

Evidentiary Hearing Puts Spotlight Back on Antitrust Concerns of CVS-Aetna Merger

When the \$69 billion CVS-Aetna mega-merger obtained regulatory approval from the Department of Justice (DOJ) and key states back in [November 2018](#), few expected the deal to face further regulatory challenges, as the companies consummated the merger on what they believed to be the winning ticket. That is, until Judge Richard Leon of the U.S. District Court for the District of Columbia halted the merger by refusing to give his rubber stamp of approval as part of the routine judicial review process, stunning many in the healthcare industry.

Setting up the Unprecedented Review in Scope and Process

Fast-forward to June 2019. Exercising its authority under the Tunney Act, a 1974 federal law that requires the court to review government approval of corporate mergers to protect public interest against monopolies, the D.C. court held the first-of-its kind evidentiary hearing with live witness testimony. Three witnesses from amicus groups and three for the DOJ and CVS/Aetna testified at the two-day hearing as part of the court's review of anticompetitive concerns of the halted merger.

From the get-go, Judge Leon signaled he would be breaking new ground with this rare review. First, he emphasized that the hearing was not to be considered a trial, as it only allows direct examination and no cross-examination. Second, he rejected the argument that the Tunney Act would limit the scope of the review to only the DOJ's previously raised antitrust

concerns, which was the companies' overlap in the Medicare Part D prescription drug plan (PDP) market. Consequently, as part of the merger settlement, the DOJ required the divestiture of Aetna's Medicare prescription drug business to WellCare, which the government asserted to be sufficient to address all anticompetitive concerns. Judge Leon, however, indicated that he was also interested in how the merged entities will impact the greater market, beyond Medicare Part D drug plans, extending to the pharmacy benefit manager (PBM) market.

Witnesses for Amicus Groups Express Concerns of Negative Steering and Increased Premiums from High Concentration

In answering that inquiry, amicus groups called the three witnesses who blasted both the DOJ's divestiture settlement as insufficient and the merger's anticompetitive effects on the greater PBM market. University of Southern California professor Neeraj Sood, a witness called by the American Medical Association, argued that not only is the divestiture inadequate to alleviate anticompetitive concerns due to WellCare's weak market status, the deal would harm consumers by decreasing competition beyond the Medicare PDP market to the PBM market. Specifically, further consolidation in the form of a CVS-Aetna merger would steer Aetna's customers toward CVS clinics, thereby increasing CVS's leverage in an already highly concentrated PBM market, where three vertically integrated companies account for 70% of the market. This additional consolidation would in turn raise premiums for consumers.

Diana Moss, president of the American Antitrust Institute and witness for amicus challengers U.S. PIRG and Consumer Action, echoed Sood's concerns regarding potential steering and increase in premiums that would result from high concentration.

Additionally, Michael Wohlfeiler, chief medical officer and witness for the AIDS Healthcare Foundation, testified that previous vertical integrations between PBMs and PDPs have steered AIDS patients away from the Foundation and increased its PBM fees.

Witnesses for the DOJ and CVS/Aetna Discount Steering Argument as “Economic Suicide” and Assert Market Efficiencies as Potential Benefits

On day two of the hearing, three witnesses for the DOJ and CVS/Aetna offered their rebuttal. Judge Leon continued his inquiry of the impact on the greater PBM market by questioning the witnesses about the leverage the merged entity would gain over competitors in the PBM market. Both Lawrence Wu, president of global economic consulting firm NERA, and Alan Lotvin, CVS’s executive vice president and chief transformation officer, answered that the merger’s impact would be minimal because CVS already had access to Aetna’s insurance customers from a previous exclusive PBM contract. However, Judge Leon appeared unconvinced as the exclusive relationship is set to expire in 2023 under the contract.

The company witnesses’ other side of the argument appeared to hold more water with Judge Leon, who was intrigued when Lawrence Wu compared the deal to another vertical merger that Judge Leon approved, AT&T’s acquisition of Time Warner in 2018. Wu argued that CVS makes billions of dollars from selling its PBM services to other insurers and has no motive to harm its own business by steering these services to Aetna. Alan Lotvin added that it would be akin to committing “economic suicide.”[\[1\]](#)

In regards to whether the divestiture of Aetna’s Medicare PDP business to WellCare alleviated antitrust concerns in that

market, Terri Swanson, Aetna's vice president of Medicare business, offered testimony that WellCare is more than capable of maintaining its market power even without the divestiture, as it had greater PDP subscriber growth than Aetna last year.

Finally, Lotvin highlighted the merger's potential benefits that would result from market efficiencies, in particular allowing CVS's MinuteClinic operations to use Aetna's health care data to better treat chronic conditions. It should be noted that just the day before its witnesses testified at the hearing, CVS announced that it will launch 1,500 HealthHUBs, [\[2\]](#) which expands upon the current MinuteClinic model to include more focus on everyday needs and chronic disease management. Much of the new concept will rely on anticipated access to Aetna's healthcare data resulting from the merger.

Implications of the Hearing for the CVS-Aetna and Future Consolidation Efforts

At the end of the two-day hearing, Judge Leon set oral argument for July 17 and indicated he would accept final briefs in the matter before his final decision. It is unclear how a negative ruling would impact the already consummated merger. For starters, the DOJ would likely challenge the decision on appeal. While unlikely, the DOJ and CVS-Aetna may need to renegotiate a new consent agreement should Judge Leon indeed issue an unfavorable decision.

Regardless of the outcome, at the very least, the impact of Judge Leon's unprecedented move to review a consummated merger may be far-reaching and two-fold. First, it would likely spur more rigorous judicial scrutiny of future consolidation agreements under the Tunney Act. Second, merging entities may need to think twice before consummating the deal prior to

receiving the judicial rubberstamp. Either way, this serves as a chilling effect on the merger mania that has spread across the country in recent years.

[\[1\]](#) Jessica Wehrman, *Judge skeptical in hearing of CVS' defense of Aetna merger's effect on pharmacy benefit managers*, The Columbus Dispatch, June 5, 2019.

[\[2\]](#) Tara Bannow, *CVS to aggressively expand healthcare services in stores*, Modern Healthcare, June 4, 2019.