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Antitrust

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# Mega-Mergers Highlight Risk to Health Care Providers

In this Issue:



Consolidation in health insurance markets can injure hospitals and doctors by creating buyer-side market power that can force providers to accept below-market prices, limit patients' access to care, and reduce innovation in health care financing and delivery. In two recent lawsuits challenging the proposed Anthem/Cigna and Aetna/Humana mergers, the Antitrust Division of the US Department of Justice ("DOJ") reaffirmed that antitrust law needs to protect providers from monopsony, not just protect insurance buyers from monopoly.

The suits will allow the DOJ and the courts to further develop the legal and factual basis for challenging insurance company mergers on a monopsony theory, which may help protect providers in these and future cases.

Monopsony is the power of a large buyer to pay less than the competitive price for the services that it buys. Health insurer monopsony can harm health care providers. It can also harm patients by reducing the quality or availability of health care services, as providers provide fewer services or exit the market in response to below-market prices. The DOJ has challenged health insurer mergers on a monopsony theory in two previous cases: *Aetna/Prudential* (1999) and *United/PacifiCare* (2005), both of which resulted in consent decrees requiring the insurers to divest health insurance businesses to reduce their market shares below monopsony levels. A pending multidistrict litigation, *In Re: Blue Cross Blue Shield Antitrust Litigation*, No. 2:13-CV-20000-RDP (N.D. Ala.), asserts claims for damages caused by monopsony on behalf of an alleged class of providers nationwide.

On July 21, the DOJ and several state attorneys general filed two lawsuits, challenging the Anthem/Cigna and Aetna/Humana mergers as violations of § 7 of the Clayton Act, which prohibits mergers that may substantially reduce

competition. The cases are similar, but have important differences that are relevant to the monopsony theory.

Both complaints describe the proposed mergers as consolidation of the "big five" insurers to the "big three, each of which would have almost twice the revenue of the next largest insurer." Both complaints say the mergers will harm competition by "eliminating two innovative competitors – Humana and Cigna – at a time when the industry is experimenting with new ways to lower healthcare costs."

The cases are different in that they focus on different product markets. The Anthem/Cigna complaint alleges that that merger will restrain competition in the "purchase of healthcare services by commercial health insurers," as well as the sale of commercial health insurance to national accounts and large-group employers, and the sale of individual policies on the public insurance exchanges. The Aetna/Humana complaint alleges anticompetitive effects only in the sale of Medicare Advantage policies to individual seniors, and the sale of individual policies on the public insurance exchanges. The Aetna complaint does not charge a violation in the market for the purchase of healthcare services, and therefore does not rely on a monopsony theory.

The key allegations in support the DOJ's monopsony theory in the Anthem/Cigna complaint are:

- "The proposed merger would substantially increase concentration for the purchase of healthcare services by commercial health insurers" in 35 metropolitan areas, and is "presumptively unlawful" in 25 of those cities.
- "Anthem already has substantial bargaining leverage when negotiating with doctors and hospitals because it represents a large share of their commercial patients and revenue."
- "The proposed merger would enhance Anthem's leverage — both over physician practices that receive 'take-it-or-leave-it' terms (without any negotiation) and over hospitals and physician groups that individually negotiate their contracts and rates with Anthem. As a result of the merger, Anthem likely would reduce the rates that both types of providers earn by providing medical care to their patients."
- "This reduction in reimbursement rates likely would lead to a reduction in consumers' access to medical care. For example, lower reimbursement rates likely would cause some physician practices to limit their hours of operation or reduce their staff. It may become more difficult to recruit new physicians to many of these markets. Other more experienced doctors may decide to retire early. This would exacerbate the shortage of certain doctors — such as those providing primary care — that plagues many of these markets."
- "These rate reductions would not result from any additional efficiencies or potentially procompetitive volume discounts."
- "The merger also likely would slow down the much-needed transition to value-based contracting," by eliminating Cigna, a leading innovator in value-based provider contracting.

The Anthem complaint emphasizes that price reductions that result from insurer monopsony are not procompetitive efficiencies that might benefit consumers, because "these reductions stem from a reduction in competition." Provider price reductions that result from monopsony can harm consumers if, as DOJ alleged, they reduce the quantity and quality of health care services available in the market. And

if, as DOJ alleged, the insurer is also a monopolist in the health insurance business, the insurer will have no incentive to pass on price reductions to consumers in the form of lower health insurance premiums. These provider price reductions therefore serve only to increase insurers' profits, at the expense of both providers and patients. As Bill Baer, former Assistant Attorney General in charge of the Antitrust Division, said in a speech last fall, "Consumers do not benefit when sellers or buyers — merge simply to gain bargaining leverage."

## What Providers Need to Know:

- The use of the monopsony theory in DOJ enforcement actions and in private litigation illustrates the ways in which antitrust law protects sellers from abuse of market power by large and powerful buyers.
- Antitrust law recognizes that lower prices do not always benefit consumers. To the contrary, if below-market provider prices reduce the availability of health care services, consumers are harmed. Consumers also can be harmed if insurers reduce the prices they pay for health care services without passing those savings on to purchasers of health insurance.
- Providers should be alert to possible below-market prices, especially where conditions in their market appear to fit the facts that the DOJ alleged in Anthem/Cigna.
- Providers in the 35 geographic markets that the DOJ identified in its Anthem complaint (including cities in California, Colorado, Missouri, Illinois, Indiana, Georgia, Virginia, North Carolina, New York, New Jersey, Connecticut, New Hampshire, Vermont and Maine) should follow developments in the Anthem case, because they may be significantly impacted by the outcome of the Anthem/Cigna merger.

## For More Information

For more information, please consult the authors or your Polsinelli Antitrust attorney.


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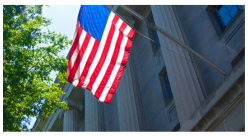



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