

## Health Insurance Merger Frenzy: Why DOJ Must Just Say 'No'

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A vital national goal is controlling health care costs and improving the quality of health care. A simple but crucial principle of our economic system is that competition matters. Where there are more competitors, transparency and choice, consumers prosper through greater competition, lower prices, higher quality and more innovation. Where competition is less than robust, consumers suffer.

In health insurance, there is an unmistakable record, well-documented in years of congressional debate, economic studies and government enforcement actions — health insurance markets are highly concentrated and there is often a lack of transparency and choice. And, research has shown that when competing health insurers merge, consumers suffer through higher premiums.



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That is why two current deals — the mergers of Aetna Inc. and Humana Inc., and Anthem Inc. and Cigna Corp., reducing the total number of national health insurers from five to three — must be blocked by the U.S. Department of Justice.[1] If these mergers are consummated, employers, unions and health care buying groups will have less choice, and consumers will have fewer options and face higher premiums. Moreover, health care providers — the heart of the health care delivery system — will be faced with reduced reimbursement potentially leading to a reduction in services rendered. As important, the remaining three insurance firms will dictate the terms of innovation vital to correcting the flaws in the health care system and moving to a less costly higher performance health care system. While the DOJ has stated that it will investigate the deals collectively,[2] the only real answer is to block both these mergers affecting nearly 100 million beneficiaries and the health care providers that serve them.

### **The Mergers Will Further Consolidate Already Highly Concentrated Health Insurance Markets**

Concentration is the core to competitive analysis. You do not need a Ph.D. in economics to understand that the greater the number of choices in a transparent market, the more consumer sovereignty will result in an optimal market outcome — low prices, high quality and innovation.

By any measure, health insurance markets in the United States are highly concentrated. According to the American Medical Association, using the Horizontal Merger Guidelines' Herfindahl-Hirschman Index, more commonly known as HHI, 72 percent of health care markets are "highly concentrated" with an HHI

above 2,500.[3] Mergers within such highly concentrated markets are presumptively illegal and “raise significant antitrust concerns,” including higher prices and a lessening of services.[4] The mergers between these four insurance giants would create overlaps in a large number of geographic markets.

These mergers will clearly worsen a competitively unhealthy situation. Analysis by the American Hospital Association demonstrates that the Anthem and Cigna merger alone will reduce competition in 817 metropolitan statistical areas.[5] In fact, post-Anthem/Cigna transaction, 600 markets will have significant HHI increases in markets already exceeding the HHI threshold of 2,500.[6] Additionally, a combined Aetna and Humana would mean that 180 additional U.S. counties would have at least 75 percent of customers for Medicare Advantage plans in the hands of only one insurer.[7] With such highly concentrated markets, there is a heightened presumption that the parties will use their newfound market power to impose competitive advantages.

Concentration is not the sole issue in competitive analysis. The merging parties may suggest that concentration is irrelevant because rival insurers can prevent any competitive harm by entering into markets. They are wrong. Years of DOJ enforcement actions have shown that entry barriers into health insurer markets are substantial.[8] Health insurers have tremendous resources, yet the examples of successful entry into metropolitan areas is modest at best. That is why, a former acting assistant attorney general cautioned these arguments should be viewed “with skepticism and will almost never justify an otherwise anti-competitive merger.”[9]

### **Substantial Concentration Harms Payors and Consumers**

The substantial concentration in health insurance markets has been a poor prescription for competition. Health insurance markets have been characterized by rising premiums and reduced choice and quality, while profits have continued to rise. Indeed, rapidly increasing premiums was one of the reasons Congress imposed an effective cap on insurance profits through medical loss ratio (MLR) regulation.[10] The MLR regulation ensures that a large group insurer must spend at least 85 percent and a small group or individual insurer 80 percent of net premiums on medical services and quality improvements. However, the MLR does not act as a “price cap” as insurers still have the ability to make up “lost” profits by increasing premiums on consumers.[11]

Economic studies demonstrate the close and essential relationship between concentration and harm to consumers. For example, one study found direct evidence “linking private insurance premiums to the market power of insurers.”[12] Another study of health insurance premiums on 34 federally facilitated marketplaces found that adding one additional insurer would lower premiums by 5.4 percent, while adding every available insurer would lower rates by 11.1 percent.[13]

Eliminating competition through these mergers means that consumers will pay more.

### **Divestitures Cannot Adequately Remedy the Competitive Problems**

Often, the antitrust enforcement agencies have remedied anti-competitive mergers through cut and paste divestitures, requiring spinoffs of assets where there are competitive overlaps. Yet, increasingly, economic studies demonstrate limited divestitures are inadequate and the right course is simply to block the merger. An economic survey by Northeastern University professor John Kwoka demonstrates how divestitures often fail to fully restore competition.[14] That is a lesson the antitrust enforcers are beginning to learn. Recently, the Federal Trade Commission and the DOJ rejected substantial proposed divestitures in blocking the Comcast-Time Warner Cable[15] and Sysco-US Foods mergers.[16] They

should do the same here.

In the past, the DOJ has relied exclusively on divestitures in health insurance merger matters. Of course, these deals are vastly more substantial than these earlier deals and the competitive overlaps are considerable. In the 2012 Humana/Arcadian transaction, for example, the DOJ noted problematic overlaps for the parties' Medicare Advantage businesses, requiring divestitures in 45 different counties throughout the United States.[17] Also in 2012, the DOJ required divestitures of Medicaid managed care plans in Northern Virginia in Wellpoint's acquisition of Amerigroup.[18]

However, in each of those cases, the merger involved a large insurance plan combining with a relatively small, niche plan. In contrast, the mergers of Aetna and Humana and Anthem and Cigna involve the combination of some of the largest health insurers in the country affecting tens of millions of beneficiaries in highly concentrated markets throughout the United States.[19] A handful of targeted divestitures are unlikely to remedy the megacompetitive problems raised by these mergers.

Moreover, there is readily available evidence that narrowly targeted divestitures within insurance markets do not alleviate a transaction's overall competitive impact. In 1999, Aetna merged with Prudential, with the DOJ requiring Aetna to divest its health maintenance organization business in Texas.[20] Using the aftermath of that merger to estimate the impact of market concentration on premiums, the authors projected that the increase in market concentration over the period 1998-2006 "raised premiums by roughly seven percent from their 1998 baseline." [21] The study's findings were made more impactful in that the evidence was collected from 139 separate geographic markets.[22] A more recent study, relying on data from the 2008 consummated merger involving UnitedHealth and Sierra Health Services in which the DOJ required divestitures of Medicare Advantage beneficiaries in Las Vegas,[23] found that post-merger commercial premiums in Nevada increased by 13.7 percent.[24] Taken together, these studies demonstrate that, regardless of utilizing the remedy of divesting certain assets, health insurance consolidation allows large, dominant insurers to drive up the cost of premiums.

The simple lesson may be that the only sensible course is to block the transactions. That was the course taken by the Pennsylvania commissioner of insurance in 2010 when he blocked the merger of Pittsburgh-based Highmark and Philadelphia-based Independence Blue Cross.[25] Because of that action, there is the potential for rivalry between the two firms.

### **Unlikely Efficiencies**

As is typical in all merger matters, the parties will rely on efficiencies to attempt to demonstrate pro-competitive benefits of the mergers. But, they face an incredible burden in invoking efficiencies as a defense to these insurance mergers. Under DOJ/FTC merger guidelines, efficiencies must be merger-specific, substantiated and cognizable.[26] The parties may make claims of improved service, but, as the Ninth Circuit recently instructed, "better service to patients" is a laudable goal "but the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations." [27]

Aetna has already noted significant, \$1.25 billion, "synergy opportunit[ies]" that will improve "operating efficiency" between Aetna and Humana.[28] The firms claim a need to increase scale to lower reimbursement rates to health care providers, thus ensuring cost savings for the entire health care system and for consumers in the form of lower premiums.[29] The parties do not explain whether a merger is the only or best means to achieve those efficiencies, nor do they explain how these savings will be passed along to consumers.

There are substantial reasons to doubt those types of claims. While a strong market presence may enable health insurance companies to negotiate lower provider reimbursement, research demonstrates those savings are not passed along to consumers. As some academics have observed, “when insurers merge, there’s almost always an increase in premiums.”[30] The only way to assure lower insurance premiums is through competition.[31]

### **Creating More Powerful Insurers Will Not Benefit Consumers**

Along with increasing prices for consumers in the form of higher premiums, narrowing the market to just three dominant health insurers would also lead to an increase in monopsony power, or the power to reduce reimbursement for health care providers. This has been a concern in past DOJ health insurance mergers and certainly was a concern that animated the DOJ and Federal Communications Commission challenges to the Comcast/Time Warner Cable merger.[32] Merging to create a stronger buyer is only beneficial to the extent it leads to lower prices for consumers.

Rather than leading to lower premiums, the mergers and any attendant monopsony power will lead to reduced “availability and affordability of health insurance for millions of consumers.”[33] As the American Association of Family Practitioners cautions, this power will lead to more restricted networks — that trend “would only be exacerbated if a single insurer held greater influence over any potential market, state, or region — potentially separating patients from their physicians and community hospitals.”[34] Additionally, there are significant and increasing shortages of primary physicians and rural hospitals,[35] and giving insurers monopsony power will only exacerbate those trends.

The parties may try to dress up as David claiming the mergers are necessary to bargain with hospital Goliaths. The DOJ will clearly see through that masquerade. The health insurers are already very powerful and large and have substantial bargaining power against providers. The canard that hospitals have substantial bargaining power is belied by the facts — hospital costs are not increasing substantially.[36]

Moreover, the insurers would acquire monopsony power against all health care providers, not just hospitals, and reduced reimbursement would clearly harm numerous provider markets leading to greater shortages of health care providers, such as family practitioners and rural hospitals, and less service for patients.

Finally, permitting a merger to enable an insurer to secure greater bargaining power is at best a Faustian bargain — since it would also acquire monopoly power, it would have no need to pass on any decreased reimbursement in lower premiums to consumers.

The DOJ recognizes that simple truth. In the DOJ’s complaint in UnitedHealth’s 2005 acquisition of PacifiCare, the agency noted that the parties’ increased buying power would allow it to lower rates to physicians. “Such lower rates would likely lead to a reduction in the quantity or degradation in the quality of physicians services.”[37] The 2012 Aetna/Prudential study made a similar finding noting that post-merger, “insurers were able to exercise market power simultaneously in input and outputs markets.”[38] Mergers between Aetna and Humana and Anthem and Cigna would further increase their ability to lower provider reimbursement rates. As previously noted, this monopsony power does not translate into lower premiums, but likely would lower physician reimbursement and could deteriorate health care quality.

## Conclusion

These mergers raise profound economic and public health concerns. Strong antitrust enforcement is vital to making these markets work.

As a former Antitrust Division head has explained:

The success of health care reform will depend as much upon healthy competitive markets as it will upon regulatory change. If health care reform is to produce more efficient systems, bring health care costs under control and provide higher-quality health care delivery, then we must vigorously combat anti-competitive mergers and conduct that harm consumers with responsible antitrust enforcement.[39]

The mergers between Aetna and Humana and Anthem and Cigna will not serve to lower costs or improve care. Instead, they will increase health insurance concentration in already concentrated markets leading to higher premiums, decreased quality of health care services, and less innovation. These mergers should be blocked.

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***DISCLOSURE: Balto is currently general counsel for the Independent Specialty Pharmacy Coalition, which is involved in health policy lobbying.***

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[1] See Robert Cyran, The Regulatory Hurdles to Health Insurance Mergers, N.Y. Times (July 24, 2015), <http://goo.gl/ph89r1>.

[2] See Brent Kendall & Anne Wilde Matthews, DOJ Girds for Strict Review of Any Health-Insurance Mergers, Wall St. J. (June 28, 2015, 5:13 PM), <http://goo.gl/q1P3Ay>.

[3] See David W. Emmons & Jose R. Guardado, Competition In Health Insurance: A Comprehensive Study of U.S. Markets, Am. Med. Assoc. (2014).

[4] Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines at § 5.3 (Aug. 19, 2010).

[5] Letter from American Hospital Association, to William Baer, Assistant Attorney General, U.S. Dep't of Justice Antitrust Division (Aug. 5, 2015), available at <http://goo.gl/S3gZCt>.

[6] Id.

[7] Anna Wilde Mathews & Christopher Weaver, Health Mergers Could Cut Consumer Options, Wall St. J (June 21, 2015 10:55 PM), <http://goo.gl/zwY0ft>.

[8] See e.g. Complaint, United States v. Aetna Inc. and Prudential Insurance Co. of Am., No. 3-99CV 1398-H (N.D. Tex. June 21, 1999) (finding that it was unlikely that new insurers would enter and compete with the newly formed Aetna/Prudential in Houston and Dallas “because of the costs and difficulties of doing so”).

[9] Assistant Attorney General Christine Varney, Department of Justice Antitrust Div., American Bar Association/American Health Lawyers Association Antitrust Healthcare Conference (May 24, 2010), available at <http://goo.gl/rzPCOG>.

[10] See generally Michael J. McCue & Mark A. Hall, Insurers’ Responses to Regulation of Medical Loss Ratios, Commonwealth Fund (Dec. 2012), available at <http://goo.gl/xudcVH> (noting the purpose of Medical Loss Ratio as part of the Affordable Care Act was created to reduce insurance profits).

[11] See Reed Abelson, Bigger May Be Better for Health Insurers, but Doubts Remain for Consumers, N.Y. Times (Aug. 2, 2015), <http://goo.gl/QBHsNj>; see also Robert Pear, Obama Administration Urges States to Cut Health Insurers’ Request for Big Rate Increases, N.Y. Times (Aug. 3, 2015), <http://goo.gl/NIV2vq> (insurance plans are seeking 10 to 40 percent increases on health insurance premiums).

[12] Leemore Dafny, Are Health Insurances Markets Competitive?, 100 Am. Econ. Rev. 1399, 1403 (2010).

[13] See More Insurers, Lower Premiums? Kellogg Insight (July 7, 2014), <http://goo.gl/Dw4Qeq> (discussing research by Leemore Dafny, Jonathan Gruber and Christopher Ody).

[14] See generally John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S Policy, MIT Press (2015).

[15] Press Release, DOJ, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and Federal Communications Commissions Informed Parties of Concerns (Apr. 24, 2015), available at <http://goo.gl/msZq6f>.

[16] Press Release, FTC, Following Sysco’s Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), <https://goo.gl/XfwPsW>.

[17] See Complaint, United States v. Humana Inc., No. 1:12-cv-00464 (D.D.C. March 27, 2012).

[18] Press Release, Dep’t of Justice, Amerigroup Corp.’s Divestiture of Its Virginia Operations Addresses Department of Justice’s Concerns with Wellpoint Inc.’s Proposed Acquisition of Amerigroup (Nov. 28, 2012), available at <http://goo.gl/5npDzs>.

[19] See Carolyn Johnson, Anthem announces it will buy Cigna to create new health insurance giant, Wash. Post (July 24, 2015), <http://goo.gl/3v4e4y> (noting the combination of Anthem and Cigna will create an entity with 53 million beneficiaries); see also Adam Smeltz, Aenta plan to buy Humana under review, Pittsburgh Post-Gazette (July 14, 2015 12:00 AM), <http://goo.gl/iowyBV> (the Aetna/Humana merger will involve 33 million covered lives).

[20] See Revised Final Judgement, *United States v. Aetna Inc. and Prudential Insurance Co. of Am.*, No. 3-99CV 1398-H (N.D. Tex. Dec. 7, 1999).

[21] Leemore Dafny, Mark Duggan, & Subramaniam Ramanarayanan, Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry, 102 *Am. Econ. Rev.* 1161, 1163 (2012).

[22] *Id.* at 1164.

[23] Final Judgement, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, 1:08-CV-00322 (D.D.C. Sept. 24, 2008).

[24] José R. Guardado, David W. Emmons, & Carol K. Kane, The Price Effects of a Large Merger of Health Insurers: A Case Study of UnitedHealth-Sierra, 1 *Health Mgmt., Pol’y & Innovation* 16, 21 (2013).

[25] See *Highmark, Inc. v. Commonwealth of Pennsylvania, Insurance Department and Pennsylvania Insurance Commissioner Joel S. Ario*, Civil Action No: 194 M.D. 2010 (Pa. Commw. Ct.).

[26] Horizontal Merger Guidelines, *supra* note 4 at § 10.

[27] *St. Alphonsus Med. Ctr. v. St. Luke’s Health Sys.*, 778 F.3d 775, 791-92 (9th Cir. 2015)

[28] Press Release, Aetna, Aetna to Acquire Humana for \$37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care (July 3, 2015), available at <https://goo.gl/dktKof>.

[29] See Thomas Greaney, Examining Implications of Health Insurance Mergers, *Health Affs.* (July 16, 2015), <http://goo.gl/ETT1DB>.

[30] David Lazarus, As Health insurers merge, consumers’ premiums are likely to rise, *L.A. Times* (July 10, 2015 4:00 AM), <http://goo.gl/nF7HRS> (quoting Erin Trish, USC’s Schaeffer Center for Health Policy and Economics).

[31] See *More Insurers, Lower Premiums?*, *supra* note 13 (finding that increasing the number of insurers in a market drives down price).

[32] Comcast Corporation Abandons Proposed Acquisition, *supra* note 15.

[33] Letter from Reid Blackwelder, Board Chair, AAFP, to Chairwoman Edith Ramirez, FTC (June 4, 2015), available at <http://goo.gl/vk4IHM>.

[34] *Id.*

[35] See generally Elizabeth Burrows, Ryung Suh, & Danielle Harmann, Health Care Workforce Distribution and Shortage Issues in Rural America, *Nat’l Rural Health Assoc.* (2012), available at <http://goo.gl/szNwKe>.

[36] Overall Growth in Spending on Health Care Down Sharply, *American Hospital Assoc.* (2014), available at <http://goo.gl/7NZhPN> (from to 2012 to 2013, the change in hospital prices was only a 1.5 percent increase).

[37] Complaint. United States v. UnitedHealth Group Inc. and PacifiCare Health Sys. Inc., 1:05-cv-02436 (D.D.C. Dec. 20, 2005).

[38] Dafny et al., *supra* note 21 at 1183.

[39] Assistant Attorney General Sharis A. Pozen, DOJ Antitrust Division, Remarks at World Annual Leadership Summit on Mergers and Acquisitions in Health Care: Competition and Health Care: A Prescription for High-Quality, Affordable Care (Mar. 19, 2012), <http://goo.gl/aQkmZw>.

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