

# PUBLICATION

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## Anthem and Aetna Merger Trials Begin

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While the election of Donald Trump as the nation's next president is clearly the biggest news in Washington over the last two months, for the insurance industry, big news has also been made at the federal district courthouse. There, only blocks from the White House, the DOJ Antitrust Division has been in trial against both Anthem concerning its proposed merger with Cigna, and with Aetna over its proposed merger with Humana. Given the size and scope of the transactions, the rulings in the case have the potential to reshape the health insurance industry for years to come.

The *Anthem* trial, being heard by D.C. District Court Judge Amy Berman Jackson, was the first to begin, starting on November 21. Prior to the commencement of the trial, Judge Jackson decided to split the presentation of the evidence into two phases, believing that doing so might prove to be more efficient. She directed the parties to present their evidence on the competitive effects of the merger on the "national market" for commercial insurance in "phase one" of the trial, and instructed that "phase two" of the trial, which would commence one week after the completion of "phase one," would focus on the impact of the merger on local commercial insurance markets.

During the first eight days of trial, the DOJ and Anthem (and their respective experts) sparred over, among other things, whether the transaction would have anticompetitive effects and/or whether a combined Anthem/Cigna would provide Anthem with operating "efficiencies" that would ultimately prove to be of benefit to consumers. When this phase of the trial, originally scheduled to conclude by December 5, went longer than scheduled, Judge Jackson heard the remainder of this evidence on December 12 and 13.

At the close of "phase one," Judge Jackson indicated that she was not prepared at that point to issue a ruling on any of the issues, but that she would begin working on her decision and that "phase two" should proceed immediately. Accordingly, "phase two" began the very next day (December 14), with the parties turning their attention to whether the combination would result in competitive harm in various local markets. After hearing additional testimony each day over the next two weeks, on December 23, the Court ordered that there would be a recess in the proceedings until January 3. At that point, the remaining testimony will be taken and closing arguments made. Thereafter, Judge Jackson will issue her long-anticipated ruling, likely no sooner than the end of the month.

While the DOJ was in trial with Anthem, on December 5 they also began trial against Aetna, in the very same building. The *Aetna* matter is being heard by Judge John Bates. In that case, the DOJ contended that Aetna's proposed acquisition of Humana would have anticompetitive effects in many local markets in which Aetna and Humana currently offer Medicare Advantage products, and on the insurance exchanges in several states. Aetna also maintains that any potential harm to competition could be cured by their proposed divestiture of certain assets to Molina Healthcare, so Judge Bates is expected to consider this issue as well.

After 11 days of testimony, including a considerable amount of testimony from expert witnesses for each side (consistently offering diametrically opposing viewpoints on the implications the proposed transaction would have on competition), the parties completed their presentation of the evidence on December 22. Judge Bates then provided the parties with some time off for Christmas, ordering them back for closing arguments on

December 30. Like Judge Jackson, Judge Bates has indicated that he intends to issue his ruling in the matter in January. Stay tuned.