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5 on 45:

On the demise of major healthcare mergers

Friday, February 17, 2017

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PITA: You're listening to 5 on 45 from the Brookings Podcast Network: analysis and commentary from Brookings experts on today's news regarding the Trump administration.

(Music)

SALLET: I'm Jon Sallet, a visiting fellow in the Governance Studies program at Brookings. Just this week, it appears that plans that two major healthcare mergers are effectively finished. That's in the wake of the victory of the Department of Justice in two separate trials. Three of the four merging companies, in fact, have declared their plans dead. One of them, Cigna, just launched a multi-billion dollar lawsuit against its erstwhile merger partner, Anthem. Only Anthem among the four has said it will continue to fight. The two judicial decisions blocked the Anthem-Cigna and Aetna-Humana deals. They're important for the shape of healthcare markets, and important for the future of antitrust. Let's start with healthcare. The companies that proposed to merge—Aetna with Humana and Anthem with Cigna—they are four of the big five U.S. health insurers, and the Justice Department describes healthcare insurers as the critical go-betweens, dealing with hospitals and doctors on the one hand, and the customers of healthcare—sometimes corporate employers, sometimes individuals—on the other.

Now, the Department of Justice brought these two cases because it concluded that competition would be harmed by these healthcare mergers. In fact, taking both mergers together, it would mean that there would be only three rather than five healthcare insurers from which to choose. Moreover, and this is important, the Justice Department also believed that the merger would lessen the prospects for future innovation. For example, the order having to do with Anthem-Cigna says "Cigna has

sought to differentiate itself with its approach towards reducing costs by increasing health.”

Of course, it's not a new thought that cutting the number of competitors in a market can harm competition. Just over 100 years ago, Congress enacted the Clayton Act, and ordered that antitrust agencies take action on corporate transactions that may substantially lessen competition. And that's because merged companies may have the power to raise prices or cut quality or slow innovation—in other words, to harm consumers.

In July of 2016, the Justice Department filed two complaints in federal court, asking that these mergers be blocked, joined by states and D.C. I should say I was at the Justice Department in the course of these cases, but everything here is based, of course, only on public information. So anyway, late last year, both cases went to trial, lasting for several weeks each. And then in late January and February, the decision arrived and the Justice Department prevailed. First, the decision from Judge John Bates in Aetna-Humana: Judge Bates ruled that this merger would likely substantially lessen competition in the sale of Medicare advantage plans to senior citizens in 364 counties across the U.S. The critical question in this case turned on the distinction between original Medicare, which is often directed by the government, and the separate Medicare advantage policies that are offered by health insurance companies. The companies argued that there was only one big Medicare market, but Judge Bates concluded that both economics and evidence demonstrated that the companies provide Medicare advantage in a separate product market, and that led to his conclusion that competition could be harmed by this merger.

Second, just this month, Judge Amy Jackson ruled that the proposed combination of Anthem and Cigna would have an anti-competitive effect on the sale of health insurance to national accounts in Aetna territory, that is to say the big employers, typically companies with more than 5,000 employees in more than one state. Anthem has said that it will appeal, but the important question is whether, even if it wins, the case would have to go back to Judge Jackson for the resolution of other claims.

Now, to have two big merger trials at the same time was a big test for the Justice Department, and in fact, the department was at the same time litigating two other mergers, one in agriculture and one in energy, and alleged anticompetitive conduct in three other cases, involving hospitals and television sports. With all of this, and other work going on, the healthcare verdicts are a tribute, I believe, to the hard work and professionalism of the career staff of the antitrust division.

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