

# PUBLICATION

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

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**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 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.