

## CVS-Aetna merger

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The AMA argued in a 141-page analysis why the proposed CVS-Aetna merger would run afoul of federal antitrust law, noting how it would likely harm patients. CVS is one of the two largest players in the retail pharmacy market and operates the largest pharmacy benefit manager.

The AMA showed that the merger would reduce competition in certain pharmaceutical benefit markets, leading to higher premiums and lower-quality insurance products. The AMA believed that the merger faced enormous implementation challenges and was unlikely to realize efficiencies that benefit patients. Learn more about the AMA's opposition to this merger.

## AMA's challenge to the CVS-Aetna merger

The AMA protects patients and physicians by opposing anti-competitive health care mergers.

## Merger announcement

CVS-Aetna announced their proposed merger on Dec. 3, 2017. The CVS-Aetna deal is the biggest health care merger in U.S. history.

The AMA immediately began analyzing the merger's likely impact on competition.

## CVS-Aetna merger: AMA leaders answer key questions

Find out how the AMA believed the proposed merger would impact patients and physicians.

## The AMA's leading role in challenging the CVS-Aetna merger

The AMA took a leading role in challenging the massive CVS-Aetna merger. The AMA argued that, if approved, the merger would injure competition in five key health care markets: Medicare Part D; health insurance; pharmacy benefit management; retail pharmacy; and specialty pharmacy. The AMA opposition was evidence-based, the result of months of analysis by nationally-recognized health economists and legal experts. The AMA's advocacy led to an almost unheard-of development: a federal judge holding hearings to evaluate the settlement between the U.S. Department of Justice (DOJ) and CVS-Aetna that got the DOJ to approve the merger.

In calling these hearings, the judge recognized the AMA's advocacy, and asked the AMA to play a major role in the hearings—in fact, the AMA was the only medical association invited to participate. Although the judge ultimately approved the merger, the AMA will continue to boldly challenge any merger that will hurt the nation's patients and physicians.

## **CVS-Aetna merger**

The CVS-Aetna merger was a horizontal and a vertical merger. In horizontal mergers, two competitors combine, and CVS-Aetna are significant competitors in numerous Medicare Part D geographic markets and also with respect to pharmaceutical benefit management (PBM) services.

In additional markets, the merger was “vertical” because Aetna is a buyer of inputs (such as PBM services and pharmacy) that CVS sells. The AMA had never opposed a vertical merger—it had only challenged horizontal mergers of health insurers with varying degrees of success. Vertical mergers' impacts are much more difficult to determine than those of horizontal mergers. Compared with horizontal mergers, very little economic research and legal guidance about vertical mergers exist. These factors make it difficult to determine whether or not opposition to a vertical merger can succeed.

## **AMA CVS-Aetna advocacy**

### **September 2019**

Judge Richard Leon, the federal judge responsible for approving the consent decree between the DOJ and CVS-Aetna in which the DOJ allowed the merger subject to Aetna divesting its PDP business, approves the CVS-Aetna merger. The AMA issues a press release expressing disappointment that the court's ruling leaves patients unprotected. Although this outcome is not what the AMA fought for, the AMA is optimistic that this case and the thorough examination of its underlying facts are a sign of things to come. The AMA's antitrust merger advocacy should benefit from the precedent set in this case, for at least three reasons. First, whenever the AMA concludes that a DOJ merger settlement in

the healthcare space is not in the public interest, there may now be a mini-trial hearing opportunity in which the AMA can express its views on a national stage and drag a merger's anticompetitive problems into the sunlight. Second, because Judge Leon reviewed antitrust violations alleged by outside parties, including the AMA, and did not confine his review to the specific claims brought by the DOJ, the DOJ will be forced to do the hard work of thinking about all the ramifications of the mergers it reviews. Third, the DOJ is on notice that the AMA is capable of "raising substantial issues that deserve serious consideration"-- phrases that Judge Leon repeatedly used to characterize the AMA's merger challenge.

## **July 2019**

On July 19, AMA advocacy delivers its closing statement to, arguing vigorously why Judge Leon should reject the consent decree between the DOJ and CVS-Aetna in which the DOJ approved the merger subject to Aetna divesting its Medicare Part D prescription drug plan (PDP) business is not in the public interest.

## **June 2019**

In an unprecedented hearing that takes place on June 4 and 5, Judge Leon hears from three witnesses opposing the merger, and three witness supporting the deal. The AMA's expert—Neeraj Sood, PhD—was the lead witness to discuss how the DOJ's divestiture remedy may affect certain insurance markets for pharmaceuticals. Dr. Sood is Professor and Vice Dean for Research at the University of Southern California Sol Price School of Public Policy and Director of Research at the Leonard D. Schaeffer Center for Health Policy & Economics.

## **April-May 2019**

The AMA participates in the April 5 status hearing before Judge Leon, , arguing the points made in its brief and in favor of having a subsequent hearing where witnesses may present evidence. On April 8, Judge Leon, orders CVS, DOJ, and the "friends of the court," or "amici," including AMA, to submit a list of potential witnesses, with a description of their potential testimony, for his consideration.

The DOJ, CVS-Aetna and the "friends of the court" or "amici," including AMA, submit a list of potential witnesses and the DOJ and CVS also file motions to limit the scope of the hearing and to restrict the testimony of witnesses proffered by the amici.

AMA and the other amici file responses to the motions to restrict.

On May 13, Judge Leon decides that he wants to hear from six witnesses about the merger: three for the amici and three for CVS-Aetna. Remarkably, Judge Leon noted in his decision that "....Amici have

persuasively argued, in effect, that an assessment of the proposed judgment on the public interest must take into account, among other things, the ways the divestiture remedy may be affected by PBM markets. The Court, will therefore, hear testimony that concerns, in part, the impact of the merger on PBM markets.” AMA expert, Neeraj Sood, PhD, will be the lead witness to discuss this very issue.

Finally, the judge sets a hearing for June 4-6.

## **March 2019**

AMA files a friend of the court brief with Judge Leon, explaining why Aetna’s proposed divestiture will not come close to restoring competition in the PDP market to premerger levels. The AMA makes three main points:

- The divestiture would decrease the number of firms in already concentrated and rapidly consolidating PDP markets.
- New entry will not solve the problem because there are high barriers to entry into PDP markets.
- The merger and divestiture would eliminate the unique and important role of competition between Aetna and CVS in the PDP market.

Judge Leon decides to set a status hearing on April 5 to discuss next steps in the merger review, e.g., whether witnesses should testify about the merger. Judge Leon’s decision is a highly unusual development – with a Tunney Act hearing, with live witnesses, being almost unheard of.

## **February 2019**

The AMA submits its Tunney Act comments regarding the CVS-Aetna merger to judge Leon.

## **December 2018-January 2019**

Judge Leon holds a few more hearings and continues to signal that he is aware of the AMA’s advocacy as it relates to this merger and specifically, that he expects (and is waiting for) AMA to file Tunney Act comments.

## **November-December 2018**

In several hearings, Judge Leon expresses concerns regarding how the DOJ has handled the merger. Judge Leon indicates that he expects to receive significant public comments about the merger during the 60-day comment period required by the federal Tunney Act law, and that his review of the merger may not end until summer 2018.

## October 2018

The DOJ announces that it has approved the merger via consent decree, on the condition that Aetna divest its PDP business. That same day, the AMA issues a press release, stating that while it welcomes the DOJ's divestiture requirement, the AMA is disappointed that the DOJ did not block the entire merger.

## August 2018

The AMA submits a comprehensive analysis of the CVS-Aetna merger to the DOJ stating that the CVS-Aetna merger is anticompetitive because it is likely to substantially lessen competition in PBM services, health insurance, retail pharmacy, PDP, and specialty pharmacy, and asks that the DOJ oppose the merger.

The AMA's opposition is based on reports (which were attached to the AMA statement) by the following nationally recognized experts:

- Lawton “Rob” Burns, PhD—Professor of management and chairperson of the Health Care Management Department of The Wharton School of The University of Pennsylvania. Dr. Burns' report shows that the benefits of the proposed CVS-Aetna merger are speculative, the benefits of vertical integration are limited, and retail clinics have significant shortcomings.
- Richard Scheffler, PhD—Distinguished Professor of Health Economics and Public Policy, joint tenured appointments in School of Public Health and Goldman School of Public Policy, University of California, Berkeley. Dr. Scheffler's report (PDF) describes the potential anticompetitive effects that the CVS-Aetna merger would have in the PDP market across the country.
- Neeraj Sood, PhD—Professor & vice dean for research at the USC Sol Price School of Public Policy and Director of Research at the Leonard D. Schaeffer Center for Health Policy & Economics. Dr. Sood's report discusses the CVS-Aetna merger's potential anticompetitive effects in the insurance, pharmacy and PBM markets.
- Amanda Starc, PhD—Associate professor of strategy at the Kellogg School of Management and a Faculty Research Fellow at the National Bureau of Economic Research. Dr. Starc's report shows that the CVS-Aetna merger would raise health insurance premiums, and that any cost efficiencies resulting from the merger are not likely to be passed on to consumers.

The AMA's statement is shared extensively with state and federal regulators and legislators. AMA also reconvenes its state-based workgroup to develop next steps in its advocacy strategy. The AMA and the Utah Medical Association file a statement requesting that the Utah Commissioner of Insurance oppose the proposed CVS-Aetna merger (PDF). Attached to this statement is a report by Dr. Richard Scheffler discussing the merger's anticompetitive effects in the PDP market. On **August 1**, California

Insurance Commissioner David Jones submits an extensive analysis to the U.S. Department of Justice (PDF), recommending that the Department of Justice sue to block the CVS-Aetna merger.

## July 2018

AMA experts Drs. Sood and Burns file supplemental statements with the California Department of Insurance (CA DOI) that rebut claims made in documents filed with the CA DOI by CVS and Aetna after an extensive public hearing about the merger that the CA DOI held on June 19. Diana Moss, PhD, President, American Antitrust Institute (AAI) also submits a statement that counters claims made by CVS and Aetna, as does Thomas “Tim” Greaney, JD, Visiting Professor at UC Hastings Law School.

The AMA continues to develop legal theories and evidence to further support its opposition to the CVS-Aetna merger.

The AMA continues working with state medical associations and national medical specialty societies to identify other opportunities to further opposition to the CVS-Aetna merger, e.g., state attorneys general and insurance departments.

## April-June 2018

On **June 29**, the AMA files a comprehensive statement (PDF), along with an exhibit containing expert reports from Drs. Burns, Scheffler, Sood and Starc, with the CA DOI describing in detail why the AMA opposes the merger and urges the CA DOI to recommend that the DOJ challenge the merger. The AMA also sends copies of the statement and exhibit to the National Association of Attorneys General.

On **June 22**, California Medical Association (CMA) files a statement (PDF) with the CA DOI in which CMA announces that it opposes the CVS-Aetna merger.

Working closely with the California Medical Association (CMA), the AMA and CMA are able to secure a hearing—on **June 19**—before the California Department of Insurance (CA DOI) on the CVS-Aetna merger. During the hearing California Insurance Commissioner David Jones, the AMA and a number of experts testify about the CVS-Aetna merger.

- Barbara McAneny, MD, AMA president, testifies (PDF) that after very careful consideration over the past months, the AMA now opposes the merger and urges the CA DOI and Commissioner Jones to recommend to the DOJ that the DOJ oppose the merger.
- Dr. Lawton Burns testifies that the benefits of the proposed CVS-Aetna merger are speculative, the benefits of vertical integration are limited, and retail clinics have significant shortcomings.

- Dr. Richard Scheffler testifies about the potential anticompetitive effects that the merger would have in the PDP market in California and across the country.
- Dr. Neeraj Sood testifies about the merger's potential anticompetitive effects in the insurance, pharmacy and PBM markets.
- Testifying on behalf of CMA, Long Do, JD, states that the CMA has serious concerns about the proposed CVS-Aetna merger. (However, in its subsequent June 22 filing with the CA DOI, CMA changes its position to outright opposition to the proposed merger.)
- Thomas "Tim" Greaney testifies about the analysis that should be applied to vertical mergers and the competitive concerns that the CVS-Aetna merger raises.
- Dr. Diana Moss explains why the AAI opposes the CVS-Aetna merger.
- Representatives from Consumers Union, Health Access California, and Consumer Watchdog testify as do representatives of CVS and Aetna.

Throughout **May** and into **June**, the AMA begins to receive reports from Drs. Scheffler, Sood, Starc and Burns. In these reports, the AMA's experts conclude that the CVS-Aetna merger is likely to substantially lessen competition in PBM services, health insurance, retail pharmacy, PDP and specialty pharmacy.

In **May**, based on the evolution of the work with its national experts, the AMA files a statement with the California Department of Managed Health Care (DMHC) (PDF), asking the DMHC to closely scrutinize the CVS-Aetna merger in PBM services, health insurance markets, retail pharmacy markets, PDP, and specialty pharmacy.

The AMA continues throughout **April, May** and **June** to analyze the CVS-Aetna merger.

## **March 2018**

In March, the AMA hires four nationally recognized antitrust experts to help evaluate the proposed CVS-Aetna merger and begins building an evidence base needed to help the AMA evaluate its position on the merger. These experts are Dr. Lawton Burns, Dr. Richard Scheffler, Dr. Neeraj Sood and Dr. Amanda Starc.

## **February 2018**

On Feb. 28, 2018, the AMA submits a statement to the House Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law in anticipation of a hearing entitled "Competition in the Pharmaceutical Supply Chain: The Proposed Merger of CVS Health and Aetna."

In this document, the AMA states that the CVS-Aetna merger has the potential to worsen competition in the following four markets: PDP; PBM services; local health insurance; and many local retail

pharmacy markets.

The AMA also forms and conducts the first of an ongoing series of calls with an AMA-state and specialty society coalition established to coordinate CVS-Aetna and advocacy efforts.

## **December 2017**

The AMA begins its comprehensive analysis of the proposed CVS-Aetna merger shortly after CVS-Aetna made their announcement.

For more information on AMA health insurance merger advocacy, please visit the Advocacy Resource Center, or contact our staff members Wes Cleveland, JD at [wes.cleveland@ama-assn.org](mailto:wes.cleveland@ama-assn.org) or (312) 464-4503 and Henry Allen, JD at [henry.allen@ama-assn.org](mailto:henry.allen@ama-assn.org) or (312) 464-4271.