that [the deal] will substantially lessen competition based on the factors recited in the DOJ and FTC Horizontal Merger Guidelines." Moreover, Commissioner Jones also opined that he "did not believe that partial divestiture or other remedies traditionally used by the Department of Justice will adequately protect consumers or address the adverse consequences of a merger of Anthem and Cigna," and for that reason, he urged DOJ to block the deal in its entirety.

Only a few days later, on June 20, Aetna and Humana received some initial good news from California, when California DMHC Director Shelley Rouillard (who does have authority over that deal) announced that she was approving it, albeit with conditions. Specifically, Director Rouillard explained that her approval was conditioned on Aetna agreeing to improve its quality scores on care for hypertension, diabetes, stroke and heart attack prevention by 2018, to "keep HMO small group premium rate increases to a minimum," and to invest close to \$50 million in the state in the next few years, including \$23 million on a Fresno service center. Notwithstanding these required commitments, the decision by Director Rouillard was widely viewed as another positive sign for the Aetna/Humana transaction.

Aetna's good news, however, was significantly tempered only a few days later by another announcement by Insurance Commissioner Jones. On June 23, in another letter to DOJ, Commissioner Jones urged DOJ to block the Aetna/Humana transaction as well. Commissioner Jones explained that Director Rouillard's approval of the transaction was based on a more limited review than the one he had conducted (Director Rouillard's review was pursuant to California's Knox-Keene Act, while Commissioner Jones had examined the transaction based on the standards set forth in California's Insurance Holding Company System Regulatory Act, which considers a greater number of factors). Thus, while Commissioner Jones stopped short of suggesting that Director Rouillard's decision had been ill-advised, Commissioner Jones informed DOJ that he had concluded that "the Aetna and Humana merger will harm Californians, especially seniors, and [California's] health insurance market." Echoing the words in his earlier letter to DOJ regarding the Anthem/Cigna deal, Commissioner Jones urged DOJ not to agree to any proposed divestitures by Aetna and Humana, and instead to sue to block the deal in its entirety.

While all of this was happening in California, significant developments were also occurring in Washington. Specifically, on June 22, a collection of Senate Democrats, led by Senator Blumenthal of Connecticut, sent a letter to DOJ as well. In the letter, the Senators urged DOJ to challenge both the Anthem/Cigna and Aetna/Humana transactions.

Whether Senator Blumenthal's letter – or the letters from Commissioner Jones – will have any impact on DOJ remains to be seen. However, we may soon have an answer. DOJ is reportedly almost finished with its analysis of the proposed deals, with an answer expected in July. Stay tuned.