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November 2016

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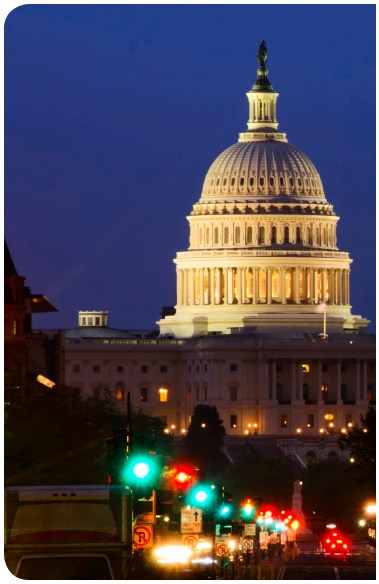
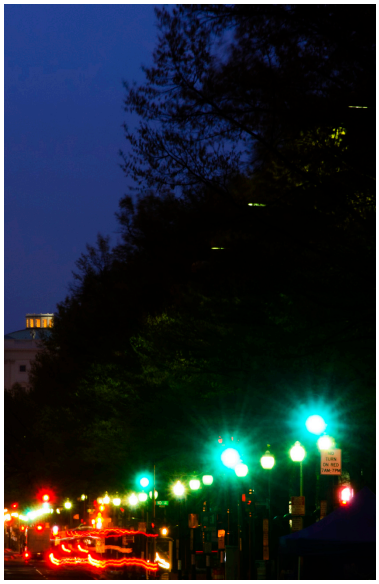


Anthem and Aetna Prepare for Merger Trials Against the DOJ Antitrust Division

In late July, the DOJ Antitrust Division filed actions in federal district court seeking to derail both the Anthem/Cigna and Aetna/Humana mergers. In each case, the DOJ contended that consumers would face higher insurance costs if the merging parties were permitted to combine into a single entity. Since then, the cases have proceeded at a swift pace, with the parties taking discovery from numerous third parties (and each other) on an expedited basis. As the cases now head toward trial, the issues to be tried are now beginning to come into clearer focus.

The *Anthem* case, which will be decided by D.C. District Court Judge Amy Berman Jackson, will be the first of the two cases to be tried, beginning on November 21. To increase the possibility of a swift ruling, Judge Amy Berman Jackson has also decided to split the presentation of the evidence at the trial into two parts. Specifically, Judge Jackson ordered the parties to complete their presentation of their evidence on the competitive effects of the merger on the "national market" for commercial insurance by December 2. Then, after a one-week hiatus, assuming that a ruling by the Court on the first issue that is not dispositive of the entire case has not yet issued (and/or the parties choose not to proceed), the parties will return to court to present their evidence on the impact of the merger on local commercial insurance markets. Judge Jackson has also indicated that, in any event, the trial will wrap up by December 30.

Notably, the DOJ's complaint against Anthem alleged that the proposed transaction would cause competitive harm to the insurance exchanges as well, but the DOJ has announced that it will not proceed with that claim at trial. The DOJ has indicated that it will, however, likely raise the very public disharmony between Anthem and its merger partner, Cigna, at trial, arguing that if Anthem and Cigna cannot work together during

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Anthem and Aetna Prepare for Merger Trials Against the DOJ Antitrust Division, *continued*

the pending litigation, the efficiencies and other merger benefits that Anthem claims can be achieved after they merge will not result. Judge Jackson's ruling in the *Anthem* matter is expected no later than the end of January.

At the same time, the DOJ is also preparing for trial against Aetna over Aetna's proposed acquisition of Humana. The *Aetna* trial is currently set to begin on December 5, and will be tried by Judge John Bates (also on the D.C. District Court bench). The DOJ has 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. However, unlike in the *Anthem* matter, the DOJ has not dropped its insurance exchange claims, even after Judge Bates questioned whether Aetna's announcement that it intends to withdraw from the exchanges in 2017 should moot such claims. (DOJ has responded, at least for now, that because Aetna has made no binding commitment to withdraw from those markets, "the competitive reality has not changed," and that they intend to present evidence on the claim at trial.) Judge Bates has scheduled closing arguments in the *Aetna* trial for Saturday, December 31, and promised a ruling in January as well.

Given their size and scope, the *Anthem* and *Aetna* mergers have garnered significant industry interest since they were announced in the summer of 2015, and the trials of these matters should be of equal interest, if not more so. Stay tuned.

DOJ/FTC Issue Antitrust Guidance Hiring on Practices: Insurance Industry Spotlight

On October 20, the DOJ Antitrust Division and the Federal Trade Commission issued joint guidance for human resources ("HR") professionals regarding the potential antitrust dangers created when competitors make joint decisions regarding employee hiring and compensation issues. The guidance follows a considerable uptick in interest in the subject over the last several years, both by regulators and the private plaintiff bar. As the guidance explains, "an agreement among competing employers to limit or fix the terms of employment for potential hires may violate the antitrust laws if the agreement constrains individual firm decision-making with regard to wages, salaries, or benefits; terms of employment; or even job opportunities." In addition, the guidance makes clear that, in some circumstances, criminal penalties may even arise from such conduct.

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DOJ/FTC Issue Antitrust Guidance Hiring on Practices: Insurance Industry Spotlight, *continued*

The DOJ/FTC guidance includes specific instruction to HR professionals on how to avoid antitrust risk. While the guidance makes clear that the following conduct is not necessarily unlawful in all circumstances, the DOJ/FTC recommends that HR professionals avoid:

- Agreeing with another company about employee salary or other terms of compensation, either at a specific level or a range;
- Agreeing with another company to refuse to solicit or hire that other company's employees (so-called "no poaching agreements");
- Agreeing with another company about employee benefits;
- Agreeing with another company on other terms of employment;
- Expressing to competitors that the companies should not compete too aggressively for employees;
- Exchanging company-specific information about employee compensation or terms of employment with a competitor; and
- Discussing the above topics with representatives of competitor companies at social events and other non-professional settings.

While the insurance industry enjoys a limited exemption from the federal antitrust laws by virtue of the McCarran Ferguson Act (15 USC 1051 *et seq.*), the applicability of the exemption to agreements concerning employee wages or hiring decisions is tenuous, at best. The exemption applies only to the "business of insurance," and the Supreme Court has held that the "business of insurance" is limited to conduct that (1) involves the "spreading and underwriting of policyholder risk;" (2) has a direct connection with the contractual relationship between the insurer and insured; and (3) are arrangements limited to entities within the insurance industry. *Group Life & Health Insurance v. Royal Drug*, 440 U.S. 205, 214-15 (1979). Accordingly, an agreement among insurance industry HR professionals that suppressed insurance employee wages or hiring could raise significant antitrust concerns. For this reason, insurers would be well advised to consider whether their HR departments are fully aware of their antitrust obligations and in full compliance with the law.

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Auto Body Shop Antitrust Case Crashes on Appeal; Can It Be Repaired?

Over two years ago, class action antitrust cases were commenced by numerous auto body shops against many of the largest auto insurers in the nation. In each case, the auto body shops contended that the insurers had conspired to limit the reimbursement rates provided by the insurers for insured repairs. The cases were ultimately consolidated before Judge Gregory Presnell (Middle District of Florida) as the *In re Auto Body Shop Antitrust Litigation*.

Earlier this year, in a series of rulings, Judge Presnell dismissed the claims in each of plaintiffs' actions, finding that plaintiffs had failed to state any actionable claim against the insurers. Several plaintiffs appealed Judge Presnell's rulings to the 11th Circuit Court of Appeals, maintaining that Judge Presnell acted too quickly in dismissing their actions.

Plaintiffs filed their appeal brief in the earliest filed appeal, *Parker Auto Body v. State Farm*, in September, contending that Judge Presnell applied a higher pleading standard to their claims than permitted under *Twombly*, by "disregarding or discrediting facts alleged in the complaint, mischaracterizing factual allegations as conclusory statements, applying affirmative defenses to causes of action, and requiring appellants to plead specific facts beyond that required by Rule 8 of the Federal Rules of Civil Procedure."

The insurers' brief was scheduled to be due on October 31, but in an October 5 Order, the 11th Circuit dismissed the appeal on procedural grounds. Specifically, the Court order indicates that the appellants failed to file the case appendix (the records from the district court that the appellate court reviews when considering an appeal) with their appellate brief, in violation of court rules. While the auto body shops have filed an emergency motion seeking to have the appeal reinstated (claiming that the clerk of the court had informed them that the appendix could be filed at a later date), the Court has not yet ruled on the auto body shops' request.

In addition, the appeal in one of the companion cases (*Alpine Straightening Systems v. State Farm et al.*) may suffer from the same procedural problems. Those appellants (represented by the same counsel as the *Parker Auto Body* plaintiffs) filed their appellate brief on October 11, again without the required appendix. No action has been taken, to date, in that action.

Accordingly, while the 11th Circuit certainly has the power to reinstate the auto body shop appeals should it choose to do so, unless it does so, it appears that appellants may be facing a possible dismissal of their appeals without the opportunity to have the 11th Circuit address Judge Presnell's rulings on the merits. Should that occur, it would bring a rather unorthodox conclusion to a matter that has been closely watched by the entire auto insurer industry for over two years. Stay tuned.