AET/CVS and ERSX/CI: Judge Leon's Decision in TWX/T May Help Healthcare Deals

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Event Driven Takeaways

- Antitrust observers said they see Judge Richard Leon's decision in the Time Warner/AT&T case as helping Aetna/CVS and Express Scripts/Cigna clear regulatory hurdles.
- However, a person familiar with the DOJ's process countered this view, saying that Judge Leon's decision will not affect the DOJ's enforcement decisions in other mergers. It also will not impact the agencies' preference for structural remedies, the person noted.

Judge Richard Leon's decision in the Time Warner/AT&T case clearly helps the Aetna/CVS and Express Scripts/Cigna deals even though there exist differences between media and healthcare industries, according to antitrust specialists.

"The inputs may be different but the analysis is the same," said Matthew Cantor, partner in the law firm of Constantine Cannon. The AT&T ruling will have "certainly some, if not a lot" of effect on the DOJ's future antitrust analysis, he added.

However, a person familiar with the DOJ's process countered this view, saying that Judge Leon's decision approving the Time Warner merger does not affect the DOJ's preferences for structural remedies over behavioral ones and that the DOJ will continue to enforce structural remedies in such deals. The DOJ does not believe that the decision will affect its decision to bring enforcement actions in other vertical merger cases, the person added.

Both antitrust observers and sources with knowledge of the DOJ's process point out that Judge Leon's ruling was on a media deal, which may have less serious implications compared to a healthcare deal. Antitrust enforcers and the courts could scrutinize healthcare mergers, like Aetna/CVS and Express Scripts/Cigna, with extra care as the tie-ups will directly impact consumers' healthcare access and outcomes, sources said.

Harry First, a New York University law professor specializing in antitrust, agreed the DOJ is likely to continue fighting vertical deals. DOJ antitrust head Makan Delrahim "charged into this and I think he wants to make a mark," First said. "I expect him to say, 'I thought we had a good case, and we still believe that vertical mergers are a problem.'" First added: "I don't see this as a backdown administration."

But even if the DOJ will continue to bring vertical cases, that does not mean Aetna/CVS and Express Scripts/Cigna are prime candidates for a court challenge. Barak Richman, a professor at Duke Law School, commented that the "purported efficiencies from insurer-PBM vertical integration are more compelling than the purported efficiencies from AT&T-Time Warner."

The conventional wisdom, Richman noted, is that vertical deals will now be tougher for the antitrust agencies to challenge. As long as the horizontal overlaps in the insurer-PBM deals are resolved through divestitures, those transactions are now "more likely to gain approval" post-AT&T, he said.

Also noteworthy is that Judge Leon allowed Time Warner/AT&T to proceed despite the deal's status as a mega-merger between two large companies. "While the AT&T/Time Warner decision would not be controlling, it does provide further evidence that such mega-mergers may be difficult to block even in industries where we are seeing significant consolidation such as healthcare," said Patrick Souter, of counsel at Gray, Reed & McGraw.

Event Driven has learned that both parties in the healthcare mergers are subject to timing agreements with the DOJ that are set to expire at the end of August.

Event Driven's past coverage of Aetna/CVS can be found **HERE**; previous coverage of Express

Scripts/Cigna can be found **HERE**.

--Kathryn Haake and Ryan Lynch
