

Blog Post

Long Delayed CVS/Aetna Merger Finally Gains Court Approval

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Concluding one of the longest merger reviews in history, on September 4, Judge Richard Leon, District Judge for the District of Columbia, issued his final ruling in *United States v. CVS Health*, approving the proposed settlement of the United States’ challenge to CVS’s merger with Aetna. The ruling concludes Judge Leon’s eleven month review of the proposed settlement, during which he repeatedly questioned whether the proposed settlement was “in the public interest” – the test for approval of the proposed settlement set forth under the Tunney Act (15 USC 16(e)(1)). To make that determination, Judge Leon conducted the first-ever live hearing in a Tunney Act proceeding, at which he heard testimony from those for and against the proposed settlement. The decision grants final approval of a merger that combines the nation’s largest pharmaceutical chain (CVS) with the nation’s third largest health insurance company. Both entities are also among the largest providers of insurance in the individual Medicare Part D prescription drug plan market, and the settlement requires CVS to divest Aetna’s Medicare Part D business to WellCare.

In reaching his decision to approve the proposed settlement, Judge Leon noted that “although amici raised substantial concerns [about the merger] that warranted serious consideration, CVS’s and the Government’s witnesses, when combined with the existing record, persuasively support why markets at

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issue are not only very competitive today, but are likely to remain so post-merger.” Specifically, those issues centered upon (1) whether Aetna’s proposed divestiture of its Medicare Part D business was sufficient to address the potential for competitive harm in that market; (2) whether the proposed settlement’s failure to address potential harm to the pharmaceutical benefit manager (PBM) market would result in harm to the public; and (3) whether additional provisions in the proposed settlement were warranted to protect HIV and AIDS patients from potential harm. Ultimately, Judge Leon concluded that “the harms to the public interest the amici raised were not sufficiently established to undermine the Government’s conclusion to the contrary.”

Notably, however, before reaching this conclusion, Judge Leon took issue with what he perceived to be a failure on the part of the DOJ – at least initially – to provide him with the information necessary to properly assess the merits of the proposed settlement. Indeed, Judge Leon characterized the DOJ’s initial written submissions, which were intended to demonstrate that the proposed settlement was in the public interest, as being “rife with conclusory assertions that merely reiterate the Government’s confidence in its proposed remedy, but shed little light on the reasons for that confidence.” Judge Leon continued: “Indeed, the Government’s perfunctory response to the public comments was particularly disappointing in light of the volume and quality of the comments to which it was responding!” It was for this reason that Judge Leon ultimately held the first-ever evidentiary hearing in a Tunney Act proceeding, hearing testimony for two days in June of this year. In addition, Judge Leon also took issue with DOJ’s contention that he was expanding his review of the proposed settlement beyond what is permitted under the Tunney Act, stating that DOJ had “severely understate[d] the permissible scope of Tunney Act review.”

Notwithstanding Judge Leon's strong disagreement with DOJ over the proper scope of his Tunney Act review, ultimately Judge Leon concluded that "unfortunately for the amici," the full record (after Judge Leon had conducted his hearing) "did not persuasively undermine the parties' contention that the proposed final judgment is in the public interest." Thus, citing language in *United States v. Microsoft* that explains that "the court's function is not to determine whether the resulting array of rights and liabilities is one that will best serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest," Judge Leon signed off on the proposed settlement.

While Judge Leon's ruling finally brings to an end this long merger review, and permits CVS and Aetna to consummate their merger in all respects, several important procedural issues regarding the Tunney Act remain unresolved. Perhaps most significantly, Judge Leon's disagreement with DOJ over the proper scope of Tunney Act review (and his view that an evidentiary hearing was permissible under the Act) are issues that will not be conclusively determined in this case. Accordingly, only time will tell whether courts engaged in Tunney Act review in the future will adopt the procedures undertaken by Judge Leon, and/or whether the DOJ may amend its practices to try to address in advance some of the concerns that Judge Leon raised. Stay tuned.

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