

Blog Post

District Court Further Extends Review of CVS/Aetna Merger

April 10, 2019

The District of Columbia District Court has again deferred its decision regarding whether to approve the merger between CVS Health and Aetna, a \$69 billion transaction that was first announced back in December 2017. Notably, while the parties closed the transaction back in November of 2018, after reaching a proposed settlement with the US Department of Justice (DOJ) Antitrust Division that required CVS to divest its Part D Medicare business to WellCare, final approval of the deal has stalled as the Court continues to assess whether the proposed settlement adequately addresses the competitive harms addressed in the DOJ's complaint that originally sought to derail the merger (as required by the Tunney Act). Pending a decision by the Court, CVS has voluntarily agreed not to integrate Aetna's operations into CVS.

Since the November settlement was reached, the DOJ has received over 170 comments on the proposed settlement, many of which expressed concerns about whether it adequately addressed all of the potential competitive harms associated with the merger. However, in accordance with the Tunney Act, the DOJ addressed these comments in a filing with the Court in February, seeking to persuade the Court that the divestiture to WellCare was sufficient to maintain competition in the Medicare Part D market, and that other comments about the settlement that DOJ had received

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suggesting that it was insufficient because it did not address the “vertical” aspects of the transaction were misplaced. With respect to the vertical aspects of the deal, DOJ asserted that they were not alleged to be anticompetitive in the DOJ’s Complaint, and thus were outside of the scope of the Court’s Tunney Act review, and further stated that they had examined those issues in their investigation and that no competitive concerns were found. Urging the Court to approve the proposed settlement at that time, DOJ suggested that the Court’s review under the Tunney Act was a “limited” one, and that DOJ is “entitled to broad discretion to settle with the defendant within the reaches of the public interest.”

Typically, in most Tunney Act merger reviews, the Court reviews the DOJ’s response to the public comments the DOJ has received, agrees with the DOJ that the proposed settlement is in the public interest, and approves the proposed settlement without a hearing or any further extended review. However, that has not been the case – at least so far – with respect to this merger.

Instead, at a hearing on April 5, Judge Richard J. Leon, who is presiding over the matter, stated that, given the number and substance of the comments objecting to the settlement, he was not yet ready to rule on whether it should be approved. Instead, over the objections of the DOJ, Judge Leon indicated that he will hear live testimony from various entities that had filed comments opposing the settlement, including the American Medical Association, at a hearing to be held in May. In addition, Judge Leon indicated that the hearing could last up to a week. Until then, a final decision on the proposed settlement will continue to be delayed/deferred, likely making this the longest Tunney Act review in history. Stay tuned.

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