The Antitrust Ax Swings at Healthcare Part I: A Look at the Recent Healthcare Merger Cases and the Return of Antitrust Principles

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Judges and Congress have at times bent over backwards for the healthcare industry. But with the back-to-back blocked mergers of Aetna-Humana (January 2017) and Anthem-Cigna (April 2017) on antitrust grounds, it looks like the healthcare insurance industry is confined permanently to the Big Five (Humana, Aetna, Cigna, Anthem, and UnitedHealth Group). Some see this as an indicator that further market concentration will not be tolerated under antitrust law.

This two-part article looks at this year’s Aetna-Humana and Anthem-Cigna mergers and highlights the traditional antitrust principles leaking from the opinions. The opinions themselves read like a textbook example of antitrust principles. Professor Waller’s recent law journal piece suggests that healthcare often has enjoyed a special status under antitrust laws. ¹ This status is reaching the limits of acceptability. The law for the moment in the healthcare markets has swung back in favor of antitrust principles, and the antitrust ax continues to cut down mergers across all of health care.²

Healthcare is special because merger efficiency arguments carry significantly more weight than a typical industry.

The special status for healthcare comes from the nature of the industry. Typically, more healthy individuals on a plan create lower cost premiums for the consumer. Larger pools for the insured spread the risk of loss around such that costs can be lowered in correlation to the shared risk.

Given these basic realities, some suggest the best possible industry structure for healthcare insurance is a benevolent monopoly. A benevolent monopoly would have 100% participation spreading the risk across 100% of the population resulting in the lowest possible premium base for consumers. Mergers are one of the quickest ways to acquire hundreds of thousands of new consumers. The industry pressures to merge lead to $1 billion deals in the hopes of acquiring more consumers.

But little room exists for such monopolies in antitrust law, regardless of the possible social goods. The best the industry hopes for is a relatively large sharing oligopoly. Competition would exist in theory between the limited providers, and consumers would benefit from the size of the plans with lower costs overall. Health care efficiency arguments are based on these market realities and arguably should be more persuasive than similar claims in other industries. The federal court block of the Aetna-Humana merger was not 100% predictable given the past weight given to mergers of this type. Why the change?

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Market concentration and previous anticompetitive behavior is making courts suspicious of healthcare efficiency arguments.

The Aetna-Humana merger was blocked in federal court back in January on grounds that the merger would reduce competition, limit patients’ coverage options, and limit the kind of available care patients could receive. The two companies claimed the merger would allow the Medicare Advantage markets to be more efficient with cost benefits passed along to the consumer. But well before the decision to block the merger, antitrust advocates were already highlighting the reasons why this merger would not go through.

In a lengthy and detailed opinion, the District Court agreed that the merger should not go through because it would result in substantial loss of competition for Medicare Advantage plans and the health insurance plans sold on the public exchanges. The HHI analysis of a post-merger market alone was greater than 5,000 with an increase of sometimes more than 1,000. This market concentration drew the eye of the Court to the very real dangers of anticompetitive behavior. The proposed efficiencies by Aetna-Humana failed to be sufficient to mitigate any of the anticompetitive effects for the consumers. In addition, the Court regarded it as highly suspect that consumers would see any benefit for efficiency gains given past behavior.

Aetna, for instance, had threatened to withdrawal from the public exchanges should the DOJ challenge the merger with Humana and ultimately did so. The reason Aetna withdrew from the exchanges became important because it determined the weight the Court should give to the evidence that Aetna is not offering plans in the public exchanges. The Court determined it is not

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4 Aetna, 2017 WL 325189 at *36.
5 Id. at *54.
limited to looking at 2017 for competition purposes mainly because proposed merger analysis focuses on the future of competition and whether the proposed merger lessens it.\textsuperscript{6}

However, competition cannot be viewed as an on-off switch where a merging party can avoid antitrust scrutiny by withdrawing during a merger only to enter again as the now merged firm and raise prices.\textsuperscript{7} One foot in the door and one foot out of the market have traditionally been viewed as actual competitors.\textsuperscript{8} Aetna’s absence from the markets in question then, if the result of sound business needs, strengthens the efficiencies and necessity reasons given by Aetna. If it were purely tactical, then it suggests the merger was unnecessary for Aetna to join the market. Ultimately, the Court found that Aetna left for a tactical advantage, because Aetna experienced profitability in those markets at time of withdrawal.\textsuperscript{9} This damaged Aetna’s credibility on the argument that the merger should go through as a benefit for consumers.

The facts of this case, compiled with the malicious looking intent behind Aetna’s withdrawal from the market, led to the demise of this merger on antitrust grounds. But it is a mistake to believe that Aetna’s chances would have been improved had it remained in the public exchange markets. The market concentration reached a critical point such that the courts cannot ignore the anticompetitive possibilities in favor of the possible consumer benefits. It is these facts that largely limit the continuous consolidation of healthcare and force traditional antitrust principles to apply.

\textbf{Future mergers must rely on more than just efficiency because of market concentration}

\textsuperscript{6} \textit{Id} at *55.
\textsuperscript{7} \textit{Id} at *56.
\textsuperscript{8} \textit{Id}.
\textsuperscript{9} \textit{Id}.
As Part II will explore, Anthem-Cigna relied not just on efficiency arguments but also on value-based product arguments and negotiation power resulting in savings that could be passed along to consumers. No doubt Anthem and Cigna saw the January ruling and recognized the limitation a pure efficiency argument would have. Consumer savings purely through administrative efficiency no longer would be enough to counter anticompetitive effects. However, their overall attempt failed. This suggests that courts are viewing the health care markets as having a critical concentration worthy of suspicion. Exactly what would justify a merger on this scale is still up for debate, but the industry is on notice that something more than a bare efficiency claim is required. Part II is forthcoming and will explore the Anthem-Cigna merger and what is needed to convince a court that merger benefits outweigh anticompetitive effects.