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Hospital, Physician, and Payer Alignment: Trends and Strategies

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I. Introduction[1]

A. Healthcare entities, including Hospitals, Hospital Systems, Physicians and Payers, are acquiring companies or sets of assets in areas where they have gaps in services in an attempt to provide more integrated, collaborative, lower cost, more efficient care.

B. Overarching Goals of Consolidation Strategies:

1. Cost efficiencies/economies of scale.
2. Improve quality of care while lowering costs.
3. Ability to invest in IT.
4. Access to capital.
5. Improved competitive position.
6. Adapt to reimbursement changes.

II. Impact of Payer Consolidation on Healthcare Delivery

With radical transformation occurring in the health care industry since implementation of the Affordable Care Act ("ACA") on March 23, 2010, providers and payers have accelerated the process of consolidation both horizontally (*e.g.*, hospital-hospital or payer-payer collaborations where collaborations are characterized by formal affiliation with other similarly situated entities producing the same goods and services), and vertically (*e.g.,* provider-payer collaborations, where collaborations are characterized by affiliations among key opposing stakeholders in the market).

In the horizontal payer context, both the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") identified certain anticompetitive outcomes resulting from the large scale mega-mergers announced in 2015. For providers or payers contemplating consolidation, both the Aetna/Humana and Anthem/Cigna merger examples illustrate that courts will closely scrutinize a payer's ordinary course of business documentation and post-merger actions. The same is likely true in the context of large-scale, horizontal provider consolidations. For providers contemplating vertical integration with payers, for example, aligning distinct

[1] As of the submission date of this paper (March 13, 2017), the American Health Care Act, a Republican draft bill to repeal the Affordable Care Act, had just been released and two House Committees had sent the measure to the House Budget Committee to hold hearings on the bill. The topics in this paper could be significantly impacted by the passage of any legislation or series of legislative measures that materially modifies or replaces the Affordable Care Act.

compliance landscapes is also challenging, due largely to different sets of regulatory schemes and core competencies that must be understood in the merged or combined companies.

A. Background of the Aetna/Humana and Anthem/Cigna Mergers.

A federal court in Washington, D.C. recently ruled in favor of the Department of Justice and blocked the proposed mergers of Aetna/Humana and Anthem/Cigna due to the anticipated anticompetitive effects of these mergers in violation of federal antitrust laws. The Aetna/Humana ($37 billion) and Anthem/Cigna ($48 billion) mergers were the largest proposed insurance mergers in U.S. history, and have also come at a time of unprecedented consolidation on the health care provider side. The Aetna/Humana merger was first announced on July 2, 2015.[2] Announcement of the Anthem/Cigna merger followed shortly thereafter on July 23, 2015.[3] Lawsuits challenging both mergers were each separately filed in the United States District Court for the District of Columbia on July 21, 2016. In both cases, the DOJ claimed a violation of Section 7 of the Clayton Act, which prohibits acquisitions that "may . . . substantially . . . lessen competition".[4] The Aetna/Humana and Anthem/Cigna mergers were enjoined on January 23, 2017[5] and February 8, 2017,[6] respectively.

For Aetna/Humana, the DOJ's challenge to the merger focused on two specific health insurance products: (1) Medicare Advantage ("MA") Plans (and more specifically, whether these MA Plans were close enough substitutes to traditional Medicare for traditional Medicare to actually compete with them) and (2) Individual Insurance sold through the ACA's health insurance exchanges. The court notably relied upon the following key arguments and observations when ultimately siding with the government:

1. A "ubiquitous" number of ordinary course of business documents demonstrating direct competition between Aetna/Humana and other MA Plans, and the limited documentation evidencing direct competition with traditional Medicare.[7]

2. Little to no switching of customers from MA Plans to traditional Medicare, although the insurers attempted to argue that MA Plans encounter significant competition upon entry (*i.e.,* the point when seniors at age 65 enter the market and make their choice between MA Plans and traditional Medicare).[8]

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[2] Press Release, "Aetna to Acquire Humana for $37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care", https://news.aetna.com/2015/08/aetna-to-acquire-humana/.
[3] Press Release, "Anthem Announces Definitive Agreement to Acquire Cigna Corporation", http://betterhealthcaretogether.com/content/uploads/2015/10/Better-Healthcare-Together_Press-Release.pdf.
[4] 15 U.S.C. § 18.
[5] *See generally* Memorandum Opinion, *United States of America, et al. v. Aetna, Inc., et al*, Civil Action No.16-1494 (JDB), accessed at https://dlbjbjzgnk95t.cloudfront.net/0879000/879134/aetna%20humana%20opinion.pdf (Jan. 23, 2017).
[6] *See generally* Memorandum Opinion, *United States of America, et al. v. Anthem, Inc., et al*, Civil Action No. 16-1493 (AB), accessed at https://dlbjbjzgnk95t.cloudfront.net/0894000/894502/https-ecf-dcd-uscourts-gov-doc1-04515949732.pdf (Feb. 8, 2017).
[7] *See* Aetna Memorandum Opinion 30.
[8] *Id.* at 75-76.

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