

Why the Justice Department rejected the Aetna and Anthem deals

By [Bob Herman](#) | July 21, 2016
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After more than a year of scrutiny, the U.S. Justice Department filed requests for preliminary injunctions Thursday to block the two health insurance deals led by Aetna and Anthem that would shrink the number of national carriers from five to three if allowed to proceed.

For the past year, Aetna has pursued its [\\$37 billion acquisition](#) of Humana to bolster its Medicare Advantage business. Anthem's [\\$53 billion bid](#) for Cigna Corp. would consolidate health insurance administration offered to employers.

But federal and state regulators officially [sued to block those deals](#), citing reduced competition and potential harm to American consumers.

"If allowed to proceed, these mergers would fundamentally reshape the health insurance industry," Attorney General Loretta Lynch said Thursday during a news conference announcing the lawsuits. "They would leave much of the multitrillion-dollar health industry in the hands of three mammoth insurance companies, restricting competition in key markets."

Aetna and Anthem each released statements saying they intend to fight for their deals. But the Anthem-Cigna tie-up appears to be on its deathbed, with Cigna expressing doubt of an approval.

"We do not believe the transaction will close in 2016, and the earliest it could close is 2017, if at all," [Cigna's statement](#) reads. [Cigna disclosed pessimism](#) on the prospects of the deal in its first quarter regulatory filing with the Securities and Exchange Commission.

"Anthem is fully committed to challenging the DOJ's decision in court but will remain receptive to any efforts to reach a settlement with the DOJ that will allow us to complete the transaction and deliver its benefits at a critical time when American consumers are seeking high quality healthcare services with greater value at less cost," [Anthem said in its statement](#).

[Aetna and Humana, however, will "vigorously defend"](#) their pending transaction, according to a joint release. The companies will continue to advance their main argument, that [traditional Medicare and Medicare Advantage compete with each other](#)—although Justice Department officials explicitly said Thursday they disagreed with that interpretation. Aetna also issued [\\$13 billion of new debt](#) last month in anticipation of closing on the deal, giving the insurer a huge incentive to challenge the

decision.

Anthem will have to pay Cigna a \$1.85 billion breakup fee if the deal falls apart. Aetna will have to pay Humana \$1 billion if litigation fails. Cigna said in [securities documents](#) Thursday that it believes it is entitled to the full fee and also touted its “stand-alone prospects,” further fueling belief that the Anthem-Cigna deal is essentially over.

Those termination fees could provide spending money for Cigna or Humana to pursue other acquisitions of their own, and Wall Street analysts agree that federal opposition to these deals will not halt other future transactions.

The Justice Department's [complaint against Anthem and Cigna \(PDF\)](#) and the [complaint against Aetna and Humana \(PDF\)](#) detail a long, meticulous list of grievances with each transaction. Eleven states and the District of Columbia joined the federal government in seeking an injunction against Anthem and Cigna, and eight states and D.C. piled onto the complaint against Aetna and Humana.

In both lawsuits, the government argues the pending transaction would “substantially lessen competition in numerous markets around the country.” The result, antitrust regulators said, would lead to “higher prices and reduced benefits” for consumers.

If Anthem acquires Cigna, the biggest impact would be felt in the national employer market, where many self-insured companies pay for their employees' medical care but use health insurers to administer other functions, such as provider network design and claims adjudication. Many employers have expressed concern the merger would [raise administrative fees and result in worse customer service](#).

Aetna's pursuit of Humana would consolidate [two of the largest players](#) in the Medicare Advantage industry, which now enrolls more than 18 million seniors and disabled people, or about one-third of all Medicare beneficiaries. The complaint said the merger would harm seniors in more than 300 relevant markets, which builds on [other analyses](#) that have said the Medicare Advantage market is already highly concentrated.

Justice Department officials also raised concerns that both deals would eliminate competition in the Affordable Care Act's [new marketplaces](#) for individuals and small groups.

“It's just a reminder that the number of competitors is significant,” said Andrea Murino, a partner at law firm Goodwin Procter in Washington. Murino previously worked within the Justice Department's antitrust division.

Moreover, antitrust officials strongly opposed the notion that divesting health plan assets would fix their overarching concerns. “Those proposed remedies are incomplete and impractical,” Bill Baer, the Justice Department's principal deputy associate attorney general and former antitrust chief, told reporters Thursday. Baer added the department has “zero confidence” divestitures will solve the competition problems.

Aetna reportedly had lined up large buyers, including Centene Corp. and WellCare Health Plans, to acquire Medicare Advantage plans in areas of significant overlap. Anthem and Cigna would have a harder time divesting commercial insurance lives because there already are so few national insurers that can take on so-called “jumbo” employer accounts.

“The language of the complaint and the temperature in the room seemed to be resistant to a future settlement,” said Tim Greaney, law professor at Saint Louis University and a former antitrust enforcer at the Justice Department.

Federal regulators rejected another important aspect of the deals: that they were necessary to extract better price discounts from hospitals and doctors. Anthem, for instance, claimed “if it becomes the 800-pound gorilla at the bargaining table,” it could push back against the consolidating provider systems, which could hypothetically lower premiums.

But, Baer said, “Antitrust laws don't work that way.”

Baer's comments were an indirect reference to Greaney's “sumo wrestler theory”--that it's a fallacy to assume dominant insurers will bargain fairly with dominant hospitals to the benefit of consumers.

“That theory has just great intuitive appeal,” said Greaney, who [explained it to Congress \(PDF\)](#) last year during the health insurance merger hearings. “There is economic evidence that large insurers get better discounts than markets with small insurers. But the economic evidence also shows they don't pass those savings along to consumers in the form of lower premiums.”

The lawsuits also scolded company executives for trying to downplay potential antitrust problems. In the Aetna-Humana complaint, the DOJ attorneys wrote: “When preparing a presentation for the company's board of directors, senior Aetna executives circulated a list of 'words to avoid,' which included terms likely to raise law enforcement concerns, such as 'markets,' 'dominate/dominance,' and 'consolidate.' But merely avoiding those words does not make the merger any less likely to harm consumers by eliminating competition.”

Both cases will be heard by a federal judge and could take several months before reaching a conclusion, assuming both Aetna and Anthem attempt to proceed with the deals. Antitrust experts note the concurrent review of both mergers, which were announced within weeks of each other last year, might have made it more difficult to obtain approval.

“If one pair had come forward sooner and gotten a deal done, it would've presented a very different mode of analysis,” Murino said. “DOJ had no choice but to look at the complete landscape as it would appear if both deals went through.”

The American Hospital Association and the American Medical Association each cheered the federal government's lawsuits in statements. Rick Pollack, CEO of the AHA who opposed the mergers **in testimony to Congress**, said the Justice Department “**made the right decision.**” AMA President Dr. Andrew Gurman **applauded the feds** for “fighting to protect patients and physicians from a health insurance system dominated by a few corporate Goliaths.”

But their celebratory messages ignore the waves of **physician group, hospital and health system mergers** that similarly **have worried** consumers, health economists and federal regulators for their effects on healthcare prices. The Federal Trade Commission, in particular, has ramped up its **oversight of hospital mergers** it deems **anti-competitive.**

“They're jumping up and down, but they should be aware that equal vigilance should be turned to their side of the equation, too,” Greaney said of providers. “The same people at the Justice Department and the FTC think it's equally important, and perhaps more important, to keep a lid on provider mergers.”

Trade group America's Health Insurance Plans—which notably does not represent Aetna after **Aetna bailed on the group** earlier this year—released a statement that said “mergers among health plans can deliver significant benefits.” The lobbying organization, led by former CMS chief Marilyn Tavenner, mostly has stayed out of the health insurance merger debate.

“Ultimately, the most pressing competition issues in healthcare today are the result of anti-competitive provider mergers and the soaring cost of pharmaceuticals driven in part by anti-competitive pricing tactics,” AHIP spokeswoman Clare Krusing said.

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