

## Appeal Of Aetna-Humana Merger Loss Would Face Long Odds

By **Eric Kroh**

Law360, Fort Wayne (January 23, 2017, 7:25 PM EST) -- Aetna Inc. and Humana Inc. are mulling an appeal of a D.C. federal judge's Monday order preliminarily enjoining their \$37 billion merger, but experts said the judge's airtight opinion leaves little room to pursue such a bid and the Trump administration may not want to interfere.

U.S. District Judge John D. Bates said in **his opinion** accompanying the order that the merger would reduce competition in the market for Medicare Advantage plans, increasing premiums and reducing options for seniors. He agreed with the U.S. Department of Justice's argument that Medicare Advantage plans form their own distinct market and do not compete with traditional, government-provided Medicare.

A spokesman for Aetna said the company was looking over the opinion and weighing whether to lodge an appeal of the ruling.

Should the insurers try to win a reversal from the D.C. Circuit, Judge Bates has set the stage for an onerous appeal in his 156-page opinion, which presented a thorough analysis of the merger's likely effects on competition rooted in the evidence presented at trial, according to Matthew L. Cantor, a partner with Constantine Cannon LLP.

"I think it's going to be difficult to appeal this decision and win on the law," Cantor said. "The appellate court has to be very deferential to the district court."

Judge Bates' opinion hinged on the **crucial question** of whether Medicare Advantage plans compete with traditional Medicare. In his analysis, Judge Bates relied heavily on Aetna and Humana's business documents, concluding the insurers themselves drew a distinction between Medicare Advantage and traditional Medicare plans.

Andrea Murino, a partner with Goodwin Procter LLP, said court reliance on so-called ordinary course of business documents has played a large role in several of the most significant merger cases in recent memory, such as Sysco Corp.'s failed \$3.5 billion tie-up with US Foods Inc., which was **likewise blocked** by a D.C. federal judge in 2015 after the companies were sued by the Federal Trade Commission.

Judge Bates' ruling is a "reminder again to the business community that what they say in these documents can be very persuasive evidence to judges," Murino said.

The win by the DOJ also continues the government's recent success in merger challenges in which it has asserted a narrow definition of the relevant market, she said. A similar strategy resulted in victories for the FTC in **its opposition** to the combination of Staples Inc. and Office Depot Inc. and in the agency's challenges to hospital mergers in **Pennsylvania** and **Illinois**.

Rob Fuller, a partner with Nelson Hardiman LLP, said despite Judge Bates' painstaking opinion, he thought an appeal could be worth the time and expense that would have to be invested by Aetna and Humana. Should they end up with an amenable panel, the companies have avenues they could pursue to persuade the judges that the district court was wrong, he said.

For example, they could make their case based on sales documents showing the amount of time they spend marketing Medicare Advantage plans to traditional Medicare recipients, Fuller said.

"There's no question that the primary competition for Medicare Advantage is regular Medicare," Fuller said, adding, "You do need to get a favorable panel to have a shot at this one."

Though an appeal would not be easy, Aetna may be motivated by another significant factor in the equation: the \$1 billion breakup fee it would owe to Humana if the deal falls through, Murino said.

"One billion dollars is a lot of money," she said. "It might be in Aetna's interest to take a chance on the appeal."

In any case, an appeal would buy time for Aetna and Humana to try to salvage the deal through settlement talks with the Trump administration, Cantor said. During the campaign, Trump's camp showed a willingness to meet with representatives from companies who were in the middle of a transaction under review to negotiate a mutually beneficial arrangement, he said.

The administration may be open to discussions because of the politics surrounding its proposal to repeal and replace the Affordable Care Act, Cantor said. If the companies were to, say, promise to expand coverage or publicly support a transition to a new health care law, they may be able to broker a deal, he said.

However, even if the companies were successful in securing a settlement agreement with the DOJ, that would not be the end of the story, Cantor said. The District of Columbia and eight states also joined the DOJ in suing to block the merger, and they would all have to sign off on a deal, he said. That is unlikely, given that some of the states involved have Democratic attorneys general, he said.

"If the state of Illinois doesn't want to settle, it's got an order and there's nothing that can eliminate that order," Cantor said.

Though Trump has not publicly stated his position on the merger, Fuller said he would be surprised if the president would seek to undo the preliminary injunction. The Republican plan to replace Obamacare relies on competition and market forces to keep costs down, and allowing the Aetna-Humana merger to go through would run against that philosophy, he said.

"The bottom line is: You think being a businessman, he'd talk business with anyone, but with his populist message, I don't think he'd allow a big merger and think that was good for competition," Fuller said. The Trump administration is "probably quietly very happy that the district court took it out of their hands," he said.

If Aetna and Humana do want to feel out the administration, they will have to wait a few months, since there is no antitrust management apparatus in place at the moment, Fuller said. Sen. Jeff Sessions, R-Ala., would first have to be confirmed as attorney general, and the head of the DOJ's Antitrust Division would have to be appointed before serious talks can begin, he said.

"Absent that, you might have some discussions with White House advisers," Fuller said. Otherwise, the companies are "unfortunately in a holding pattern for a few weeks," he said.

The government is represented by Craig William Conrath, Eric Mahr, Patricia L. Sindel, Peter Joseph Mucchetti, David Altschuler, Ryan Danks and Chris Wilson of the U.S. Department of Justice.

Aetna is represented by John M. Majoras, Michael R. Shumaker, Geoffrey S. Irwin, Christopher N. Thatch, Thomas Demitrack and Paula W. Render of Jones Day. Humana is represented by Kent A. Gardiner and Shari Ross Lahlou of Crowell & Moring LLP.

The case is U.S. et al. v. Aetna Inc. et al., case number 1:16-cv-01494, in the U.S. District Court for the District of Columbia.

--Editing by Katherine Rautenberg and Mark Lebetkin.

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