

# PUBLICATION

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## States Launch Hearings on Major Insurance Company Mergers

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This summer, in the space of only a few weeks, Aetna announced an intention to acquire Humana, followed by an announcement by Anthem that it was planning to merge with Cigna. As was widely reported at the time, if consummated, the deals would transform the current "Big Five" national health insurers into a "Big Three" of Aetna, Anthem and United Healthcare. However, as the parties acknowledged, before the deals could be completed regulatory approvals at both the federal and state levels would be required. For this reason, the parties announced a targeted date of late 2016 for closing the deals.

Since the announcements, the parties have been hard at work seeking the necessary regulatory approvals, in addition to gaining shareholder approval for the transactions, which has now been obtained. This past fall most of the early attention was focused at the federal level. Congress held hearings on the mergers in October, calling the CEOs of the merging parties to Washington to testify about the transactions, even though Congress plays no formal role in the review process. The Department of Justice (DOJ) Antitrust Division, which is the federal regulator that will ultimately approve or challenge the deals, issued "second requests" to the parties in each deal, requiring them to produce additional information so that the Antitrust Division could further study the potential competitive implications of the transactions. Since then, the Antitrust Division has quietly continued its work, providing little indication – at least so far – of where their analysis is leading, when it may be completed and, most significantly, how the Antitrust Division will ultimately come out on either of the transactions.

As activity at the federal level appears to have quieted (at least publicly-reported activity), activity at the state level has begun to fill the void. The Aetna/Humana deal requires approval in all 50 states, and the Anthem/Cigna deal requires approval in approximately 25 states, so there is clearly much work to be done by the parties before they may be in a position to close the deals. Ramping up of activity on the state level began in November, with the Florida Department of Insurance announcing that it would be the first state to hold public hearings on the deals.

Notably, unlike the Antitrust Division's review, which focuses solely upon whether the transactions are likely to lessen competition and create a monopoly, the scope of state insurance regulatory review of a proposed insurance merger includes other factors as well, including – most significantly – a general assessment of whether the transaction is "in the interests of policyholders and the general public." In addition, the "lessening competition" standard that is typically applied by the states is also somewhat less well-defined than that applied by the Antitrust Division, which applies a test set forth in its 2010 Horizontal Merger Guidelines.

Given the wider scope of review at the state level, and the fact that the review is not limited *solely* to competition issues, the Florida Insurance Department held separate hearings on each deal. On December 7, a hearing was held on the Aetna/Humana deal, which would create Florida's largest insurer (albeit with only a somewhat modest 31 percent market share). The very next day a hearing was held on the Anthem/Cigna transaction, even though Anthem's combined market share of the commercial insurance market in Florida, post-merger, would still be less than seven percent. (Notably, Anthem does not offer commercial insurance products in Florida; another Blue, Blue Cross Blue Shield of Florida, is the Blue Cross Blue Shield licensee in the state.) Consistent with the testimony that Aetna and Anthem had offered at the Congressional hearings, at the Florida hearings the merging parties expressed the view that the transactions would permit them to operate more efficiently, creating substantial benefits for Florida consumers.

Perhaps not surprisingly, the American Medical Association (AMA), which has urged the Antitrust Division to block both deals on competitive grounds, filed comments in Florida (in conjunction with the Florida Medical Association), urging the Florida Insurance Department to block the Aetna/Humana deal. Somewhat more surprisingly, the AMA did not take the same approach with respect to the Anthem/Cigna deal, notwithstanding the AMA's opposition to that deal on a national level, perhaps in recognition of the very modest combined Anthem/Cigna market share in Florida. Nevertheless, this small combined share did not dissuade several other groups from filing comments opposing the transaction, focusing principally on the contention that the transaction was generally not in the public interest. The Florida Insurance Department's ruling on both deals is not expected until the end of the first quarter of 2016.

Several other states, including New Hampshire and Kentucky, have now also announced that they will be holding public hearings on the deals in the coming months, and other states are likely to follow suit. (Many state regulatory schemes affirmatively *require* a public hearing prior to approval). Whether these hearings will ultimately lead to state-level opposition to either deal remains to be seen; typically, state decisions on insurance mergers have followed the Antitrust Division's decisions, particularly with respect to the assessment of the potential competitive implications of such deals. Where insurance mergers have faltered, most often it has been federal opposition that has been the cause. For example, in 2010, plans by Blue Cross Blue Shield of Michigan to acquire in-state rival Physicians Health Plan of Mid-Michigan were derailed by an announcement by the Antitrust Division that it would challenge the deal. Similarly, in 2012, Anthem's acquisition of Amerigroup was temporarily halted by the Antitrust Division until the parties agreed to divest Amerigroup's Northern Virginia operations to a third party. Thereafter, both the Antitrust Division and Virginia regulators approved the deal.

However, this general rule has not been absolute. On occasion, insurance mergers that have gained federal regulatory approval *have* been held up, even prevented, by state regulators. Most notably, in 2009, Highmark and Independence Blue Cross gained approval for a proposed deal from the DOJ, without the necessity of any concessions at all, only to see their plans derailed by an inability to gain approval from the Pennsylvania Insurance Department. Similarly, in 2004, after Anthem and Wellpoint had gained federal approval for their deal (by agreeing to a number of divestitures and other concessions), they were forced to offer additional benefits to consumers in California and Georgia to gain approval from regulators in those states before the deal was able to close.

What will the regulatory response be to the Aetna/Humana and Anthem/Cigna transactions, at both the federal and state levels? Only time will tell. However, what is certain is that the potential impact of the deals on competition and consumers will be the focus of considerable attention and debate at both the federal and state levels throughout the first half of 2016. Stay tuned.