

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	.	
et al.,	.	
	.	CA No. 16-1493 (JDB)
Plaintiffs,	.	
	.	
v.	.	
	.	
ANTHEM, INC., et al.,	.	
	.	
Defendants.	.	
.....
	.	
UNITED STATES OF AMERICA,	.	
et al.,	.	CA No. 16-1494 (JDB)
	.	
Plaintiffs,	.	
	.	
v.	.	
	.	
AETNA, INC., et al.,	.	Washington, D.C.
	.	Thursday, August 4, 2016
Defendants.	.	10:06 a.m.
.....	.	

TRANSCRIPT OF STATUS HEARING
BEFORE THE HONORABLE JOHN D. BATES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For Plaintiffs

United States:	JON B. JACOBS, ESQ. SCOTT I. FITZGERALD, ESQ. CRAIG. W. CONRATH, ESQ. RYAN M. KANTOR, ESQ.
State of California:	NATALIE S. MANZO, ESQ.
State of Colorado:	JENNIFER HUNT, ESQ.
State of Connecticut:	RACHEL O. DAVIS, ESQ.
State of Delaware:	MICHAEL A. UNDORE, ESQ.

District of Columbia: CATHERINE A. JACKSON, ESQ.
State of Florida: LIZABETH A. BRADY, ESQ.
State of Georgia: DANIEL WALSH, ESQ.
State of Illinois: ROBERT W. PRATT, ESQ.
State of Iowa: LAYNE M. LINDEBAK, ESQ.
State of Maine: CHRISTINA M. MOYLAN, ESQ.
State of Maryland: JOHN TENNIS, ESQ.
State of New Hampshire: JENNIFER L. FOLEY, ESQ.
State of New York: IRINA C. RODRIGUEZ, ESQ.
State of Ohio: THOMAS ANGER, ESQ.
Cmlth. of Pennsylvania: AARON SCHWARTZ, ESQ.
State of Tennessee: VICTOR J. DOMEN, JR., ESQ.
Cmlth. of Virginia: TYLER T. HENRY, ESQ.

For Defendants

AETNA, INC.: JOHN M. MAJORAS, ESQ.
PAULA W. RENDER, ESQ.
CHRISTOPHER N. THATCH, ESQ.
ANTHEM, INC.: CHRISTOPHER M. CURRAN, ESQ.
J. MARK GIDLEY, ESQ.
CIGNA CORP.: CHARLES F. RULE, ESQ.
ANDREW J. FORMAN, ESQ.
DANIEL J. HOWLEY, ESQ.
HUMANA, INC.: KENT A. GARDINER, ESQ.
SHARI ROSS LAHLOU, ESQ.
Court Reporter: BRYAN A. WAYNE, RPR, CRR
U.S. Courthouse, Room 4704-A
333 Constitution Avenue, NW
Washington, DC 20001
(202) 354-3186

P R O C E E D I N G S

1
2 THE DEPUTY CLERK: Your Honor, calling civil action
3 No. 16-1493, the United States of America et al. v. Anthem, Inc.
4 and Cigna Corporation; and civil action No. 16-1494, United
5 States of America et al. v. Aetna, Incorporated and Humana, Inc.

6 Will counsel for the government in 1493 please rise and
7 identify you and all your colleagues for the proceedings this
8 morning.

9 MR. JACOBS: Good morning, Your Honor.

10 Jon Jacobs for plaintiff United States, and with me is my
11 colleague, Scott Fitzgerald.

12 THE COURT: Good morning.

13 THE DEPUTY CLERK: Would counsel for defendant Anthem
14 identify yourself for the record and any and all your colleagues
15 either here in court or on the telephone.

16 MR. CURRAN: Good morning, Judge Bates.

17 Christopher Curran for White & Case representing Anthem.
18 I'm accompanied by one of my law firm partners, Mr. Mark Gidley,
19 and we are also accompanied by the general counsel of Anthem,
20 Mr. Thomas Zielinski.

21 THE COURT: Good morning to you.

22 THE DEPUTY CLERK: Counsel for Cigna, please.

23 MR. RULE: Good morning, Your Honor. Charles Rule on
24 behalf of Cigna. With me today are Dan Howley and Andrew
25 Forman.

1 THE COURT: Good morning to you.

2 THE DEPUTY CLERK: Representing the states in that
3 case, would someone from the State of California, if you're in
4 the courtroom, identify yourself and your colleagues on the
5 phone.

6 MS. MANZO: Natalie Manzo for the State of California.
7 On the phone we have Paula Lauren Gibson and Patricia Nagler.

8 THE DEPUTY CLERK: State of Connecticut?

9 MS. DAVIS: Rachel Davis, Your Honor. We do not have
10 anyone else on the phone.

11 THE DEPUTY CLERK: Counsel for the District of
12 Columbia.

13 MS. JACKSON: Catherine Jackson for the District of
14 Columbia. We have no one on the phone.

15 THE DEPUTY CLERK: For the State of Georgia.

16 MR. WALSH: Daniel Walsh on behalf of the State of
17 Georgia.

18 THE DEPUTY CLERK: Counsel for the State of Iowa.

19 MR. LINDEBAK: This is Layne Lindebak from the Iowa
20 Attorney General's office.

21 THE DEPUTY CLERK: From the State of Maine.

22 MS. MOYLAN: Christina Moylan for the State of Maine.

23 THE DEPUTY CLERK: From the State of Maryland, please.

24 MR. TENNIS: This is John Tennis for the Maryland
25 Attorney General's office.

1 THE DEPUTY CLERK: Thank you. For the State of New
2 Hampshire.

3 MS. FOLEY: Jennifer Foley from the New Hampshire
4 Department of Justice.

5 THE DEPUTY CLERK: Counsel for the State of New York,
6 please.

7 MS. HOFFMANN: Elinor Hoffmann for the State of New
8 York.

9 THE DEPUTY CLERK: Counsel for the Commonwealth of
10 Virginia.

11 MR. HENRY: Tyler Henry on behalf of the Commonwealth
12 of Virginia.

13 THE DEPUTY CLERK: Counsel for the State of Colorado.

14 MS. HUNT: Jennifer Hunt for the State of Colorado.

15 THE DEPUTY CLERK: Thank you. One of the attorneys
16 for the State of Tennessee, please.

17 MR. DOMEN: Victor Domen for the State of Tennessee.

18 THE DEPUTY CLERK: And your colleagues, please?

19 MR. DOMEN: Cynthia Kinser as well.

20 THE DEPUTY CLERK: Thank you very much. Counsel for
21 the -- this is in case 16-1494. Counsel for the government,
22 please.

23 MR. CONRATH: Good morning, Your Honor. Craig Conrath
24 for the United States. With me on this case is Ryan Kantor, and
25 back there, Mr. Eric Welch.

1 THE COURT: Good morning to all of you.

2 THE DEPUTY CLERK: Counsel for the State of Delaware,
3 please.

4 MR. UNDORF: Michael Undorf for the State of Delaware.

5 THE DEPUTY CLERK: Thank you. Ms. Jackson from the
6 District again. Thank you.

7 THE COURT: We don't need to repeat those who have
8 already been identified.

9 THE DEPUTY CLERK: Thank you. Can I just get counsel
10 for the defendants, Aetna and Humana, please, to identify
11 themselves.

12 MR. MAJORAS: Good morning, Your Honor. John Majoras
13 from Jones Day on behalf of Aetna. With me at counsel table are
14 my colleagues, Paula Render and Christopher Thatch.

15 THE COURT: Good morning.

16 MR. GARDINER: Good morning, Your Honor. For Humana,
17 Kent Gardiner from Crowell & Moring. With me is Shari Lahlou
18 from Crowell & Moring as well, and also in the courtroom is
19 Elysia Solomon, associate general counsel for Humana.

20 THE COURT: Good morning to you.

21 THE DEPUTY CLERK: Just as a small housekeeping
22 measure, anybody on the phone, it would be extremely helpful for
23 the court reporter if, when you speak, you would identify
24 yourself and the party you represent before talking. Thank you
25 very much.

1 THE COURT: Thank you. We'll think of a shorter way
2 to identify everybody in future proceedings, but it's good to go
3 through all who are here today; and there are many here in the
4 courtroom as well, and apparently in an overflow courtroom.

5 We're going to try to get a little bit of a handle on
6 scheduling and what's going to take place here, and I thought
7 that what I would do is give you five minutes or so just to say
8 anything further beyond the written filings that I've received
9 with respect to your assessment of -- I'll just call it
10 scheduling in this matter.

11 I'll hear from you in the order of the cases, meaning I'll
12 hear first from the Department of Justice, then from Anthem and
13 Cigna, but presumably Cigna won't have much to add since you
14 didn't add much in writing, and the same thing with respect to
15 Aetna and Humana.

16 Don't repeat everything that you've said. I'll have a few
17 questions for each of you, but I do think I need to give you a
18 couple of minutes just to give me your sense of how you think
19 these matters should proceed, whether together or apart. So
20 let's hear first from the Department of Justice with respect to
21 that question.

22 MR. JACOBS: Thank you, Your Honor, and good morning.
23 Jon Jacobs for the United States in the Anthem-Cigna case. As
24 we made clear, we will be ready for trial in either case by
25 February 17, which is just over six months from now. The

1 parties largely agree that these cases should be coordinated
2 during pretrial discovery but tried separately and that these
3 are appropriately related cases.

4 THE COURT: What do you mean by "appropriately
5 related"? You mean under our local rules?

6 MR. JACOBS: Yes.

7 THE COURT: Why?

8 MR. JACOBS: Because there are common issues of fact.

9 THE COURT: There are also a lot of issues that are
10 not common, aren't there?

11 MR. JACOBS: That is true.

12 THE COURT: Which will predominate, those that are
13 common or those that are not common?

14 MR. JACOBS: Because most of the issues are not
15 common, we recommend separate trials. But we do recommend
16 coordination during pretrial discovery. Plaintiffs in both
17 cases, as well as Aetna and Humana, and, Your Honor, even Anthem
18 and Cigna -- I don't believe we mentioned in our papers that
19 when we received a request for our investigation file from both
20 Anthem and Cigna, they not only asked us for the documents
21 related to their merger, but for documents related to the other
22 merger as well.

23 THE COURT: That was mentioned in someone's papers.

24 MR. JACOBS: And that is appropriate, Your Honor,
25 because we are likely to use material received from both Aetna

1 and Humana in our case challenging the Anthem-Cigna case.

2 So they're appropriately related cases I say because there
3 are common issues of fact. We have the one common relevant
4 product market. We will have common witnesses. We have common
5 third-party competitors in several of those markets that are
6 common, and there will be common discovery issues.

7 THE COURT: Let me ask you a generalized question.
8 Has the Antitrust Division ever had a situation -- maybe we can
9 go back -- maybe the Cardinal Health case is one I can think of,
10 but have you had many situations where you've had significant
11 mergers in an industry that have both been challenged and you're
12 going to try two cases either together or apart but basically at
13 the same time, one of which -- the outcome of one of which could
14 affect the outcome of the other? Have you ever had that before?

15 MR. JACOBS: I'm not aware in the Antitrust Division.
16 The Cardinal Health case was brought by the Federal Trade
17 Commission in the 1990s. We have had cases somewhat similar to
18 this in non-merger civil cases where we challenge a company's
19 conduct under Section 1 or Section 2 of the Sherman Act.

20 We have private plaintiffs who follow suit, alleging that
21 they're entitled to damages, and we coordinate during discovery
22 to minimize the burden on third parties; but the trials are
23 separate because there are different issues.

24 THE COURT: So what do you intend to do in this case?
25 In merger B, let's say, are you going to present through your

1 experts evidence that the market will look one way if merger A
2 occurs and another way if merger A doesn't occur? Is that what
3 we're going to have? We're going to have sort of alternative
4 presentations with respect to the concentration in the market?

5 MR. JACOBS: Not really, because again, the one common
6 product market is the sale of individual policies on the public
7 exchanges. The common issues to be decided there by the Court
8 is, is that a relevant product market. Whichever trial goes
9 first will determine that question, and the second trial will
10 follow that rule.

11 THE COURT: Maybe, maybe not. What if it's a different
12 judge?

13 MR. JACOBS: Then if it's a different judge, then that
14 different judge can decide for him or herself. But that's one
15 reason why we related them, because there is that common issue.
16 As I said, there is also common competitors in the geographic
17 markets for individual commercial -- United and Kaiser are both
18 competitors.

19 THE COURT: Do we expect to hear from them in these
20 cases?

21 MR. JACOBS: We do, Your Honor, at least from United.
22 I don't expect as I stand here today that they will be witnesses
23 in our case, but they certainly will receive third-party
24 discovery requests from not only the Anthem-Cigna case but also
25 Aetna-Humana.

1 Because we do think it's appropriate, as Anthem and Cigna
2 does, and I believe Aetna and Humana does, that all parties to
3 both cases get everyone's documents, we have to negotiate a
4 protective order that has identical protections in each case.

5 Just to give you an example how much longer that has taken
6 just in the time since we filed the complaints on July 21st.
7 Less than a week after filing the cases, the United States sent
8 a proposed protective order to the Aetna-Humana defendants and
9 the Anthem-Cigna defendants. We're not only negotiating with
10 one set of defendants, but two.

11 But it's been a little more difficult than that. We got a
12 common response from Aetna-Humana saying here are some suggested
13 edits. We got edits from Anthem. And independently we got it
14 from Cigna, Anthem and Cigna not working well --

15 THE COURT: I appreciate the complexity of that, but
16 there are a lot of cases that have multiple parties. The fact
17 that multiple parties have to work on a protective order is not
18 unique to this setting. I don't know that that makes this a
19 particularly complex setting. You've basically got two other
20 parties -- they're four companies but really two of them -- two
21 pairs of companies. And it's not unusual to have a piece of
22 civil litigation with that many parties involved.

23 MR. JACOBS: On the -- I'll call it primary question
24 or a primary question to be decided, when should the trial date
25 or dates be, we included in our brief a table of we think the

1 most comparable cases, not FTC cases seeking a preliminary
2 injunction, which this court knows is under a different
3 standard, but cases brought by the United States, a full trial
4 on the merits.

5 THE COURT: Most comparable, although the ones in
6 D.C., I think four of the eight are in D.C., and they're the
7 ones with the shorter schedules. There's some in other
8 jurisdictions that have much longer schedules. But the schedule
9 you propose is longer than any of the other schedules in D.C. of
10 cases that you've brought.

11 MR. JACOBS: And there's a reason for that. But
12 before I get to that, I was going to say that in none of those
13 cases am I aware was there a related case where we were
14 working -- whether it's common in other civil cases or not, I'm
15 not aware of any of those cases being situations where we were
16 working to negotiate a common protective order. We were working
17 to negotiate an identical or similar enough case management
18 order.

19 THE COURT: Believe me, I'm not of the view that these
20 are simple cases or that these are not complex in many regards.
21 But I don't want to give the impression that just because there
22 are multiple parties, that's a unique situation. It's not
23 unique.

24 So the schedule that you proposed would lead to a
25 trial-ready date of February 17, that date being the date for a

1 pretrial conference or final pretrial conference, and therefore
2 trial thereafter consecutively, if you will.

3 Do you agree with the estimates provided by the defendants
4 in the two cases of three weeks of trial for the Anthem case --
5 Anthem-Cigna case -- and two weeks of trial for the Aetna-Humana
6 case?

7 MR. JACOBS: We don't. I can speak to the
8 Anthem-Cigna case which should be longer. We estimate
9 currently, with all of the issues that appear to be in dispute
10 given Anthem's answer and our initial discussions with them,
11 that we would need at least three weeks to put on our
12 case-in-chief, and we estimate another at least half a week for
13 our rebuttal case, which would primarily go to addressing the
14 defendants' efficiencies defense.

15 With that scope of -- and that includes an estimate of how
16 long the defendants would cross-examine our witnesses. With
17 that estimate, Anthem's lawyers can give you an estimate of what
18 their defense case is likely to look like, and I think I'll
19 leave it to Mr. Conrath to estimate the length of the
20 government's case in the Aetna-Humana case.

21 THE COURT: Will -- I'll save that question. Is there
22 a possibility here of expediting the trial at least in each case
23 by having some testimony in writing rather than all through live
24 witnesses? We've done that in antitrust and some other cases in
25 other settings. Why not here?

1 MR. JACOBS: That is certainly something that we would
2 be open to, Your Honor, if you would find that helpful, and that
3 would help to expedite matters. We are certainly agreeable to
4 considering that.

5 THE COURT: With respect to coordination of pretrial
6 proceedings and discovery, what about a special master to do
7 that?

8 MR. JACOBS: We would not oppose Aetna's suggestion
9 for the appointment of a special master. We would note that in
10 the division's experience, often parties' behavior is better if
11 they are in front of the judge who's ruling on the merits when
12 addressing discovery disputes, but if this --

13 THE COURT: But you, of course, would take care of
14 that from your side. Right?

15 MR. JACOBS: Right. Of course. That has been our
16 experience, unfortunately. But if the Court finds that to be an
17 efficient way to coordinate and make sure that common third
18 parties are not overly burdened and the common discovery issues
19 that arise in these two cases are addressed, we would not oppose
20 that.

21 THE COURT: And I don't think that we would have a
22 magistrate judge available to do that given our circumstances
23 here at the moment with our magistrate judges; so there would
24 probably have to be a special master appointed who would then be
25 paid by the parties. Any objection to that by the Department of

1 Justice?

2 MR. JACOBS: No objection.

3 THE COURT: If we -- I know I'm speaking as if you're
4 handling both cases, and to the extent that has to be -- you
5 need the aid of your colleagues, please say so. But if you look
6 at your February 17th date, which really would be a date
7 sometime after February 17, perhaps shortly after the 17th of
8 February. Then for the second trial, a date probably a month
9 later at least, by your estimate, maybe two months later, you're
10 talking about more than seven months between filing and trial
11 for the first trial, and probably more like nine months between
12 filing and trial for the second case.

13 That's significantly longer than any other merger case the
14 Department's filed has taken to get to trial or be scheduled for
15 trial in this district. Isn't that too conservative? Don't we
16 need to push this along a little faster than that?

17 MR. JACOBS: Well, a couple of points on that,
18 Your Honor. The average civil case in general takes
19 approximately two years to get to trial.

20 THE COURT: I know, but the Clayton Act says something
21 about that.

22 MR. JACOBS: But each of these cases is much more
23 complex than that, and I would say much more complex than the
24 other civil cases we listed in our brief in terms of the time
25 from the filing of the complaint to trial. These are

1 unprecedented mergers in this industry, both very large. They
2 raise a number of issues. So we understand that that would take
3 a while.

4 We had developed our schedule from the ground up, thinking
5 what do we need to develop an adequate record so that you have a
6 sufficient record on which you can make a decision. Four months
7 of fact discovery does not strike us as too much. One month of
8 expert discovery and having a gap in between so the experts are
9 able to absorb the material generated in fact discovery, and
10 then approximately a month, I think a little less in our
11 proposal, for pretrial matters.

12 The shorter cases that you cited from this district, I
13 would just like to say --

14 THE COURT: You mean from your list?

15 MR. JACOBS: Yes, from our list. There are
16 significant differences. I mean, the American-US Airways
17 merger was very large, very significant, nationwide effects, but
18 American was in bankruptcy and cited that fact in its papers for
19 moving up the trial date.

20 It said this deal was the "foundation of our plan to exit
21 bankruptcy." As the Court knows, when there's a bankruptcy
22 situation, our time deadlines during the investigation are
23 shortened, and it's a very different situation, as was the
24 SunGard case.

25 In H&R Block, although it was technically a trial on the

1 merits, really should be considered a preliminary injunction
2 hearing because the court converted it from a PI to a trial on
3 the merits just before opening statements, and there was one
4 product at issue in that case, a tax software.

5 THE COURT: I think conversion from PI to trial on the
6 merits, whatever the uniqueness of that case, is also reflective
7 of the fact that there often isn't that much difference between
8 trying a case for preliminary injunction in an antitrust setting
9 and trying it on the merits.

10 MR. JACOBS: So that's H&R Block, what we consider to
11 be a relatively, compared to these cases, very straightforward
12 relevant product market, a particular type of tax software, and
13 the relevant geographic market was stipulated, wasn't an issue.

14 Electrolux, that actually was a case where the government
15 agreed with the schedule, in part because it was a very
16 different case than this one. It had to do with ranges and oven
17 tops and so forth.

18 THE COURT: There always are reasons that contribute
19 to the expedited schedule, whether it be the government's
20 agreement or something else. Bankruptcy, for example. Here,
21 the primary reason that is pushing these cases, from the
22 defendants' perspective, on a faster track, is their contractual
23 agreements with respect to the mergers. Should I ignore that?

24 MR. JACOBS: Well, Your Honor, we think you should
25 ignore that for purposes of scheduling. What you should do is

1 take a look at these cases and ask what time is necessary to
2 build the factual record that is necessary, and not use a
3 deadline that is under the parties' control themselves.

4 They set this date knowing -- in the Anthem-Cigna case --
5 that there were antitrust risks here, and that they had to
6 obtain approval from a number, they say 26 state insurance
7 commissions.

8 They knew that when they drafted the contract. Now they
9 are using their schedule, Anthem's schedule, is not really based
10 on a ground-up approach, how much time do we need here, it's
11 really coming from the other direction saying, well, we have
12 this deadline, April 30.

13 THE COURT: I think they're really using the deadline
14 for the court proceeding more of January 31, leaving the April
15 30 additional four months to take care of the state insurance.

16 MR. JACOBS: The April 30 date is about nine months
17 out, and they're saying, you know, we really need this court to
18 hold a trial, make a decision, write a written opinion, before
19 the end of this calendar year, primarily because they're not
20 getting along with Cigna.

21 THE COURT: But they also say, they announced these
22 mergers -- each of them did, slightly different dates -- but a
23 year ago. And the Department of Justice took a year to
24 investigate.

25 MR. JACOBS: Well, we did. We had a year-long

1 investigation in terms of --

2 THE COURT: Is that unusually long, or is that
3 typical?

4 MR. JACOBS: It is not unusually long for a case of
5 this magnitude. And I will say although -- a couple things on
6 the investigation. Although we opened the investigation shortly
7 after the mergers were announced, about a year before the
8 complaints were filed, we only got their documents in early
9 March. So we only had their documents for about four months
10 before the complaint was filed, and we continued getting data
11 after that. That's the first point.

12 The second point is, like we always do, we investigated a
13 broader range of product markets that we ended up not suing on.
14 Anthem and Cigna compete on vision insurance; they compete on
15 dental insurance. They compete in many more than the 35 local
16 markets we ended up alleging in the complaint.

17 So we did what we were supposed to do during the
18 investigation, determined whether to bring an enforcement
19 action, and if so, the proper scope of that action. And that is
20 why the investigation took as long as it did.

21 THE COURT: All right. What's your reaction -- well,
22 I'll save this for later too. Let me hear from --

23 MR. JACOBS: Thank you, Your Honor.

24 THE COURT: First I guess maybe I should hear from
25 your colleague. Is it Mr. Conrath?

1 MR. CONRATH: Yes.

2 Craig Conrath, Your Honor, in the Aetna-Humana matter. I
3 won't repeat either what's in our papers or what Mr. Jacobs has
4 already explained, but let me add a couple of additional
5 thoughts.

6 One is that a very, very accelerated schedule in a merger
7 case uniquely disadvantages the plaintiffs. We are law
8 enforcement plaintiffs in these merger cases, which means that a
9 very substantial amount of the information that we need to prove
10 our case to make available to you to decide the case is in the
11 hands of the defendants.

12 THE COURT: So give me an example of the -- just
13 generically -- of the kind of additional information that you
14 think you need to acquire during discovery that you haven't
15 already acquired during the investigation.

16 MR. CONRATH: Okay, sure. There's a fair amount of
17 additional information. We have to make sure all the evidence
18 that we have is in shape, ready to be presented at a full trial
19 on the merits. But a few examples of some of the kinds of
20 things that we need is for the Medicare -- in the Medicare
21 Advantage markets, recent competitive actions by Aetna and
22 Humana. Aetna and Humana and third-party competitors have made
23 their submissions to the department of HHS in June for their 27
24 plans that will be competing.

25 We need the planning documents, the decisions, and the

1 analysis that they used to prepare those to submit those plans
2 because that's where they sit down and say, okay, what do we
3 think the competition is going to do? Who is the competition
4 here? What benefits do we need to offer? What price do we have
5 to offer? Highly relevant to the kinds of questions that the
6 Court will be called upon to decide, and in order to present the
7 Court with up-to-date information, we need to get that.

8 Competitive plans of Aetna and Humana in the Medicare
9 Advantage market. These two are two of the fastest growing
10 Medicare Advantage companies. They have plans to move into new
11 territories. One of the allegations in the complaint is their
12 growth will put them more and more in competition with each
13 other. Those plans, the latest information that we have is from
14 end of September of last year; so we would seek more current
15 information about their plans to grow and expand and compete
16 with each other.

17 In individual commercial markets sold on the public
18 exchanges, there are recent competitive actions by Aetna and
19 Humana and third-party competitors in those markets. Each of
20 them have recently submitted their 2017 plans. And in the same
21 vein, the strategic decisions they made, who are we competing
22 with, what prices should we offer, would be highly relevant to
23 the Court's analysis.

24 There have been some recent marketplace changes in the
25 individual commercial exchange markets as some companies are

1 pulling back, which might make some of these markets more
2 concentrated than even they were based on the information we had
3 before.

4 On issues that go more to defenses or claims we expect to
5 hear from the other side that we need to prepare for, we expect
6 that they are -- based on the arguments, we had a lot of back
7 and forth telling them what our view was during the investigation,
8 hearing from them what their view was, but we expect them to
9 argue about the effect of regulation, that maybe HHS regulations
10 would prevent any anticompetitive harm from occurring.

11 And we would want to seek discovery from Aetna and Humana
12 custodians, who are the ones actually responsible for
13 negotiating regulatory compliance with that part of HHS, so that
14 we can evaluate whether it's really a binding constraint.

15 There's likely to be, we understand, a substantial claim of
16 efficiencies from this merger. This is something that we tried
17 to look at during the course of the investigation. They put out
18 a big proposal -- in fact, as the evidence mounted for the
19 anticompetitive effect of the merger, the amount of efficiencies
20 they claimed also grew. And we investigated that some during
21 the investigation.

22 But a big part of what we got back was, well, we're working
23 on it. And we asked, well, where are the facts? What's the
24 backup? How are you going to achieve these? The answer is
25 substantial as well. That's underway. They hired six

1 consulting firms to do this analysis. We'd have to take
2 discovery from them.

3 THE COURT: Let me interject by asking, is the -- sort
4 of on the remedial end, is the information that's in a footnote
5 in Aetna-Humana's filing about the sale of certain Medicare
6 Advantage assets to another company, is that something new, or
7 is that something that the Department of Justice has already
8 taken into account?

9 MR. CONRATH: That is the very next topic I was going
10 to address because it's very relevant. So they floated -- at
11 the very end of the investigation, they floated the generic idea
12 of what if we divest some contracts. So I should be clear here.
13 They're not talking about let's take Humana's Medicare Advantage
14 division and sell it as an ongoing entity to someone else.

15 What they're saying is we'll take the Aetna contracts with
16 individuals in a particular county, and we'll send them a notice
17 that says you signed up last open season for a contract to get
18 your Medicare Advantage product from Aetna, but due to a federal
19 court order, now it's going to be provided by a company called
20 Molina, and you're stuck with that. And they won't write this
21 in the notice, I presume, but the fact is they're stuck with
22 that until the next open season.

23 There's a very significant -- if you can imagine, that
24 means there's a very significant question whether that's a
25 sustainable ongoing plan. So we had a little bit of discovery

1 at the very end of the investigation.

2 THE COURT: That needs to be explored more, you
3 believe?

4 MR. CONRATH: This surely needs to be explored more if
5 the plan is to present that at trial. Now we understand they
6 have a contract; we haven't seen it. But will that firm be a
7 replacement for either Aetna's or Humana's competition is a very
8 serious question.

9 THE COURT: Speaking for the Department of Justice as
10 a whole, is one case simpler than the other?

11 MR. CONRATH: So there are fewer product markets in
12 the Aetna case.

13 THE COURT: Two versus four?

14 MR. CONRATH: That's right. There are more geographic
15 markets. It looks pretty clear that Aetna is going to present a
16 proposed remedy and inject that into the trial. I think that
17 hasn't been ruled out in the other case, but I don't think it's
18 really been proposed.

19 We know that a lot of things happen, cases widen and narrow
20 during the course of pretrial; so that's one of the reasons we
21 suggest the parallel ready dates. But if you look at the two of
22 them today, based on where we are today, probably the
23 Aetna-Humana case is simpler than the other.

24 THE COURT: And how long for trial?

25 MR. CONRATH: So I estimate our case -- I should say,

1 we approached the defendants shortly after the complaint was
2 filed and said, you know, what are you planning to contest here?
3 You haven't answered yet, but if you can tell us what's going to
4 be at issue, for example, remedy, efficiency, product market.
5 As far as we know, everything's on the table to be litigated. I
6 think it's probably, to put on our case, I would estimate about
7 two weeks.

8 THE COURT: All right. What else do you want to add?

9 MR. CONRATH: I think that's it, Your Honor. Let me
10 leave you with this thought: We know the Court wants a full,
11 robust, and reliable record to make this decision, and we built
12 our schedule from the ground up to give the time to be able to
13 put that in front of you. Thank you.

14 THE COURT: All right. Thank you.

15 All right. Mr. Curran.

16 MR. CURRAN: Judge Bates, the Anthem case was assigned
17 to Your Honor as a result of the random assignment of cases in
18 the clerk's office.

19 THE COURT: Oh, let me clear up something by asking
20 one of the Department of Justice attorneys this question. Was
21 there some reason that one case got 1493 and the other case got
22 1494, or is it just that someone came in to file the two cases
23 and happened to hand one to the clerk before the other?

24 MR. JACOBS: My understanding, Your Honor, is that the
25 Anthem case was filed first because we have more state

1 co-plaintiffs, and there was something about starting the case
2 on ECF that made it easier to do that.

3 THE COURT: Something from the clerk's office
4 perspective or something from...

5 MR. JACOBS: We did it from our office.

6 THE COURT: Okay.

7 MR. JACOBS: We didn't file the case in person.

8 THE COURT: All right.

9 MR. JACOBS: The exact reason for that, Your Honor,
10 I'll be honest, I'm not sure.

11 THE COURT: But there's no legal or other procedural
12 reason one case was filed before the other?

13 MR. JACOBS: That's right. There is not.

14 THE COURT: Just this technological reason.

15 MR. JACOBS: Yes.

16 THE COURT: Okay. Mr. Curran.

17 MR. CURRAN: Judge Bates, the fact of the matter is
18 the Anthem case was filed first.

19 THE COURT: And it has a lower number.

20 (Laughter)

21 MR. CURRAN: That's right. Assigned to Your Honor
22 randomly. The Aetna case was assigned to Your Honor solely
23 because the Department of Justice attorneys designated that case
24 as related to this one.

25 THE COURT: That too is true.

1 MR. CURRAN: I submit that that designation is not
2 supported by rule 40.5 of the local rules. We cited in our
3 submission to you three cases that I think support that point:
4 the Dale case, the Reno case, and the Keepseagle case.

5 All of those cases are -- in general they rely on the Tripp
6 case, which was an unusual case coming out of this court because
7 it was issued by a three-judge panel of the calendar committee
8 at the time. And that Tripp case, which is arguably the leading
9 case on what constitutes a related case in this district, says
10 that for a case to be related on the basis of common issues of
11 fact, it has to have a direct factual nexus to the core
12 allegations of the complaint. That's the conclusion in Tripp.

13 The submissions that Your Honor has gotten from the other
14 parties in this case refute any suggestion that that standard is
15 met here. First of all, even before the complaints were filed,
16 at the press conference that the Department of Justice senior
17 officials held, they affirmatively stated that the
18 investigations were separate and the cases are separate and that
19 they involve separate markets and separate products. And then
20 the complaints bear that out.

21 The Aetna brief to Your Honor is very interesting. On page
22 5, beginning on line 7, it contains a paragraph that with Your
23 Honor's indulgence I'd like to read to you. Or refer you to
24 specifically. Because there, Your Honor, I submit that Aetna
25 and Humana indicate that the cases are highly distinct from each

1 other --

2 THE COURT: Page 5?

3 MR. CURRAN: Yeah, page 5, beginning line 7.

4 THE COURT: Oh, line 7. I don't see a paragraph
5 beginning on line 7.

6 MR. CURRAN: Okay. "For present purposes, Aetna and
7 Humana merely observe that the two cases are highly distinct
8 from each other in a number of key respects. As noted above,
9 the two cases center on very different issues" --

10 THE COURT: Well, you don't disagree with that, do
11 you?

12 MR. CURRAN: No. In fact, I agree wholeheartedly.

13 THE COURT: So you both agree on that.

14 MR. CURRAN: So we both agree that different products,
15 different markets, and as Aetna and Humana say here, no common
16 witnesses.

17 THE COURT: The government seems to feel there will be
18 some common witnesses. Let's assume there will be some.

19 MR. CURRAN: It's still not enough. The fundamental
20 allegations are different, distinct, different product markets.
21 Under General Dynamics and its progeny, as Your Honor knows from
22 the Arch Coal case, the analysis in an antitrust case,
23 particularly a Clayton Section 7 case, focuses on the particular
24 markets alleged.

25 These two cases are so fundamentally distinct that there is

1 no basis for them to be conjoined or designated as related,
2 particularly given this court's historical effort to make random
3 assignment of cases a key part of the Court's --

4 THE COURT: So what makes the most sense to you, that
5 the two cases be before different judges but there be a special
6 master assigned, hired, who will coordinate the discovery and
7 pretrial proceedings with respect to both cases under the
8 supervision of the two judges, and then the trials will be set
9 based on the availability of counsel and the judge separately in
10 each case? Is that what makes the most sense to you?

11 MR. CURRAN: For the most part, yes. First of all, I
12 think you have to keep our case because it was randomly assigned
13 to you.

14 THE COURT: I hate to tell you something, but I'm
15 actually senior judge. I don't have to keep any case.

16 (Laughter)

17 I can send any case back.

18 MR. CURRAN: Yes.

19 THE COURT: But go ahead.

20 MR. CURRAN: I hope Your Honor keeps our case. But it
21 certainly -- it's the one that was randomly assigned to you.
22 That's indisputable. The other case, I think, under rule 40.5,
23 should be then sent to the calendar committee for reassignment.
24 Whether there's a common special master or not we're agnostic
25 to, but I question whether that's really necessary. Given the

1 fundamental differences in the cases, discovery is not going to
2 overlap significantly.

3 Now, Mr. Jacobs was pointing out that we asked for the
4 entire file of the investigation of the Aetna-Humana case.
5 Well, of course we did, because as Mr. Jacobs himself said, and
6 as their papers indicate, their investigation was sweeping into
7 all sorts of areas far beyond the scope of what they ultimately
8 alleged.

9 So of course we want access to their broader investigation
10 to the extent it relates to the commercial health insurance
11 business that's at issue in our case. So there's no
12 inconsistency there. In fact, it's perfectly consistent. And
13 I would assume that the Aetna folks would want access to our
14 entire investigation file because there might be something in
15 that broad investigation that's relevant to their case.

16 THE COURT: You're not portraying someone who's really
17 agnostic on it. It sounds like you don't think there should be
18 a common special master.

19 MR. CURRAN: But I don't want to rule it out, and of
20 course we would contribute. If Your Honor and perhaps the other
21 judge were to think that it's nonetheless wise to do a special
22 master, sure. I just don't see that as advancing the interests
23 of judicial economy.

24 So that's maybe enough about the related case point. Our
25 fundamental issue is speed.

1 THE COURT: But it's a speed that is determined at
2 least in part by you and your partner in the merger. You've set
3 those dates. And what -- other than the interests of Anthem and
4 Cigna with respect to the merger, what harm would there be if a
5 trial didn't take place until, instead of the October date that
6 you proposed, until January? What harm would there be?

7 MR. CURRAN: First of all, I think it would kill the
8 deal, but the harm --

9 THE COURT: It would kill the deal because of those
10 involved in the deal deciding that it should kill the deal.

11 MR. CURRAN: Well, not exactly. As Your Honor pointed
12 out earlier, this merger agreement was reached over a year ago.
13 Right? And that's when these dates were set. We're distinct in
14 that sense from the Aetna-Humana situation where they have
15 already extended, by agreement. We at Anthem want to acquire
16 Cigna, and we have a contract that gives us rights to make that
17 acquisition if we can overcome the regulatory hurdles.

18 It's apparent, as DOJ alleges in paragraph 14 of their
19 complaint, that there's now contentiousness between Anthem and
20 Cigna. And I think that's also apparent from the public record
21 where Anthem came out after the complaint with a press statement
22 saying that they were fully supportive of pushing forward and
23 will fight this and want to get the deal done, whereas Cigna
24 said first they were exploring their options and then they said
25 they will abide by their contractual obligations.

1 So we have a situation here where Anthem, the acquiror,
2 wants to do the deal, Cigna, at least its top management, is now
3 a suitor that's no longer interested in being pursued.

4 So under that scenario, I submit that our end date of April
5 30, which is all Anthem can extend to unilaterally, that's real
6 and hard and fixed.

7 THE COURT: And it also has 120 days, by your
8 estimate, for getting state insurance approvals. That looks
9 like a long time. And indeed, it looks to me as if you're
10 effectively saying, court -- I won't say "judge" meaning this
11 judge, but whatever judge -- court, you need to really hurry up.
12 You need to do it fast, fast, fast, fast, fast because we need
13 this buffer of four months to deal with the remaining state
14 insurance approvals that we have to get.

15 That's a little bit odd.

16 MR. CURRAN: But in a broader perspective, if the
17 merger agreement was assigned in July 2015 and picked this end
18 date of April 2017, in that perspective, it's pretty reasonable
19 that the parties thought they could get through a DOJ
20 investigation -- now, it turns out DOJ took a year to do the
21 investigation, notwithstanding the Hart-Scott-Rodino
22 contemplation of a couple of 30-day extensions. DOJ took a long
23 time. They got a lot of information. They should be
24 trial-ready.

25 THE COURT: Although you didn't finish producing their

1 information, although they said in March, Anthem finished
2 producing its information February 9.

3 MR. CURRAN: That's right. That's right. That's
4 finished. Anthem began producing right after the deal was
5 announced and right after the deal was disclosed to DOJ. It was
6 a rolling production. It's not like there was a dumping of
7 stuff in February of this year and then there was only six
8 months left. Even six months after substantial compliance is a
9 long time for DOJ to be conducting this investigation.

10 And then, for them, after making these tremendous demands
11 and requiring a heroic and expensive production by Anthem and
12 Cigna, for them in their submission to Your Honor to say that
13 the delay is the merging parties' delay? That's pretty beyond
14 the pale there. DOJ has taken a long time. The merging parties
15 do not want to be in this predicament. They do not want to be
16 in this rushed, cramped position. But it's a consequence of
17 factors beyond their control.

18 And in this regard, it's not that different from what we
19 see in the SunGard case, which Mr. Gidley and I tried, and
20 various other cases where this court's determination of the
21 Section 7 issue may still not allow the merger to take place
22 immediately. In that case, it was the bankruptcy court that
23 still had to approve things. Same in the US Air-American
24 situation. When this court set the trial -- set the expedition,
25 there was still a bankruptcy proceeding that had to approve.

1 And in the AT&T merger case, there was a simultaneous FCC
2 investigation. So sometimes there are other regulatory or court
3 proceedings that are separate barriers to closure.

4 THE COURT: I'm not questioning that the state
5 insurance approvals have to be obtained. I'm just wondering
6 whether the four months you've allotted in the schedule is
7 reasonable given all of the other factors that we have here.

8 MR. CURRAN: I anticipated some skepticism; so that's
9 exactly why we submitted so many declarations to Your Honor from
10 counsel that are experts in this field. So as Your Honor can
11 see, in the Donaldson declaration, we have the supervising
12 attorney, and then we have sub-declarations from various of the
13 states at issue.

14 There are various periods of time, some of them statutorily
15 dictated, for public hearings and otherwise. And that's why
16 we've laid it out in such detail to Your Honor. And I've seen
17 no rebuttal or suggestion that those estimates are incorrect or
18 exaggerated.

19 THE COURT: Other than the one I've just given. But
20 go ahead.

21 MR. CURRAN: Fair judicial skepticism is one thing,
22 but no counter-declaration, no assertion or anything else like
23 that. So we feel that we're in this pickle through no cause of
24 our own, a long DOJ investigation, a necessary state situation
25 on the far end. And by the way, Your Honor, the state -- maybe

1 this was clear from the Donaldson declaration, one of the key
2 maybe the key issue at the states is whether the proposed
3 acquisition will cause a substantial lessening of competition.
4 It's basically a paraphrase of Section 7 of the Clayton Act.

5 So we think that if Your Honor, or whoever the judge is,
6 were to conclude that there's no Section 7 violation, we think
7 that we would then move pretty effectively through the process.
8 But nonetheless, the time period is dictated by state
9 regulation. And those states, as indicated in these
10 declarations, various of the states have said they're suspending
11 their consideration until this court proceeding is --

12 THE COURT: Some states. Four states.

13 MR. CURRAN: Actually it's five overnight. New York
14 announced that they too were suspending. And as Mr. Donaldson
15 said in his declaration, there may be more.

16 THE COURT: So if I adopt the schedule that you
17 propose, which pushes the Anthem-Cigna case forward to trial on
18 October 17, am I really doing what the court of appeals has
19 suggested, and that is taking all the time that I need to deal
20 with and decide a case of this complexity and magnitude? That's
21 a very fast schedule, looking at other cases, and certainly
22 looking at cases of this magnitude according to the Department
23 of Justice.

24 Aren't I running head on into the observations of judges
25 like Judge Tatel that rushing is not what the Court should do?

1 MR. CURRAN: Well, I'm glad you asked that. I have a
2 couple of responses to that. Maybe my first one is, in that
3 Whole Foods opinion, which was cited as though it was D.C.
4 Circuit precedent in the DOJ submission, in fact is not.

5 THE COURT: I recognize that, but you should also
6 recognize that district judges do take seriously what the court
7 of appeals says.

8 MR. CURRAN: What even an individual circuit judge --
9 so Judge Tatel, for example, did not join that opinion; right?
10 That was strictly Circuit Judge Brown. But more importantly, on
11 the merits, we don't want Your Honor to rush through this. We
12 want Your Honor to use the allotted time in the best way that's
13 possible and productive. We proposed that October date two
14 weeks ago. This case is already two weeks old.

15 We think that because of DOJ's lack of cooperation with us,
16 we've lost a couple of weeks, but we're not wedded to that start
17 date. All we want is to have judicial resolution by the end of
18 the year. If Your Honor thinks that starting on November 1 or
19 November 15 or something like that is still okay and getting a
20 judicial resolution by the end of the year, fine. We want to be
21 flexible.

22 THE COURT: Why the end of the year rather than the
23 end of January?

24 MR. CURRAN: By the end of the year.

25 THE COURT: Why?

1 MR. CURRAN: Because 120 days, January 1 to April 30
2 is 120 days.

3 THE COURT: That's the only reason?

4 MR. CURRAN: That's the only reason. That's the only
5 reason. It's the predicament we were put in through no fault of
6 our own as a result of the state regulation. It's the only
7 reason. So we want to get judicial resolution by the end of the
8 year. We're willing to do whatever it takes to work with the
9 Court and to work with DOJ to make that happen.

10 We said three weeks. That was our best estimate of the
11 duration of the trial.

12 THE COURT: What's your best estimate now that you've
13 heard what the government said?

14 MR. CURRAN: Well, I thought three weeks was on the
15 long side, and I figured if we asked for three weeks, maybe we'd
16 get two. We tried the original Staples-Office Depot case before
17 Judge Hogan in one week, we tried the SunGard case before Judge
18 Huvelle in a couple of days. We can try this in whatever period
19 of time the Court permits. I think a two-week trial or
20 something in that order of magnitude would be sufficient.
21 Again, we want to be flexible. All we really care about is
22 getting a judicial resolution by the end of the year.

23 We're willing to adjust discovery periods --

24 THE COURT: So notwithstanding the Department of
25 Justice's estimate that it needs three and a half weeks for its

1 case, and presumably you would need, if they took that long,
2 you'd probably need a week or two for your case, notwithstanding
3 that, I should ignore that and I should set the case on a
4 shorter schedule. And I'm not saying that judges don't do that,
5 and I'm not saying that I haven't set a case on a shorter
6 schedule than the parties have indicated. But that's what you
7 want me to do?

8 MR. CURRAN: Absolutely. I think the DOJ to say that
9 they need three or four weeks for their case-in-chief, that's
10 hard to square with the history of Section 7 cases. I think
11 that would be unprecedented.

12 And by the way, Your Honor, you know that chart, there was
13 a bunch of discussion about the chart in the DOJ's submission.
14 Some of those cases, like the Bazaarvoice case, that was a
15 post-closing case. So there was no urgency there, no rush.
16 That whole analysis is skewed.

17 We put forth in our brief actual injunctive actions under
18 Section 7, some of them FTC actions, some of them DOJ actions.
19 But those are the real precedents here. And what we're asking
20 for is not out of line with what this court has done, including
21 what Your Honor has done.

22 Now, I know that there's an argument that Arch Coal is
23 not as complex as our case. It's easy to argue about relative
24 complexity of different cases. I've read and analyzed your
25 Arch Coal decision in some detail. That was a complex case,

1 with an esoteric industry, dealing with Btu powers of various
2 types of coal, the visibility of railway cars --

3 THE COURT: I'm not sure you're going to convince me
4 or most members of the public that health care is not an
5 esoteric industry.

6 (Laughter)

7 MR. CURRAN: Well, that may be true, but at least it's
8 an industry that you and I and everyone else has some
9 familiarity with out of the blocks, in contrast to the Arch Coal
10 situation dealing with Wyoming coal mining, where I don't think
11 any of us walk into that with some basic understanding.

12 So, yeah, there are going to be challenges, there are
13 challenges in all of these cases, and that's part of the
14 process. And Your Honor has recognized that. Your Honor
15 recognized that in Arch Coal and in an article you wrote after
16 that case.

17 So we think, yeah, there are challenges, but speed is
18 essential here. It's dictated by Section 15 of the Clayton Act,
19 as Your Honor I think alluded to in your comments when
20 Mr. Jacobs was addressing you.

21 THE COURT: But it doesn't dictate a specific
22 expedition, it just dictates expedition, and as I think all will
23 agree, if these cases were tried in the spring, it would still
24 be an expedited schedule in this court compared to most cases.

25 MR. CURRAN: Compared to most cases, that's right, but

1 not compared to most Section 7 cases. I'm available to answer
2 any other questions or concerns Your Honor has.

3 THE COURT: Let's hear from your colleagues. I may
4 have some more questions for you or others, but let's hear from
5 others. Cigna have anything to add?

6 MR. RULE: Your Honor, I think as we said in our
7 papers, we would defer to Anthem. I don't think anything
8 Mr. Curran has said I would dispute.

9 THE COURT: Thank you, Mr. Rule.

10 All right. Aetna. You think your case is simpler than the
11 Anthem case?

12 MR. MAJORAS: I think our case is simpler. We've
13 obviously been looking at the Anthem case since it was filed by
14 the Department of Justice on the same day, and if you look at
15 the different allegations, especially the product market
16 allegations, it is a, in our view, I think consistent with what
17 the DOJ has said, a broader case than what you will see in the
18 Aetna case.

19 I think also there are some aspects of the Aetna case that,
20 despite the number of geographic markets that are alleged, a
21 number of issues are going to override all of those markets.

22 So, for example, one of the things that the Department of
23 Justice has done is it has excluded original Medicare as part of
24 the product market. And we think the evidence will make it very
25 clear from the outset of when you first go on the CMS Web site

1 and it says to people who have now aged in, here are your
2 choices, the Medicare Advantage options or original Medicare.
3 And we think, when we get into the economic data on that, it
4 will show that original Medicare belongs on all of these product
5 markets that the DOJ has alleged.

6 THE COURT: That issue will require trial?

7 MR. MAJORAS: Well, I think we are looking at the
8 prospect, Your Honor, of whether it can be submitted short of
9 trial in terms of on the papers. But I think that the
10 information in particular that the economic experts will be able
11 to add in terms of the movement among plans and back and forth
12 and what the different options are and the fact that, although
13 the plans may have different features, if you look at what are
14 important to seniors as they choose them and as they choose over
15 time, it will show that it's in that market. And we think the
16 expert testimony on that will be very helpful.

17 But in terms of simplifying the trial, it certainly will do
18 that because we think when that is apparent, that original
19 Medicare belongs in that market, it's going to take care of
20 virtually every market that is alleged -- geographic market
21 alleged by the Department of Justice and move it outside of any
22 ability to claim there is a presumption of anticompetitive
23 conduct.

24 Likewise, with respect to the divestiture, as counsel
25 indicated, Mr. Conrath indicated, there is a divestiture. It

1 was announced by Aetna and Humana a few days ago, earlier this
2 week. But that has been in the works for a long time. I think
3 this allegation that during the course of the investigation
4 there was a vague statement about a divestiture is hardly the
5 case.

6 The divestiture option was put on the table frankly to try
7 to resolve the case, to try to settle the case before it ever
8 got to the point of litigation. The parties who were potential
9 buyers were put before the Department of Justice.

10 THE COURT: I think the only thing they've said, in
11 response to my question, although they were going to raise it
12 independently, is that that's another subject that requires
13 factual exploration in terms of discovery. I don't think
14 they're faulting or criticizing you for it.

15 MR. MAJORAS: No, I don't take it as a criticism that
16 we did it. I think the issue is, was it known to the Department
17 of Justice. The Department of Justice's answer to our potential
18 resolution of the case was to file the lawsuit. That was the
19 first we had heard of their answer.

20 Will there be some discovery on that? I certainly think
21 there will be. However, that issue is yet another issue that's
22 going to override or at least apply across the vast number of
23 the geographic markets.

24 THE COURT: When do you suggest that the Aetna-Humana
25 case should be tried?

1 MR. MAJORAS: We have said, purposely vaguely,
2 mid-fall. I hate to get into the judge's calendar --

3 THE COURT: What does mid-fall mean?

4 MR. MAJORAS: Your Honor, I think in the
5 October-November period is the ideal time for this. If you look
6 at the cases that we've been hearing about and the timing
7 available and what needs to be done in these cases, I think that
8 appropriately allows both parties to take the discovery they
9 need, put on what we need from our defense standpoint.

10 THE COURT: Do you agree with Anthem that -- maybe I
11 should put it differently. Do you agree generally that if
12 Anthem's case needs to be tried in mid-fall and your case needs
13 to be tried in mid-fall, the same judge can't do both?

14 MR. MAJORAS: No, I don't agree with that at all. And
15 we have not put that in our papers specifically because we don't
16 agree with that.

17 THE COURT: So how would the same judge do both?

18 MR. MAJORAS: Well, I think the sequencing of the
19 trials would be one, and obviously would be dependent upon Your
20 Honor's views of how to handle that. I think that there can be
21 a sequencing of the trials one into the next in terms of -- the
22 real issue being when and how Your Honor would want to come to a
23 decision, what time you would want to do that with respect to
24 the first case, whether those decisions are pending both cases
25 being tried, whether there's some other alternative opinions to

1 follow. I haven't sat on that side of the bench to know
2 those --

3 THE COURT: So you're of the view that there is so
4 little overlap that the outcome of one case doesn't have any
5 impact on the other case?

6 MR. MAJORAS: I can't sit here and say what the impact
7 would be of one case on the other.

8 THE COURT: In some of these markets, all four
9 companies, or at least three of the companies do compete.
10 Right?

11 MR. MAJORAS: Yes.

12 THE COURT: So even though you might not be -- all
13 four might not be in the top four or five competitors in that
14 market, they are all competitors in the market.

15 MR. MAJORAS: Well, then, you would have to look at
16 each individual geographic market at the time.

17 THE COURT: Some of the geographic markets may be
18 different, but in terms of the product market.

19 MR. MAJORAS: For the product market, certainly in the
20 commercial products that are alleged, there is an overlap
21 between the cases, and I think as you suggested very early in
22 these proceedings, that the decision on the product market may
23 very well carry over to the next case.

24 I think having separate judges look at that issue in
25 particular does set up the potential that there could be

1 conflicting decisions on that. I think if you look at the
2 relationship of the cases between the regulations that are going
3 to be involved, the antitrust issues, and the antitrust legal
4 aspects of how to analyze the different markets even though they
5 may be different between the cases, is something that I think
6 will be very efficient for the Court to be able to handle and do
7 it in a way that doesn't create a conflict.

8 Our discussion on the differences in the cases that
9 Mr. Curran read was specifically on the question of whether the
10 cases should be tried together. And here I think all parties
11 before you have agreed there should not be a trial.

12 I'm not going to belabor that since it's already been
13 stated, but the comments about how the case would be presented
14 to the Court, we don't see a great deal of overlap in terms of
15 witnesses and things like that. But from a discovery
16 standpoint, I think we suggested the special master, I've used
17 that before in other cases. In the airlines case we think it
18 was very effective.

19 THE COURT: And you think it would work well even with
20 the separation of the two cases?

21 MR. MAJORAS: I think so, Your Honor.

22 THE COURT: Would it work well even if the cases were
23 before two different judges?

24 MR. MAJORAS: Well, first, the judge would have to
25 agree to appoint the same special master.

1 THE COURT: Assuming the judges were willing to do
2 that.

3 MR. MAJORAS: But then there's also, depending on what
4 happens with special master opinions, if they have to go up to
5 the judge ultimately for some type of review, again, we have the
6 potential for conflict, we also have the potential of delay in
7 the process. The third parties are going to have views in terms
8 of how their information should be delivered during the course
9 of discovery. I think the special master in the same case with
10 you in charge of it is going to be able to do that much more
11 efficiently and without the prospect of conflicts.

12 But in terms of the last -- the last thing in terms of my
13 remarks, Your Honor, not to repeat what we have in our briefing,
14 but I think you look at these cases, and you look at the time
15 period that the cases have been put in front of the courts, this
16 court in particular, but district courts around the country, the
17 time period that we're suggesting is very typical and falls
18 really within the range in which we see these cases presented.

19 All cases have complexity; so to sit here and say this
20 merger was less or more complex than another one I think is
21 difficult to do and probably not worth our time. But it is
22 worth our time to talk about the fact that courts have been able
23 to say, yes, here's the time period, here's the time period for
24 the trial. I've yet to be in front of a judge where we get to
25 say, Judge, we want to go as long as we want and the judge

1 agrees with me. We know how to take care of issues in terms of
2 how cases are presented in the time period that is allotted for
3 the trial and also allotted for the pretrial.

4 The issue, as we said, Your Honor, we have a drop-dead date
5 of the end of this year.

6 THE COURT: Should I give more weight to your
7 drop-dead date than to Anthem's drop-dead date, or are both
8 drop-dead dates, so to speak, of the same import here?

9 MR. MAJORAS: Well, I think you give them the same
10 import, but the difference of course is they're different in
11 timing. Our drop-dead date is the end of this year. That had
12 already been extended once. And my understanding of the Anthem
13 deal is that the drop-dead date now is the end of April. And I
14 think that's a critical issue in terms of how these cases ought
15 to be sequenced.

16 Are those dates at the control of the parties? Sure, from
17 some aspect, they are. They were set quite some time ago with a
18 view in mind of how long this should take, also recognizing that
19 there could be litigation. Our case has been under
20 investigation for over 13 months. And for the DOJ really to
21 come in here and say we need more time because we don't know
22 that much about it -- and I recognize that's a paraphrase of
23 what they said earlier --

24 THE COURT: They would say an overstatement.

25 MR. MAJORAS: That may be the case. And perhaps it

1 is. But it's not an overstatement to say that they've had
2 subpoena power for third parties throughout the course of this
3 investigation, that they've collected millions of documents from
4 the parties during the course of this investigation, that
5 they've looked at all of these different markets during the
6 course of the investigation, did not disclose the number of
7 markets and the specific counties to us until fairly late in the
8 investigation, only a few months ago.

9 So to suggest that somehow it is one-sided is not correct.
10 And likewise, to talk about the regulatory issues, that somehow
11 they have to investigate that, CMS is part of the government.
12 We've already been told that and we recognize that.

13 THE COURT: So if I were to agree with you and
14 Mr. Curran with respect to the significance of the deadlines
15 that are in play here, and that therefore each of these cases
16 needs to be resolved by the end of the year, and therefore each
17 needs to be tried approximately in the October-November time
18 frame, but I were to disagree with you as to whether one judge
19 can effectively do that, what should I do?

20 MR. MAJORAS: My view is, and our view is that this
21 case is one that is both going to be ready, and because of the
22 issues that we just talked about in terms of how the cases align
23 and the issues in the case, this is a case that can be and ought
24 to be tried initially and ought to be tried by you.

25 THE COURT: All right. Thank you.

1 MR. MAJORAS: Thank you, Your Honor.

2 THE COURT: Anything from Humana?

3 MR. GARDINER: Nothing further from Humana, Your
4 Honor.

5 THE COURT: So from the government's perspective, if I
6 thought that these cases merited, whether because of the
7 deadlines set by the parties, by the corporate parties, or for
8 other reasons, greater expedition than you're arguing, and
9 therefore needed to be resolved by the end of the year or
10 shortly thereafter, what should I do? Should I hold on to both
11 cases and try both cases? Is that what you would suggest?

12 MR. CONRATH: I think we can't say we know the answer
13 to that, Your Honor. We understand --

14 THE COURT: I know you don't know my schedule. Take a
15 guess that my schedule is flexible enough to do it. I'm not
16 saying that's true. Indeed, there's a real question mark there.
17 But just assume for the moment that it could be done by one
18 judge, this judge. Is that what should be done?

19 MR. CONRATH: We take Rule 41 to be a judicial
20 efficiency rule, and Mr. Jacobs identified some of what seemed
21 like the judicial efficiencies that apply here, and they would
22 apply in a very difficult situation that you're positing.
23 Yeah -- yes, but, look, we understand at the end of the day it's
24 the judicial efficiency that matters, and the Court -- we'll
25 respect whatever decision obviously of the Court. If the Court

1 felt the need to make another decision, we would obviously
2 adjust and deal with keeping them as coordinated as was possible
3 under a different arrangement.

4 THE COURT: All right. I'm not sure exactly what your
5 answer was to my question.

6 (Laughter)

7 MR. CONRATH: I guess that reveals the question that
8 we weren't exactly expecting, Your Honor. Let me put it this
9 way. We think the Court -- there are efficiencies to keeping
10 them together, and if the Court --

11 THE COURT: Together meaning before one judge?

12 MR. CONRATH: Yes, before one judge. No other way.
13 And that would be our recommendation. But we respect the
14 reasons why you might decide otherwise.

15 THE COURT: And what's your reaction to the view --
16 paraphrasing what was said -- that the estimates you're giving
17 for trial are longer than necessary and these cases can be tried
18 in a shorter period of time?

19 MR. CONRATH: When I heard that, I tried to think back
20 to my experience in prior cases, and I think I would say that
21 they're usually -- they've gone both ways, both a little longer
22 than the trial lawyers estimated beforehand, but also a little
23 shortening beforehand. You know, in the 10 to 20 percent range.

24 THE COURT: Well, I assume they'd go shorter if the
25 trial lawyers estimate X, and the judge allots X minus 2.

1 MR. CONRATH: Well, that's not the situation I would
2 suggest. Obviously, that's one way to address it. And we've
3 seen courts assign hours per party, and that's one way to handle
4 it. I think, as the plaintiffs with the ultimate burden of
5 persuasion, we would urge sufficient time that we can get our
6 case in and be convincing, but obviously we know that courts
7 have limited time and understand that one of the ways that
8 that's dealt with sometimes is setting a fixed time.

9 THE COURT: I assume that when Anthem says first three
10 weeks and now even down to two weeks for trial, they're saving
11 some of that time for themselves. So they're saying in the
12 Anthem-Cigna case, that that case, the government only needs a
13 week or a little more to present the case. And when Aetna says
14 two weeks, they saying to the government, you only need a week
15 or a little more to present your case. Do you think that's a
16 sufficient time?

17 MR. CONRATH: No, I don't. I think that's too short.
18 If you think that -- just thinking about what are -- the
19 evidence that the Court's likely to hear, in particular,
20 economic evidence is very important in merger cases, both
21 examination and cross-examination in order to effectively get it
22 in front of the Court --

23 THE COURT: If all issues have to be tried, if there
24 isn't any simplification of the Aetna-Humana case, how many
25 expert witnesses do you think the government would be presenting

1 in its case-in-chief? How many expert witnesses?

2 MR. CONRATH: Perhaps two, Your Honor.

3 THE COURT: Just two. Okay.

4 MR. CONRATH: You touched on the subject of
5 simplification, if I could just comment briefly on that.

6 Because we've heard the suggestion from Aetna that maybe the
7 whole question of Medicare and Medicare Advantage would simplify
8 the whole trial and enable it to go much faster.

9 Actions sometimes speak louder than words, because last
10 week they served discovery on HHS related to the Medicare
11 product market definition question, that we now hear from HHS
12 just one speck there would require, they estimate, about 250
13 million records. They want records of everyone who's ever
14 enrolled in Medicare and Medicare Advantage since 2001.

15 These are records that are their reports, they can include
16 people's medical conditions and identifying information. Just
17 to mask that data that they've sought in order to enable it to
18 be produced is a process that could take, based on HHS's first
19 response to us, more time than they're anticipating for the
20 entire proceeding.

21 But sometimes actions speak louder than words. The
22 suggestion that this can be simplified so fast is inconsistent
23 with the idea that you need this vast, burdensome discovery on
24 HHS. You really can't have it both ways.

25 THE COURT: Let me ask one other question, but it may

1 be that this is a better question with respect to the Anthem
2 case. Take your last best shot at telling me why these are
3 related cases, why the United States believes that
4 notwithstanding independent product markets, and even geographic
5 markets for the most part, and issues that will be unique to
6 each case that are very, very important -- the product market
7 and inclusion or exclusion of Medicare, for instance, on the
8 Aetna case, the monopsony issues with respect to the Anthem
9 case -- why nonetheless are these cases under our local rules
10 really cases that predominantly have common issues of fact
11 and/or law?

12 MR. JACOBS: Well, the overlap, as I said before,
13 really goes to the individual market, and there will be a
14 question about what the proper relevant product market is there,
15 hearing expert testimony in whichever case is tried first, and
16 that that will have an effect on the definition of the relevant
17 product market in the second case in that same market.

18 There are no common relevant geographic markets because in
19 the individual cases relevant geographic markets we contend are
20 at the county level. But as I mentioned before, there are
21 similar third parties who are competitors in both of the cases
22 that, even if we don't bring them into the courtroom for you to
23 hear, their documents, perhaps deposition testimony depending on
24 how the Court wants the admission of that handled at trial, will
25 come in.

1 THE COURT: Common witnesses isn't really what the
2 local rules are built on, though, the fact that there might be
3 common witnesses in the case. All right. Anything else on
4 that?

5 MR. JACOBS: Not on that issue, Your Honor. If I
6 could just touch on what you're characterizing as the
7 significance of Anthem's deadline? You know, the significance
8 of the deadline for Anthem, its date is much farther out. It's
9 almost nine months from now.

10 It's our belief that if this court decides that that is a
11 significant deadline, and that instead of building up and
12 deciding how much time do we need to build the appropriate
13 record, rather, let's decide what the deadline is and work back.

14 The Court would be assuming that nine months from now, if
15 Anthem tries the case, wins -- because this argument is only
16 relevant if the Court denies our request for injunction -- that
17 it will not be able to go to Cigna, that things won't be patched
18 up enough then to say we won in court, we're this close --

19 THE COURT: Well, I have no idea how things will stand
20 between Anthem and Cigna then and whether Cigna will say, well,
21 it's a better economic decision for us to say, no, it's a
22 regulatory obstacle and under our agreement you can't push us
23 beyond April 30 and so give us \$1.8 billion.

24 MR. JACOBS: That's precisely my point, Your Honor.
25 We're assuming -- if you decide that that deadline is

1 significant, you're assuming that Cigna will terminate on May 1.
2 And we don't know that. I mean, we know --

3 THE COURT: No, you don't.

4 MR. JACOBS: Right. And the length of time between
5 now and April 30 and the effect that an opinion from this court
6 denying a request for injunction would have both on Cigna, but
7 also the state DOIs -- as Mr. Curran said, there are some
8 statutory deadlines there, but part of their analysis is
9 competitive as well.

10 Second, Mr. Conrath offered a list of things, and you asked
11 the appropriate question, what do you really need after a year
12 of discovery, or if you want to characterize it, you know, four
13 months with their documents, what else do you need? I have a
14 similar list of things we need from the parties, which I can go
15 through, if Your Honor would like to hear it, but I would like
16 to point out one thing. In addition to additional discovery on
17 Anthem and Cigna, there's important third-party discovery that
18 we need time for.

19 And while this court may decide it's appropriate to
20 expedite this and require the defendants to respond to our
21 document request in less than 30 days, Rule 45 gives third
22 parties some rights that we don't think can be sped up. I've
23 mentioned United before. They're a competitor in the national
24 accounts market. We received relatively few documents from them
25 in the investigation. We're going to need substantially more

1 from them. We're going to have to get documents from Anthem's
2 joint venture partners, the other BlueCross BlueShield plans, as
3 well as the BlueCross BlueShield Association.

4 One of the ways this merger lessens competition is that
5 today, Anthem, that competes under the Blue Cross and Blue
6 Shield license in 14 states, in one of -- some of those states
7 it doesn't have the shield license -- cooperates with its joint
8 venture plans to win national accounts against the likes of
9 United and Cigna and Aetna.

10 If this merger goes through, Anthem is going to own Cigna.
11 And so it's going to be both at the same time competing with the
12 Blues' plans to win national employer business, and competing
13 against them with their Cigna hat on. We need some more
14 discovery to find out how that's going to work if there's
15 concern among other Blues plans, and we did receive in the
16 investigation some documents from other Blue Cross plans but not
17 many.

18 So those are just two examples of some third-party
19 discovery. We were made aware yesterday that Anthem served a
20 draft subpoena on a third party in Connecticut. So it's already
21 going on third-party discovery, and I don't want the Court to
22 assume that things can be expedited and that all discovery that
23 needs to be done is for us to give them our investigative file
24 and for them to give us more documents, because it's more
25 complicated than that. Thank you.

1 THE COURT: All right. I have a couple of
2 observations. Mr. Curran.

3 MR. CURRAN: Your Honor, I just wanted to respond
4 briefly to Mr. Jacobs on that. First, perhaps, on the
5 relatedness point. The case law shows that the designation --
6 correctness of the designation is the burden of the party
7 asserting relatedness. And I think it's pretty apparent that
8 DOJ cannot carry that burden here under this court's case law
9 and under local rule 40.5, for reasons I've already said.

10 Now, Mr. Jacobs makes a point that there may be common
11 witnesses in the two cases, but the cases are so different, like
12 in the case of United Healthcare, United Healthcare might have
13 witnesses in both cases, but in one case it would be United
14 Healthcare's people dealing with commercial health insurance,
15 and the other with Medicare Advantage. So that's kind of a
16 false argument there.

17 And I guess I've already said this, but our end date is
18 real. There's every indication that it is. DOJ kind of gloated
19 in their complaint about the contentiousness between the
20 parties, so they shouldn't be heard now to be suggesting that
21 that's not real. They made the allegation.

22 Again, Your Honor, we just want the speed necessary to make
23 sure that there's a judicial determination about this merger,
24 not just for the parties, but also for the customers who may
25 benefit from the huge efficiencies that we claim. If we're

1 right about the efficiencies that this merger will bring, and
2 this merger dies on the vine, then customers and consumers will
3 be deprived of those potential efficiencies. And I think that's
4 what Section 15 of the Clayton Act is all about, making sure
5 there's a judicial determination, not an executive branch
6 determination that survives strictly because of delay.

7 Thank you, Your Honor.

8 THE COURT: Thank you. Before I get into talking
9 about this a little bit, I should make sure that none of you
10 have a problem with my handling particularly the Anthem case.
11 Before I became a judge, I did represent the BlueCross
12 BlueShield Association and several Blue Cross plans in various
13 contexts, not merger contexts. That's 20 years ago, 15, 20
14 years ago. But I want to make sure that that doesn't pop up
15 later on as a surprise to anyone and that there's no problem
16 from that perspective. So first I'll ask Anthem if there's any
17 problem.

18 MR. CURRAN: No, Your Honor. In fact, I had forgotten
19 you had once been in private practice.

20 THE COURT: I've sort of forgotten that too.

21 (Laughter)

22 MR. CURRAN: No. That issue does not concern us.
23 Thank you.

24 MR. JACOBS: The government doesn't have an objection
25 either, Your Honor.

1 THE COURT: All right. So basically, in trying these
2 cases, we've got three alternatives it sounds like. Try them
3 both in 2016, try one in 2016 and one early in 2017 -- early
4 meaning perhaps in February -- by the February time period,
5 March at the very latest. Or let them both slide until early
6 2017, as the government would like. The defendants all would
7 like them both tried in 2016.

8 Both DOJ and Aetna think, apparently, that I could do that.
9 I question whether they are right. These cases, as the
10 Department of Justice has brought them, are of great magnitude
11 and significance, and to say that I could complete the task by
12 the end of the year, if that's what I decide would have to
13 happen with these cases, in both cases, seems to me to fly in
14 the face of what the government is saying is necessary in order
15 to prepare the two cases, and the magnitude and significance of
16 the two cases. So I don't think it's really realistic to think
17 that one judge could accomplish that and be fair to all parties
18 and to the public with respect to these matters, given whatever
19 significance one thinks they have, and certainly everyone agrees
20 that they are of some significance.

21 So if it's going to be done in 2016, if I'm going to pay
22 attention to the deadlines that the companies have imposed upon
23 themselves, the merger partners, then I'm going to have to send
24 one case back for reassignment to another judge.

25 So I think you all have to think about that, because that's

1 my determination, that I can't do both, and I'll give you time
2 if you need it to think about, okay, based on that
3 determination, do you still think that each case has to be
4 decided by the end of the year and therefore I should send one
5 case back for reassignment. And you can respond to that or ask
6 for more time when I finish.

7 I do believe that coordination of the pretrial discovery
8 proceedings is something that can be advantageous here even if
9 there are two judges handling the cases. Whether the cases are
10 going to trial in 2016 or 2017 or a little bit of each, I think
11 it needs to be someone who's experienced and knows what they're
12 doing with discovery of this complexity and magnitude, but there
13 are such people out there. And I would suggest that we should
14 do that in any event.

15 There's a little bit of complication if there are two
16 judges in terms of review, but I don't think that's an
17 insurmountable hurdle; I think that's something the judges could
18 easily coordinate with the special master and not have that be a
19 cause for delay or inefficiency.

20 So, unless the schedule is put off, I'm sending one of
21 these cases back. I'm not telling you which one I'm going to
22 send back. There are reasons to do one or the other. There are
23 reasons based on the simple fact that the Anthem case was filed
24 first. That is serendipitous, as the government has confirmed.
25 It's just the way it happened. There are reasons to go the

1 other way that have to do with which merger occurred first,
2 which merger the Department of Justice was notified of first,
3 and the facts even, I suppose, that the state insurance
4 approvals are in a much better posture with the Aetna case than
5 they are with the Anthem case. I think 18 to 20 have already
6 been accomplished.

7 But there are reasons -- I'm not going to go into all of
8 them. There are reasons to send one or the other case, and I
9 think for your purposes, I think you just have to understand
10 that there's a 50 percent chance for each of you that the case
11 would be before me, and then a 50 percent chance that it'll be
12 before one of 16 or 17 other judges.

13 So, I guess that my inclination is to say that if I have
14 one case to try, I will do it on a faster schedule than the
15 government is proposing. What exactly that schedule will be, I
16 think I need to think through a little bit both in terms of my
17 own availability and calendar, but also with respect to some of
18 the things that have been said both in writing and here today,
19 with respect to whichever of the two cases. But I think it will
20 be on a faster schedule than the government is proposing.

21 Whether it will be on a schedule that matches up exactly
22 with the deadlines that the parties to the mergers have agreed
23 to remains to be seen, and for the case that I'm not doing,
24 that's up to the other judge. It's not up to me to set that
25 schedule.

1 So I'd like anyone to react to these musings in whatever
2 way you'd like to.

3 MR. CURRAN: Your Honor, maybe two points. Number
4 one, we are not posturing about the need for a judicial
5 resolution at the end of the year. So the idea of trying the
6 Anthem case next year from our perspective is a nonstarter.
7 That would just kill the deal. So in terms of timing, that's
8 where we are.

9 In terms of which case Your Honor holds --

10 THE COURT: You think that that's something that the
11 parties to mergers can always do to the courts? They can come
12 in and say, look, we want to merge, the Department of Justice
13 challenges it, but you've got to decide this by X date because
14 otherwise it's going to kill our merger? We've decided that
15 it's going to kill our merger. So is that a position that
16 merger partners can always put the courts in?

17 MR. CURRAN: I think not. I think not.

18 THE COURT: Well, if not, then why here?

19 MR. CURRAN: Because we set these dates in a merger
20 agreement well over a year ago. There's no gaming of the dates.
21 There's no demonstrated possibility of extending the dates. So
22 in this situation --

23 THE COURT: It's only that you can put the courts in
24 that position if the two merger partners aren't getting along
25 very well.

1 MR. CURRAN: Well, no. I'd say -- I think the Clayton
2 Act contemplates expedition where the circumstances are such
3 that expedition is clearly warranted. If we could extend the
4 date, we would. We can't. So we're stuck. And that's the
5 predicament we think is not really of our own making. Yeah, the
6 merger agreement set those dates. That was way far ago and well
7 before it was foreseeable that we would be here now.

8 We worked with the Department of Justice in good faith.
9 You know, the Hart-Scott-Rodino Act contemplates like a 30-day
10 period, and then a second request and then a 30-day period.
11 Instead of those 60-plus days, we spent a year there dealing
12 with multiple requests, wave after wave. You see the George
13 Paul declaration which talks about the terabytes of data, the
14 20-some depositions of Anthem alone, the four million documents
15 totaling 19 million pages, all of that stuff.

16 So here the dates are real and set long ago. It's not a
17 situation -- in fact, I would contrast it with the Aetna-Humana
18 situation where they are getting along and they plainly have the
19 ability to extend their deadline if they wish. And it was only
20 in June of this year that they set December.

21 So I think the facts and circumstances -- and I'm not
22 impugning anyone's integrity or anything else like that. It's
23 just the circumstances are different.

24 And then one further point, Judge Bates.

25 THE COURT: I'd be encouraging merger partners not to

1 get along, because that way they could force the courts to
2 decide the cases on their schedule.

3 MR. CURRAN: I hope you don't have any doubt about the
4 *bona fides* here --

5 THE COURT: I don't have any doubts about the *bona*
6 *fides*. I'm not questioning the *bona fides*. I'm just
7 questioning the control over the Court's schedule that the
8 circumstances warrant.

9 MR. CURRAN: One further point, and this is circling
10 back to some of the case law. I referred to the Tripp case
11 before, which again is that unusual case with the calendar
12 committee issuing an opinion. And that case emphasizes the
13 importance of the random assignment process and the integrity
14 that that imbues with the court.

15 There the three-judge panel wrote that "The fundamental
16 rationale for the general rule requiring random assignment of
17 cases is to ensure greater public confidence in the integrity of
18 the judicial process. The rule guarantees fair and equal
19 distribution of cases to all judges, avoids public perception or
20 appearance of favoritism in assignments, and reduces
21 opportunities for judge-shopping."

22 So I would submit to Your Honor that principles of judicial
23 administration and public perception would support Your Honor
24 keeping the case which was randomly assigned to you, and instead
25 sending back for random assignment the second case, because

1 that's consistent with these principles that underlie this
2 court's random assignment process.

3 THE COURT: I think that's consistent with these
4 principles, but I don't think doing it otherwise is inconsistent
5 with them either. I mean, there's no risk that anyone would
6 perceive that things have happened other than randomly even if I
7 decided that, for a variety of reasons, weighing each case, that
8 it made more sense for me to hold on to the Aetna case, I can't
9 even imagine how anyone would be perceiving that this was some
10 process that was skewed by the parties or by the Court.

11 MR. CURRAN: Yeah. Well, maybe. But some might
12 submit that when a party files two complaints and files the
13 first and may learn who the judge is, and then makes an election
14 whether to designate a case as related or not, that that's not
15 fully on the up and up. I don't know if that's what happened
16 here, but we have a mistaken designation of relatedness.

17 THE COURT: All right.

18 MR. CURRAN: Thank you, Your Honor.

19 THE COURT: Thank you.

20 MR. MAJORAS: Your Honor, John Majoras again. Just so
21 that our position is clear in terms of the sequencing of the
22 tries. You had given three alternatives. We are not in any way
23 suggesting to the Court that both cases need to be tried in
24 2016.

25 THE COURT: Just yours.

1 (Laughter)

2 MR. MAJORAS: Well, absolutely. Absolutely.

3 THE COURT: I think that's Anthem's position too.

4 (Laughter)

5 MR. MAJORAS: What I'm suggesting, though, Your Honor,
6 is that instead of looking at things such as whether the parties
7 are getting along with each other and, as you pointed out, would
8 seem to suggest not getting along as a better way to get an
9 early trial date, the objective issues are pretty clear.

10 The deadline of the Aetna deal is at the end of this year.
11 The Aetna deal has been around longer, has been under
12 investigation longer than the Cigna-Anthem deal. The
13 Cigna-Anthem parties have already indicated that their deadline
14 can be extended until the end of April.

15 All of those are straightforward issues in terms of the
16 sequencing and allowing the Court to try these cases in a way
17 that perhaps may not be what the lawyers want, but are still
18 going to be in a situation where the parties can get their
19 mergers done if they are successful in defeating the action
20 brought by the government.

21 And I think on this last point, and in terms of the
22 randomness and forum shopping, to suggest or even imply that
23 Aetna and Humana somehow were doing any kind of forum shopping,
24 your assignment to this case is no different than any other
25 random assignment that is made in terms of how it came about. I

1 think a situation where in the old days if you actually had to
2 show up in front of the clerk with two different complaints,
3 it's a situation where the government reached into their left
4 pocket first and their right pocket second in terms of the
5 randomness of how these got assigned.

6 So to somehow suggest that there is forum shopping or that
7 there's going to be anything that gets into the integrity of the
8 court system, I think is inappropriate under the circumstances
9 here.

10 THE COURT: All right. Thank you. Anything else from
11 anyone?

12 MR. CONRATH: Judge, two very small points.

13 THE COURT: Small but important, right?

14 MR. CONRATH: Yes. Small but important. Small but
15 significant, which is an antitrust jargon joke. You see that
16 the laughter was behind me. I apologize.

17 Two points. One, Mr. Curran made I thought a very candid
18 statement about these deadlines which are really option dates.
19 Nothing happens on December 31. The parties do nothing, the
20 deal just continues to exist until the Court rules. There's an
21 option that one party gets to back out of the deal, but they can
22 change that date, they can do nothing. Either of those lets the
23 deal just keep running.

24 But Mr. Curran said, if we could extend it, we would.
25 Well, because they recognize that's right. As I say, that may

1 not be true for Mr. Curran, but that's surely true for Aetna and
2 Humana, who appear to be getting along just fine.

3 So the Court shouldn't feel that a party can successfully
4 take itself hostage and demand that the Court make a decision in
5 the time that they picked. There's no particular importance to
6 that date. They could have picked April 30, as the other
7 parties did at approximately the same time; they could have
8 picked November 30, and they could be in here saying we need to
9 have a trial in two weeks. The Court should take the time the
10 Court needs to make a decision on a full and fair record.

11 The other thing I need to touch is the question of
12 assignments since this has been raised. The local rule -- we
13 think that we were obligated to identify these as related. The
14 local rule says that civil cases are related if they involve
15 common issues of fact.

16 So we understand that whether they stay related is a
17 question for the Court later. We related them because they
18 involve common issues of fact and we felt obligated --

19 THE COURT: I'm not faulting you for identifying them
20 as related. I'm just questioning whether, upon further
21 examination, whether they should stay related.

22 MR. CONRATH: And we understand that, Your Honor.
23 Thank you.

24 MR. JACOBS: Excuse me, Your Honor.

25 THE COURT: What, you want to rebut what he said?

1 (Laughter)

2 MR. JACOBS: I though Mr. Conrath was going to address
3 this point. Mr. Curran suggested that maybe we made the related
4 case decision after we filed the first case and saw that it had
5 been assigned to you. And that is not true. We decided before
6 filing both of these complaints, they were going to be related.

7 As I said before, we happened to file the Anthem case first
8 for some reason, because there are more state co-plaintiffs.
9 But we did not engage in any kind of judge shopping. We decided
10 internally, we're going to file these, they will be on the same
11 day, these will be related cases, and then we went ahead and did
12 it that way.

13 THE COURT: Well, if you pay any attention to media or
14 the lawyer talking heads in the media, one would think that you
15 would not have chosen to have the case assigned to me.

16 (Laughter)

17 I hope none of you are paying attention to that stuff.

18 All right. I will take action along the lines that I've
19 indicated. In all likelihood, I will be back in touch with
20 those who are on the case that will stay with me promptly to see
21 if we need to get back together to set the actual schedule in
22 the case, and with respect to this question of special master.

23 The question of special master, I probably will coordinate
24 on that with whoever the other judge is so that we can see if we
25 can do that and do it in a way that works for all involved. And

1 I will do this promptly. If we get back together, it's likely
2 to be next week, not later than next week. And I appreciate the
3 promptness of your submissions, the care that you've given to
4 both those and what you said here today.

5 Some of these scheduling and logistical matters are, quite
6 frankly, not easy to get through, but we'll get through them and
7 get on with getting to the pretrial proceedings and the
8 resolution of these important cases as quickly as we can. So
9 thank you again.

10 (Proceedings adjourned at 11:48 a.m.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

* * * * *

CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.

Bryan A. Wayne
BRYAN A. WAYNE