In the Matter of the Acquisition of Control of
Humana Insurance Company,
HumanaDental Insurance Company,
Humana Wisconsin Health Organization Insurance Corporation, and
Independent Care Health Plan
(Collectively, the "Domestic Insurers")

by

Aetna Inc.

Petitioner

Case No. 15-C40896

Procedural History

On March 15, 2016, a pre-hearing conference was held in the matter to address any procedural matters in advance of the hearing scheduled for March 30, 2016. Immediately prior to the pre-hearing conference, Attorney David Balto, on behalf of Service Employees International Union Health Care Wisconsin and Citizen Action Wisconsin (the "Movants") [1], filed a motion to intervene as a party in this matter for the purpose of asking six questions that are listed in Attorney Balto's March 15, 2016 letter. During the prehearing conference, the hearing examiner asked Aetna and Humana if they would be willing to answer the six questions posed if the movants withdrew their motion to intervene. Aetna and Humana indicated that they would be willing to answer these questions at the hearing. The offer was presented to Movants who indicated they would not agree to withdraw their motion even if the six questions were answered by Aetna and Humana. As such, a briefing schedule on the motion was set with Aetna and Humana agreeing to provide a response to the motion to intervene and the Movants agreeing to provide additional material in support of their motion by March 21, 2016. The Movants also agreed to file any response to Aetna and Humana's filing by March 22, 2016. The hearing examiner indicated that he would issue a decision on the motion to intervene by March 25, 2016 and the Movants agreed that this would be sufficient time for them to prepare for the hearing on March 30, 2016 if their motion to intervene was granted.

Discussion

Pursuant to s. 227.46(1), Wis. Stat., a hearing examiner presiding at a hearing may regulate the course of the hearing, dispose of any procedural requests, and take any other action authorized by agency rule. Section Ins 5.19(2), Wis. Admin. Code, authorizes the presiding hearing examiner to determine motions to intervene and s. Ins 5.33(1), Wis. Admin Code, authorized the hearing examiner to determine prehearing motions, such as the one filed by the Movants.

Section 227.44(2m), Wis. Stat., states that "[a]ny person whose substantial interest may be affected by the decision following the hearing shall, upon the person's request, be admitted as a party." The requirements for standing are similar to those for standing to challenge an administrative action in circuit court. "The first step under the Wisconsin rule is to ascertain whether the decision of the agency directly causes injury to the interest of the petitioner." *Waste Management of Wisconsin, Inc. v. DNR*, 144 Wis.2d 499, 505 (Wis. 1988). "While injury can be remote in time or occur as the end result of a sequence of events set in motion by agency action, the events themselves cannot be conjectural or

[1] Attorney Balto has submitted comments on the proposed merger on behalf of a larger group of organizations but it is the hearing examiners understanding that he is only moving for intervenor status on behalf of SEIU Healthcare Wisconsin and Citizen Action of Wisconsin.

hypothetical." *In re Incorporation of Lands Comprising the Delavan Lake Sanitary District*, 160 Wis. 2d 403, 413 (Wis.Ct.App. 1991) (Internal citations omitted).

The second step is to determine the question: "is the interest allegedly injured arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question?" *Waste Management*, 144 Wis.2d at 505. Movants have failed to meet either part of the test.

The first step to determine is whether Movants will suffer a direct injury as a result of OCI's decision. In its March 15, 2016 letter seeking intervention, the Movants argued that there interests would be affected by the proposed merger as there would be a significant consolidation of the "administrative-services-only" ("ASO") market, there will be decreased competition in the Medicare Advantage product area, and that business practices that led to Humana and Aetna being fined by the Centers for Medicare and Medicaid may not be corrected if the merger were to be approved. In its March 22, 2016 letter responding to Aetna's and Humana's March 21, 2015 joint response to the motion, Movants also indicated they would have "real and immediate risk of suffering from increased monthly premiums, reduced quality of care, reduced access, diminished innovation, and reduced choice."

Aetna and Humana contend that the Movants cannot establish direct injury. Aetna and Humana note that the Movants stated that they "may" be affected by OCI's decision and that the injuries they are alleging are merely conjecture and hypothetical. Further, they argue that Movants have not alleged direct injury but only injuries to consumers and the public generally.

Movants have failed to meet the first prong of the test because the injuries alleged are hypothetical and they have not alleged any direct injuries specific to their interests. Movants cite a litany of hypothetical injuries that could occur as a result of the approval of the merger including increased premiums, reduced quality of care, reduced access and diminished innovation[2]. Petitioner has failed to establish that these injuries will occur or are likely to occur as a direct result of the merger being approved. Movants have only asserted that such injuries occur with all mergers and have failed to provide a sufficient basis for the hearing examiner to determine that such claims are more than just conjecture. Movants alleged injuries are hypothetic which the Wisconsin courts have found are insufficient to confer standing.

Movant have also failed to show direct injury to their interests. Movant's have alleged no direct injury but instead claim injury to the consumers who are members or are represented by their organizations. Movants are asserting a general harm to consumers and not a harm specific to their organizations. Thus, Movants have failed to show that approval of the merger would cause direct harm to their interests.

Movants also cannot meet the second part of the test for standing. The second step to determine is whether the interest allegedly injured is in the zone of interest protected by the statute. The Movants contend that among the zone of interests protected by the statute are those of the insureds of the domestic insurers and the public. Movants assert that they "are the public and the insureds." Aetna and Humana argue that Movants have failed to identify an interest protected by law and that OCI has previously rejected motions to intervene from parties who are "merely advocates for the interests of Wisconsin consumers."

Movants have failed to identify interests within the zone of interest protected by the statute. Petitioner seeks to advance one of many interests on behalf of the public and the insureds of

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[2] Movants have also alleged consolidation in the ASO and Medicare Advantage markets as an injury. Consolidation will occur, to some degree, in any merger of competitors and is not, in and of itself, an injury. Movants also note compliance actions against the two companies brought by CMS. Movants fails to establish how approval or disapproval of this merger would have any effect on the companies' future compliance with CMS requirements or how this results in injury.

the domestic insurers. Section 611.72, Wis. Stat. gives the Commissioner broad discretion to determine whether the merger would be in the interests of the insured and whether it would substantially injure the state's competitive market and by extension consumers. It is self-evident that insureds and the broader public are not monoliths and that there are many interests that compete for a particular outcome in a proceeding. As with the statute at issue in the BlueCross-BlueShield case, "[n]o [public] interest was given a particular right to be weighed more heavily than any other under the statute."[3] For this reason, OCI has previously found that assertion of injury to the public interest was insufficient to meet the test for standing[4]. OCI has also previously denied a motion to intervene based, in part, on the assertion of the public's interest in a competitive market[5].

Movants have alleged standing as representatives of consumers and the public interest. If assertion of representation of the public interest were sufficient to grant standing, then arguably any person or group could obtain standing. OCI's has an interest in an orderly proceeding and providing standing to any party claiming to represent the public would create an unmanageable process. Further, a common sense reading of legislative intent leads to the conclusion that the legislature intended a procedure for public input and did not intend for any person or group claiming to represent the public interest to be made a party and be granted the rights to discovery, deposing witnesses, cross-examination and all other rights party-status entails. Movants claim of standing based on the public interest requires a finding that they have failed to establish that their interests are within the specific zone of protection of the statute at issue. For all the reasons described, Movants have failed to establish grounds for standing and their motion is denied.

This conclusion does not prevent movants from being heard in this matter and they need not be granted standing for their comments to be considered. Movants have already filed written comments which will be weighed in making a determination in this matter and made part of the record in these proceedings. Movants are also encouraged to provide any additional comments they would like to make at the March 30, 2016 hearing.

To be clear, because Movants' motion to intervene has been denied, Aetna and Humana may, but are not required to, respond at the hearing to the six questions posed in the Movants' March 15, 2016 letter. To the extent Aetna and Humana do respond to these questions, Movants will not be allowed to cross-examine the witnesses from Aetna and Human providing the response.

IT IS ORDERED:

(1) That Movants' motion to intervene as a full party is denied.

Dated at Madison, Wisconsin, this 25th day of March, 2016.

James C. Boll
Hearing Examiner

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[3] *In the matter of Application for Conversion of Blue Cross & Blue Shield United of Wisconsin,* Case No. 99-C26038, Decision on Motion to Intervene, p.5.

[4] "The potential injury asserted by these parties is no different from potential injury to any member of the general public caused by the agency action or inaction. To allow standing in the instant case would establish a precedent for the agency to admit multiple parties in future proceedings each with a specific interest, which is one among many to be considered in determining the public interest. Therefore, I have denied their motions to intervene." *In the matter of Application for Conversion of Blue Cross & Blue Shield United of Wisconsin,* Case No. 99-C26038, Transcript of Nov. 11, 1999 Hearing, p. 6, lines 6-15. See also

[5] *See In the Matter of the Acquisition of Control Of Physicians Plus Insurance Corporation, Case No. 13-C35798,* Prehearing Conference Memorandum, p.3.