

Aetna-Humana and Anthem-Cigna Mergers Blocked by D.C. Federal District Court

In January and February of 2017, the *U.S. Department of Justice* (DOJ) won both of its antitrust cases involving two widely publicized mergers of four of the nation's five largest health insurance companies: (1) Anthem with Cigna; and (2) Aetna with Humana.¹ In both cases, the DOJ alleged that the mergers would have anti-competitive effects on various health insurance markets in violation of federal antitrust laws, most notably Section 7 of the Clayton Act, the portion of federal antitrust law addressing mergers and acquisitions.² The Anthem-Cigna merger, a proposed \$54 billion transaction, may have impacted large-employer sponsored policies in dozens of insurance markets across the nation,³ whereas the \$37 billion Aetna-Humana merger may have impacted the *Medicare Advantage* (MA) market in 364 counties across 21 states, as well as the public exchange markets in 17 counties across 3 states.⁴ The decision in each case stands in contrast to the national trend toward consolidation in the healthcare industry, spurred, in part, by the *Patient Protection and Affordable Care Act* (ACA).⁵ This *Health Capital Topics* article summarizes the facts of each case, recaps the court's rationale to enjoin the mergers, and explores the potential immediate and long-term ramifications of the decisions, including how the new Trump Administration may address antitrust issues.

The district court decisions in the Aetna-Humana and Anthem-Cigna cases serve to block the mergers of already significant players in the U.S. health insurance market. Following a thirteen-day trial in December 2016, Judge John D. Bates of the U.S. District Court for the District of Columbia enjoined the Aetna-Humana merger in an order issued January 23, 2017.⁶ The decision in the Aetna-Humana case halted the creation of a combined company that would be the second largest health insurance company by revenue in the nation, after UnitedHealth Group.⁷ Similarly, after a six-week trial ending on January 3, 2017, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia enjoined the Anthem-Cigna merger in an order issued February 8, 2017.⁸ The decision in the Anthem-Cigna case blocked the creation of the largest health insurance company in the U.S.⁹

In the challenge to the Aetna-Humana merger, the DOJ, in its complaint filed July 21, 2016,¹⁰ alleged that the combination would violate antitrust laws in the market for two different health insurance products sold by Aetna

and Humana: (1) MA plans; and, (2) individual insurance sold on the ACA's exchanges.¹¹ In regard to the MA market, the DOJ alleged that a combined Aetna-Humana would substantially reduce competition for the sale of MA plans, by creating the nation's largest MA insurer with 24.1 percent of the market.¹² A significant issue in this case involved whether MA plans share enough characteristics (e.g., premiums, network size) with traditional Medicare to place them in the same market.¹³ The Court assessed this issue by examining: (1) the internal documents of both insurers; (2) independent economic analyses of consumer behavior regarding each product; and, (3) the potential impact of CMS regulations on competition. Based on internal documents discussing MA plans, the Court found that Aetna and Humana typically competed with other MA plans, not traditional Medicare.¹⁴ Further, the Court found that the independent economic analyses demonstrated that previous MA customers, when switching insurance plans, preferred other MA plans over traditional Medicare plans.¹⁵ On this point the insurers argued that the established MA customers' preferences showed a "durable preference" for the product, the initial point at which seniors enter the market and choose between Medicare and MA plans exhibits significant competition.¹⁶ The Court rejected this argument, utilizing econometric studies regarding seniors' preferences for MA plans to conclude that despite this initial competition, seniors would not choose MA plans if faced with higher prices and reduced benefits.¹⁷ Additionally, the Court also analyzed whether the regulatory control exerted by the *Centers for Medicare and Medicaid Services* (CMS) on the pricing, margins, and benefits of MA plans would decrease the negative effects of the merger. After noting the numerous barriers to entry in the MA market, including brand recognition and constructing an adequate network of providers, the court ruled that CMS regulatory controls would not be enough to offset the overall negative effects on competition from the merger, over the rebuttal from the insurers related to divesting MA plans in the affected geographic markets.¹⁸

In regard to the individual insurance markets established by the ACA, the DOJ alleged that the merger would reduce competition for the sale and benefits inclusion by participating carriers. In particular, the Court examined the impact of Aetna's withdrawal from the insurance exchanges, on the competitive environment of this

market post-merger. Although Aetna claimed that it had removed its insurance offerings from these markets as a result of internal business judgment, the Court ruled that consideration of internal documents and profitability margins from affected counties demonstrated that Aetna had instead pulled out of these exchange marketplaces as part of a plan to leverage its participation in the exchanges in return for favorable treatment by the DOJ.¹⁹ Further, the Court found that Aetna was likely to reenter the exchange market in Florida, as Aetna had been quite profitable there in the past.²⁰ In reaching this conclusion, the Court applied traditional antitrust analysis, which considers prospective competitors to be actual competitors, over the standard proposed by the insurers, which would have prevented the Court from examining the merger's effects on potential future competition.²¹ In light of its conclusions as to the MA and ACA markets, the Court prohibited the two companies from merging, declaring that the proposed merger would negatively impact competition in the MA and individual insurance markets, as well as raise prices for consumers.²²

In the challenge to the Anthem-Cigna merger, the DOJ, in its complaint filed July 21, 2016,²³ alleged that the combination would violate antitrust laws in the following arenas: (1) employer-sponsored health insurance in over 35 metropolitan areas; and, the ACA individual insurance markets in two metropolitan areas.²⁴ After six months of litigation, the Court enjoined the merger, citing only antitrust law violations regarding the employer-sponsored health insurance market.²⁵ On this issue, the DOJ argued that the merger would hurt the ability of large national employers to get competitive rates for the health coverage they provide their employees.²⁶ Additionally, the DOJ alleged that the merger would shrink competition for the policies purchased by large businesses to cover their employees, and also pointed toward the animosity between the top executives of Anthem and Cigna as evidence of the merger's likelihood of failure.²⁷ The insurers countered that the merger would result in efficiencies that would reduce premiums costs, and that smaller, regional insurers would provide enough competition to spur innovation and maintain low prices.²⁸ Ultimately, the Court expressed that the elimination of Cigna as a market participant for employer-sponsored health insurance would threaten competition among commercial insurers in this arena, leading to higher prices and reduced quality.²⁹

The responses to the two decisions enjoining the mergers have varied between the companies. Aetna and Humana formally terminated their merger agreement on February 14, 2017, and rather than seek an appeal, Aetna stated that

it would pay Humana the \$1 billion breakup fee due to the merger agreement failing to be finalized.³⁰ Aetna will also end an agreement to sell certain MA plans to Molina Healthcare, the insurance company that it had originally planned to divest MA plans to as part of the merger agreement with Humana.³¹ In contrast to outward mutual agreement, the termination of the Anthem-Cigna merger has already sparked litigation. Cigna ended its merger agreement with Anthem on February 14, 2017, and announced that it will seek \$13 billion in damages on top of the \$1.85 billion breakup fee outlined in the merger agreement.³² Cigna alleged that Anthem “*willfully breached*” the merger agreement in such a way that made it unlikely that the merger agreement would have ever been approved, and seeks to compensate its shareholders for what they did not obtain as a result of the merger falling through.³³ Cigna also seeks a declaratory judgment that it lawfully terminated the agreement and that Anthem cannot force Cigna to comply with the extension of the merger agreement until April 30, 2017.³⁴ In contrast, Anthem is pursuing an expedited appeal of the federal court's February 8 decision, and filed its own lawsuit against Cigna on February 14, 2017.³⁵ Anthem's lawsuit sought a temporary restraining order to block Cigna from immediately terminating the merger, which a Delaware court granted on February 16, 2017.³⁶ In the lawsuit Anthem alleged that Cigna does not have the right to terminate the merger agreement because it failed to fulfill its obligations to attempt to secure the merger agreement, and argued that it can still attain regulatory approval for the merger.³⁷

Despite the enjoinder of each merger, healthcare companies, especially insurers, are likely to continue to look for ways to aggressively lower their costs and operate as profitable entities, with the implementation of healthcare reform and the continued shift to value-based reimbursement.³⁸ It is uncertain as to whether the Trump Administration will operate similarly to the Obama Administration in its treatment of antitrust litigation in the healthcare industry. In the past, President Trump has indicated a preference for increased competition in insurance markets, which may involve a strategy of increased antitrust litigation; however, he has also made statements that would appear to exhibit a less aggressive approach to antitrust enforcement, as well as consideration of discussions with parties contemplating mergers before the DOJ has had an opportunity to review them.³⁹ The new administration, as well as the potentially changing priorities of the DOJ, may have a significant impact on continuing enforcement and oversight of antitrust concerns in the healthcare industry.

1 “U.S. Court Blocks Anthem-Cigna Merger, Dealing Blow to Consolidation” By Diane Bartz and Caroline Humer, Reuters, February 9, 2017, <http://www.reuters.com/article/us-cigna-m-a-anthem-idUSKBN15002I> (Accessed 2/10/17).
2 “Court Blocks Aetna-Humana Deal: The Mega-Mergers Meet the Trump Administration Next” By Abbe R. Gluck and Thomas Greaney, Health Affairs, January 30, 2017,

<http://healthaffairs.org/blog/2017/01/30/court-blocks-aetna-humana-deal-the-mega-mergers-meet-the-trump-administration-next/> (Accessed 2/9/17).

3 “Federal Judge Rejects Anthem-Cigna Merger” By Ana Radelat, The CT Mirror, February 8, 2017, <http://ctmirror.org/2017/02/08/federal-judge-rejects-anthem-cigna-merger/> (Accessed 2/10/17); “Anthem to Buy Cigna,

- Creating Biggest U.S. Health Insurer” By Ankur Banerjee and Ransdell Pierson, Reuters, July 24, 2015, <http://www.reuters.com/article/us-cigna-m-a-anthem-idUSKCN0PY12B20150724> (Accessed 2/10/17).
- 4 “Aetna-Humana Shares Fall After Judge Blocks Deal on Antitrust Grounds” By Berkeley Lovelace, Jr., CNBC, January 23, 2017, <http://www.cnbc.com/2017/01/23/judge-blocks-humana-aetna-deal-on-antitrust-grounds-reports.html> (Accessed 2/10/17).
- 5 Abbe R. Gluck and Thomas Greaney, January 30, 2017
- 6 “U.S. District Court Blocks Aetna’s Acquisition of Humana” Department of Justice, Office of Public Affairs, January 23, 2017, <https://www.justice.gov/opa/pr/us-district-court-blocks-aetna-s-acquisition-humana> (Accessed 2/9/2017).
- 7 “Aetna Buys Humana for \$37 Billion, but Deal Doesn’t Add Up” By Dan Diamond, Forbes, July 3, 2015, <http://www.forbes.com/sites/dandiamond/2015/07/03/aetna-buys-humana-for-34-billion-but-deal-doesnt-add-up/#26c4493f7b32> (Accessed 2/10/17).
- 8 “Federal Judge Stops Anthem-Cigna Merger” By Neil Versel, MedCity News, February 8, 2017, <http://medcitynews.com/2017/02/breaking-federal-judge-stops-anthem-cigna-merger/?rf=1> (Accessed 2/10/17).
- 9 “Cigna-Anthem Merger 2017: With Billions of Dollars at Stake, Proposed Health Insurance Deal is Blocked by Federal Judge” By David Sirota, International Business Times, February 8, 2017, <http://www.ibtimes.com/political-capital/cigna-anthem-merger-2017-billions-dollars-stake-proposed-health-insurance-deal> (Accessed 2/14/17).
- 10 “U.S. et al. v. Aetna, Inc. and Humana, Inc.” Case 1:16-cv-01494 (D.C. of DC July 21, 2016), Complaint.
- 11 Abbe R. Gluck and Thomas Greaney, January 30, 2017
- 12 *Ibid.*
- 13 Abbe R. Gluck and Thomas Greaney, January 30, 2017
- 14 “U.S., et al. v. Aetna, Inc., et al.” Case No. 16-1494 (JDB) (D.C. for DC, January 23, 2017) Memorandum Opinion, p. 5, 14.
- 15 *Ibid.* p. 47; Abbe R. Gluck and Thomas Greaney, January 30, 2017
- 16 *Ibid.* p. 34; *Ibid.*
- 17 *Ibid.*
- 18 *Ibid.* p. 82
- 19 “Aetna-Humana \$37B Merger Blocked Over Fear It Would Harm Consumers” By Kevin McCoy, USA Today, January 23, 2017, <http://www.usatoday.com/story/money/2017/01/23/aetna-humana-37b-merger-blocked-over-fear-it-would-harm-consumers/96948570/> (Accessed 2/10/17).
- 20 “U.S., et al. v. Aetna, Inc., et al.” Case No. 16-1494 (JDB) (D.C. for DC, January 23, 2017) Memorandum Opinion; Abbe R. Gluck and Thomas Greaney, January 30, 2017,
- 21 “U.S., et al. v. Aetna, Inc., et al.” Case No. 16-1494 (JDB) (D.C. for DC, January 23, 2017) Memorandum Opinion
- 22 “U.S. et al. v. Aetna, Inc., et al.” Case No. 16-1494 (JDB) (D.C. for DC, January 23, 2017) Order; “Federal Judge Blocks Aetna-Humana Health Insurance Megamerger” By Carolyn Y. Johnson, The Washington Post, January 23, 2017, https://www.washingtonpost.com/news/wonk/wp/2017/01/23/federal-judge-blocks-aetna-humana-health-insurance-megamerger/?utm_term=.85412d6f7b44 (Accessed 2/9/17).
- 23 “DOJ Sues to Block Anthem-Cigna and Aetna-Humana Mergers” By Neil Versel, MedCity News, July 21, 2016, <http://medcitynews.com/2016/07/doj-sues-anthem-cigna-aetna-humana/?rf=1> (Accessed 2/10/17); “Anthem to Buy Cigna, Creating Biggest U.S. Health Insurer” By Ankur Banerjee and Ransdell Pierson, Reuters, July 24, 2015, <http://www.reuters.com/article/us-cigna-m-a-anthem-idUSKCN0PY12B20150724> (Accessed 2/10/17).
- 24 “DOJ Sues to Block Anthem-Cigna and Aetna-Humana Mergers” By Neil Versel, MedCity News, July 21, 2016, <http://medcitynews.com/2016/07/doj-sues-anthem-cigna-aetna-humana/?rf=1> (Accessed 2/10/17).
- 25 Memorandum Opinion, p. 17, 130.
- 26 Diane Bartz and Caroline Humer, Reuters, February 9, 2017
- 27 Ana Radelat, February 8, 2017
- 28 *Ibid.*
- 29 “U.S. et al. v. Aetna, Inc., et al.” Case No. 16-1494 (JDB) (D.C. for DC, January 23, 2017) Order.
- 30 “Aetna Gives Up On Merger, Will Pay Humana \$1B Breakup Fee” By Bruce Japsen, Forbes, February 14, 2017, <http://www.forbes.com/sites/brucejapsen/2017/02/14/aetna-gives-up-on-merger-will-pay-humana-1b-breakup-fee/#3158b1fa150a> (Accessed 2/17/17).
- 31 *Ibid.*
- 32 “Anthem Seeks Restraining Order Against Cigna, Which Wants \$14.8 Billion After Breakup” By Shelby Livingston, Modern Healthcare, February 15, 2017, <http://www.modernhealthcare.com/article/20170214/NEWS/170219951/cigna-seeks-more-than-14-billion-in-formal-termination-of-anthem> (Accessed 2/17/17).
- 33 *Ibid.*
- 34 *Ibid.*
- 35 “Anthem Wins Lawsuit Seeking Restraining Order Against Cigna” By Susan Morse, Healthcare Finance, February 16, 2017, <http://www.healthcarefinancenews.com/news/anthem-files-lawsuit-seeking-restraining-order-against-cigna> (Accessed 2/17/17).
- 36 *Ibid.*
- 37 *Ibid.*
- 38 “Judge Blocks Aetna’s \$37 Billion Deal for Humana” By Reed Abelson and Leslie Picker, The New York Times, January 23, 2017, <http://www.nytimes.com/2017/01/23/business/dealbook/aetna-humana-deal-blocked.html> (Accessed 2/9/17).
- 39 Abbe R. Gluck and Thomas Greaney, January 30, 2017



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Robert James Cimasi, MHA, ASA, FRICS, MCBA, CVA, CM&AA, serves as Chief Executive Officer of **HEALTH CAPITAL CONSULTANTS (HCC)**, a nationally recognized healthcare financial and economic consulting firm headquartered in St. Louis, MO, serving clients in 49 states since 1993. Mr. Cimasi has over thirty years of experience in serving clients, with a professional focus on the financial and economic aspects of healthcare service sector entities including: valuation consulting and capital formation services; healthcare industry transactions including joint ventures, mergers, acquisitions, and divestitures; litigation support & expert testimony; and, certificate-of-need and other regulatory and policy planning consulting.

Mr. Cimasi holds a Master in Health Administration from the University of Maryland, as well as several professional designations: Accredited Senior Appraiser (ASA – American Society of Appraisers); Fellow Royal Institution of Chartered Surveyors (FRICS – Royal Institution of Chartered Surveyors); Master Certified Business Appraiser (MCBA – Institute of Business Appraisers); Certified Valuation Analyst (CVA – National Association of Certified Valuators and Analysts); and, Certified Merger & Acquisition Advisor (CM&AA – Alliance of Merger & Acquisition Advisors). He has served as an expert witness on cases in numerous courts, and has provided testimony before federal and state legislative committees. He is a nationally known speaker on healthcare industry topics, and is the author of several books, the latest of which include: “*The Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA]; “*Healthcare Valuation: The Financial Appraisal of Enterprises, Assets, and Services*” [2014 – John Wiley & Sons]; “*Accountable Care Organizations: Value Metrics and Capital Formation*” [2013 – Taylor & Francis, a division of CRC Press]; and, “*The U.S. Healthcare Certificate of Need Sourcebook*” [2005 – Beard Books].

Mr. Cimasi is the author of numerous additional chapters in anthologies; books, and legal treatises; published articles in peer reviewed and industry trade journals; research papers and case studies; and, is often quoted by healthcare industry press. In 2006, Mr. Cimasi was honored with the prestigious “*Shannon Pratt Award in Business Valuation*” conferred by the Institute of Business Appraisers. Mr. Cimasi serves on the Editorial Board of the Business Appraisals Practice of the Institute of Business Appraisers, of which he is a member of the College of Fellows. In 2011, he was named a Fellow of the Royal Institution of Chartered Surveyors (RICS). In 2016, Mr. Cimasi was named a “*Pioneer of the Profession*” as part of the recognition of the *National Association of Certified Valuators and Analysts (NACVA)* “*Industry Titans*” awards, which distinguishes those whom have had the greatest impact on the valuation profession.



Todd A. Zigrang, MBA, MHA, ASA, FACHE, is the President of **HEALTH CAPITAL CONSULTANTS (HCC)**, where he focuses on the areas of valuation and financial analysis for hospitals, physician practices, and other healthcare enterprises. Mr. Zigrang has over 20 years of experience providing valuation, financial, transaction and strategic advisory services nationwide in over 1,000 transactions and joint ventures. Mr. Zigrang is also considered an expert in the field of healthcare compensation for physicians, executives and other professionals.

Mr. Zigrang is the co-author of “*The Adviser’s Guide to Healthcare – 2nd Edition*” [2015 – AICPA], numerous chapters in legal treatises and anthologies, and peer-reviewed and industry articles such as: *The Accountant’s Business Manual* (AICPA); *Valuing Professional Practices and Licenses* (Aspen Publishers); *Valuation Strategies: Business Appraisal Practice*; and, *NACVA QuickRead*. In addition to his contributions as an author, Mr. Zigrang has served as faculty before professional and trade associations such as the American Society of Appraisers (ASA); the National Association of Certified Valuators and Analysts (NACVA); Physician Hospitals of America (PHA); the Institute of Business Appraisers (IBA); the Healthcare Financial Management Association (HFMA); and, the CPA Leadership Institute.

Mr. Zigrang holds a Master of Science in Health Administration (MHA) and a Master of Business Administration (MBA) from the University of Missouri at Columbia. He is a Fellow of the American College of Healthcare Executives (FACHE) and holds the Accredited Senior Appraiser (ASA) designation from the American Society of Appraisers, where he has served as President of the St. Louis Chapter, and is current Chair of the ASA Healthcare Special Interest Group (HSIG).



John R. Chwarzinski, MSF, MAE, is Senior Vice President of **HEALTH CAPITAL CONSULTANTS (HCC)**. Mr. Chwarzinski’s areas of expertise include advanced statistical analysis, econometric modeling, as well as, economic and financial analysis. Mr. Chwarzinski is the co-author of peer-reviewed and industry articles published in *Business Valuation Review* and *NACVA QuickRead*, and he has spoken before the Virginia Medical Group Management Association (VMGMA) and the Midwest Accountable Care Organization Expo.

Mr. Chwarzinski holds a Master’s Degree in Economics from the University of Missouri – St. Louis, as well as, a Master’s Degree in Finance from the John M. Olin School of Business at Washington University in St. Louis. He is a member of the St. Louis Chapter of the American Society of Appraisers, as well as a candidate for the Accredited Senior Appraiser designation from the American Society of Appraisers.



Jessica L. Bailey-Wheaton, Esq., is Vice President and General Counsel of **HEALTH CAPITAL CONSULTANTS (HCC)**, where she conducts project management and consulting services related to the impact of both federal and state regulations on healthcare exempt organization transactions and provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services. Ms. Bailey is a member of the Missouri and Illinois Bars and holds a J.D., with a concentration in Health Law, from Saint Louis University School of Law, where she served as Fall Managing Editor for the *Journal of Health Law & Policy*.



Kenneth J. Farris, Esq., is an Associate at **HEALTH CAPITAL CONSULTANTS (HCC)**, where he provides research services necessary to support certified opinions of value related to the Fair Market Value and Commercial Reasonableness of transactions related to healthcare enterprises, assets, and services, and tracks impact of federal and state regulations on healthcare exempt organization transactions. Mr. Farris is a member of the Missouri Bar and holds a J.D. from Saint Louis University School of Law, where he served as the 2014-2015 Footnotes Managing Editor for the *Journal of Health Law & Policy*.