Health Law Daily Wrap Up, TOP STORY: DOJ lawsuit steps in between Aetna-Humana and Anthem-Cigna mergers, (Jul. 21, 2016)

Health Law Daily Wrap Up

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The Department of Justice (DOJ) filed two lawsuits to prevent Anthem from acquiring Cigna Corp and Aetna Inc. from buying Humana Inc.—mergers that, if successful, would reduce the nation’s five largest health insurers to three. According to Attorney General Lynch’s July 21, 2016 announcement, the Justice Department carefully considered the impact the acquisitions would have on the competitiveness of the multi-trillion dollar health insurance industry and determined that the mergers would drastically restrict competition in a number of key health insurance markets. The companies have already agreed, by the terms of their merger agreements, to challenge such government lawsuits. However, Cigna’s response to the government’s announcement suggests it is less likely than Aetna to litigate the issue.

Mergers. Under the Aetna and Humana agreement, Aetna plans to acquire all outstanding shares of Humana for a combination of cash and stock valued at $37 billion (see First post-ACA mega merger moves forward, October 20, 2015). Anthem is seeking approval for a $48 billion takeover of Cigna.

Competition. Principal Deputy Associate Attorney General Baer provided additional details on the filing, calling the mergers “unprecedented in scope and scale.” He noted that the companies are thriving independent firms that do not need the mergers to survive. If the mergers were allowed to proceed, Baer suggested that innovation will be lost through decreased competition. Baer rejected the notion that consumers would benefit from the merged entities acting as an “800-pound gorilla at the bargaining table” with hospitals and providers. He noted that such reasoning gives no consideration to the resulting quality of care. Baer also rejected the insurance companies proposed divestitures as remedies for the mergers, calling them “unacceptable solutions.”

Medicare advantage. The DOJ decision was based in part upon concerns that consolidations would negatively impact Medicare Advantage (MA) plans by dramatically reducing the number of MA plans available. According to the Kaiser Family Foundation (KFF), if the Aetna and Humana merger proceeds, the resulting business would provide coverage to 26 percent of all MA enrollees (see Many Medicare Advantage enrollees may see shifts in coverage providers, July 15, 2015).

ACA. The insurers are pointing to the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) as a significant driver behind the mergers. The companies have asserted that the ACA has pressured insurers into mergers and acquisitions as a way to mitigate the risks associated with changes in the marketplace. However, in his remarks, Baer noted that the mergers would reduce consumer choice on the ACA’s health insurance exchanges and lead to increased premiums (see A sign of the times, mergers demonstrate change in government’s health care role, August 26, 2015).

Aetna and Humana. Aetna and Humana responded to the DOJ announcement with plans “to vigorously defend the companies’ pending merger.” The Aetna announcement asserts that the pending merger will increase the availability of Medicare options, improve quality, reduce costs, and lead to new product, tool, and service innovations. Aetna also noted that any concerns regarding the anticompetitive impact of the merger could be addressed through the divestiture of MA assets.

Cigna. Cigna responded to the DOJ announcement with more reserve, noting that it “is currently evaluating its options consistent with its obligations under the agreement.” After clarifying that the pending merger was led by Anthem, Cigna announced, "In light of the DOJ's decision, we do not believe the transaction will close in 2016, and the earliest it could close is 2017, if at all."
Companies: Cigna Corp.; Anthem; Aetna Inc.; Humana Inc.
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