February 23, 2016

Acting Director Anne Melissa Dowling
Illinois Department of Insurance
122 S. Michigan Ave. 19th Floor
Chicago, Illinois 60603

Re: Aetna-Humana Merger

Dear Director Dowling:

The undersigned organizations represent a wide variety of consumers across the state and have long been concerned with the competitive landscape in the health care industry. We believe competition within different health care markets that offers ample choice, high quality, and transparency is essential to ensuring accessible and affordable care to patients. We also believe competition between health insurers is essential to ensuring lower premiums, improving quality of care, and promoting access and choice.

We write to bring to your attention our concerns over the further consolidation in Illinois' health insurance markets that would result from the proposed merger of Aetna and Humana. The proposed merger would combine two of the nation's five largest insurers.[1] We are concerned that the merger of these large insurers could substantially lessen competition for consumers in Illinois. We write to ask that the Illinois Department of Insurance ("DOI") and the Director carefully review this merger, and consider holding a public hearing, to thoroughly evaluate the impact of the merger in Illinois, and to take appropriate action under its authority to protect competition and consumers.

Under Illinois law, the Director is authorized to disapprove any merger of insurers that would substantially lessen competition in insurance.[2] In assessing if a health insurance merger

[1] The other three national insurers are UnitedHealthcare, Anthem, and Cigna. Anthem and Cigna have also proposed a merger that is currently pending and under review.
[2] 215 ILL. COMPLIED STAT. § 5/131.8(1)(b).

substantially lessens competition, Illinois law applies the "competitive standard"[3] adopted by the National Association of Insurance Commissioners in its Model Act.[4]

Our comment discusses (1) the DOI's extensive review powers, (2) the high concentration and potential anticompetitive impact of this merger, (3) the likely impact of the merger on consumer costs, (4) the possible adverse effects on network adequacy, (5) why new entry and potential competition are not likely to alleviate these concerns, (6) the relevance of possible efficiencies, (7) whether there are any remedies that can adequately protect consumers and the public interest if this merger goes forward, and (8) why public hearings could be helpful to a thorough evaluation.

I. The Illinois Department of Insurance Has Extensive Powers to Review the Aetna-Humana Merger

Illinois has granted the DOI and Director extensive powers to review mergers between insurers and to disapprove those that are "unfair and unreasonable to policyholders of the domestic insurer and not in the public interest."[5] This is consistent with the standards adopted by the National Association of Insurance Commissioners ("NAIC") in its Model Act.[6] This authority is in addition to, and goes beyond, the authority of federal and state antitrust enforcers.

Illinois law gives the DOI and the Director broad powers to fully investigate an insurance merger to determine its effects on competition, including holding public hearings where that would be beneficial.[7]

The DOI process adds importantly to that of the federal and state antitrust enforcers in a number of respects. First, the Director has the broad mandate to ensure that a proposed health insurance merger is in the "public interest,"[8] while the antitrust enforcers have a more limited review that focuses solely on whether there is a reduction of competition under antitrust law precedents. Second, the DOI, as the key regulator of health insurance, brings specific and extensive expertise in health insurance market review. Third, the DOI proceedings are public and enable a significant level of transparency and citizen participation, and the creation of a public record; antitrust investigations are confidential, with limited opportunities for public input. Finally, the DOI has broader powers to fashion and monitor remedies to protect consumers from the harms these proposed mergers could cause.[9]

[3] *Id.* at § 5/131.12(a)(4).
[4] The National Association of Insurance Commissioners' Model Insurance Holding Company System Regulatory Act provides detailed analysis of the "Competitive Standard" that can be used to investigate if a health insurance merger is anticompetitive. MODEL INS. HOLDING CO. SYS. REGULATORY ACT § 440-1 (Nat'l Ass'n of Ins. Comm'rs 2015).
[5] 215 ILL. COMPLIED STAT. § 5/131.8(1)(d).
[6] *See generally* Model Holding Act, *supra* note 4.
[7] *See* 215 ILL. COMPLIED STAT. § 5/131.8(2).
[8] *Id.* at § 5/131.8(1)(d).
[9] We further discuss remedial provisions in Section VII.

II. The Merger of Aetna-Humana Will Have a Significant Impact on Illinois Health Insurance Markets

Prior to the announcement of these mergers, the vast majority of insurance markets within Illinois were already highly concentrated leaving limited options for consumers and employers. A 2014 report by the United States Government Accountability Office found that the three largest commercial insurers for individual, small group, and large group enrolled 83 percent of all Illinoisans.[10]

Data analyzing market share and concentration levels show that the merger of Aetna and Humana would result in concentration levels beyond the thresholds that trigger significant concerns under both federal antitrust law and Illinois' antitrust and insurance statutes. According to figures compiled by the American Medical Association, the Aetna-Humana merger would result in concentration beyond those thresholds for different commercial insurance products in metropolitan statistical areas of Kankakee-Bradley, Bloomington-Normal, Lake County-Kenosha County, and Peoria.[11] Moreover, the merger will also impact the Illinois Exchange for individual consumers. Both Aetna and Humana offer competing insurance products on the exchange.[12] As a result of the merger, the Illinois Exchange would only have three insurers in three separate rating areas: Rockford (area 5), Bloomington (area 8), and Springfield-Decatur (area 10).[13]

Along with commercial insurance, the merger also raises concerns in Medicare Advantage ("MA") markets. According to the Kaiser Family Foundation, the combined Aetna-Humana company would have a 37 percent market share in MA for Illinois.[14] In Winnebago County, the combined Aetna-Humana company will control 76 percent of the MA market, or roughly just over 15,000 lives.[15] In total, the two companies compete in 56 different counties throughout Illinois, meaning thousands of elderly consumers would lose access to a competitive MA plan.[16]

III. The Mergers are Likely to Result in Higher Consumer Costs Throughout Illinois

Studies of past health insurance mergers have documented that mergers harm consumers by leading to higher premiums and reduced service.[17] There are no studies demonstrating that

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[10] United States Government Accountability Office, *Private Health Insurance: Concentration of Enrollees among Individual, Small Group, and Large Group Insurers from 2010 through 2013* (Dec. 1, 2014), *available at* http://goo.gl/eYS4Ir.

[11] American Medical Association, *Markets where an Aetna-Humana merger warrants antitrust scrutiny* (Sept. 8, 2015).

[12] Aetna owns Coventry who sells individual insurance plans under the Coventry Health Care of Illinois and Coventry Health & Life Insurance Company.

[13] *See* 2016 Analysis of Illinois Exchange Rates, *available at* http://goo.gl/sCd8Kb.

[14] Gretchen Jacobsen, Anthony Damico, & Tricia Neuman, *Data Note: Medicare Advantage Enrollment, by Firm, 2015*, KAISER FAMILY FOUND. (July 14, 2015), http://goo.gl/gJ1xnz.

[15] *Id.*

[16] *See* Topher Spiro, Maura Calsyn, & Meghan O'Toole, *Bigger is Note Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers*, CTR. FOR AM. PROGRESS (Jan. 21, 2016), *available at* https://goo.gl/1Aa70h.

[17] *See infra* Leemore Dafny *et al*., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012); *see also infra* Jose Guardado et al. *The Price Effects of a Large*

health insurance mergers benefit consumers. Consumers are rightly very concerned that these proposed mergers would lead to the same harm – rising costs, i.e. higher premiums and out-of-pocket charges. In Illinois, from 2015 to 2016, insurers raised premium rates by double digits.[18] In fact, Coventry Health Care of Illinois, an Aetna owned company, sought a rate increase of 15 percent for its preferred provider organization plan, and Humana sought a 19.1 percent increase for its health maintenance organization plan.[19] With prices steadily increasing in highly concentrated Illinois insurance markets, this proposed merger could exacerbate this trend, leading to even higher consumer costs.

There is little dispute that there is a direct correlation between health insurer concentration and higher premiums.[20] According to one health economics expert at the University of Southern California's Schaeffer Center for Health Policy and Economics, "when insurers merge, there's almost always an increase in premiums."[21] Two separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger. One study found that the 1999 Aetna-Prudential merger resulted in an additional seven percent premium increase in 139 separate markets throughout the United States.[22] Another study found that the 2008 United-Sierra merger resulted in an additional 13.7 percent premium increase in Nevada.[23] There is also economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.[24] Moreover, an anticompetitive insurance merger could also impact out-of-pocket costs as consumers see increases in deductibles or other insurance-related costs.[25]

Most recently, the Center for American Progress ("CAP") released findings on Medicare Advantage that demonstrated the key importance of competition. According to the CAP report, in counties where Humana and Aetna compete with each other on MA plans, both Aetna's and Humana's average premiums are lower.[26] Specifically, Aetna's average annual premiums are

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Merger of Health Insurers: A Case Study of United-Sierra, 1(3) HEALTH MANAGEMENT, POL'Y & INNOVATION 1 (2013).

[18] Wes Venteicher & Ameet Sachdev, *Some steep increases in health premiums expected in Illinois in 2016*, CHICAGO TRIBUNE (June 1, 2015 7:53 PM), *available at* http://goo.gl/IgDtlt.

[19] *Id.*

[20] *See* Leemore Dafny, *Are Health Insurances Markets Competitive?*, 100 AM. ECON. REV. 1399 (2010).

[21] 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.

[22] *See* Leemore Dafny *et al*., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

[23] Jose Guardado et al. *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra*, 1(3) HEALTH MANAGEMENT, POL'Y & INNOVATION 1 (2013).

[24] Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), *available at* http://goo.gl/918ULo.

[25] *See generally* Leemore Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND (Nov. 20, 2015), http://goo.gl/xRYb5x; *see also* Korin Miller, 6 Ways the Big Health Insurance Mergers Will Affect Your Coverage, YAHOO HEALTH (July 24, 2015), https://goo.gl/qLioCy (noting that "out-of-pocket payments could increase" because insurance coverage could limit certain services or number of visits forcing patients to pay more).

[26] *See* Topher Spiro, Maura Calsyn, and Meghan O'Toole, *Bigger is Note Better: Proposed Insurer Mergers Are Likely to Harm Consumers and Taxpayers*, CTR. FOR AM. PROGRESS (Jan. 21, 2016), *available at* https://goo.gl/1Aa70h.

$302 lower in counties where Humana also offers a MA plan.[27] In Illinois, Aetna and Humana offer MA plans that compete with each other in 56 separate counties.[28] The clear implication of this evidence is that a merger between Aetna and Humana would likely raise prices for MA plans throughout Illinois.

In contrast, there are no economic studies or evidence indicating that insurance mergers lead to lower prices for consumers. However, that has not prevented the merging companies from suggesting that their merger will create cost savings which they will pass along to consumers.[29] Much of these supposed savings are attributed to the new merged firm's expected greater buying power, also known as monopsony power. According to proponents of these health insurance mergers, a dominant insurer can use monopsony power to lower provider reimbursement rates and pass the savings along to consumers.[30] But there is no evidence consumers actually receive any of these potential savings. In fact, Professor Thomas Greaney, a leading health antitrust scholar, has noted that there is actually "little incentive [for an insurer] to pass along the savings to its policyholders."[31] More likely, the now-dominant insurer would exploit its monopsony power to benefit only itself, closing off choices, and pressuring providers to cut corners on quality of care in order to meet its demands – the opposite of what consumers need.[32] As the American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded, economic studies and evidence indicate that "consumers do not benefit from lower healthcare costs through enhanced bargaining power."[33]

Current market regulations will not deter an insurer from raising consumer costs. Some supporters of this merger have argued that the medical loss ratio ("MLR") "directly limits the level of insurer profits," thus protecting consumers from price increases.[34] While MLR is an important tool that requires health insurers spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm. Along with MLR not applying to self-insured plans, and the potential for MLR to be gamed by insurers to reduce consumer welfare, MLR, as health antitrust expert Professor Jamie King has observed, "does not guarantee that dominant insurers will not raise

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[27] *Id*.
[28] *Id.* at 15.
[29] *See generally Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Mark T. Bertolini, Chairman & CEO of Aetna, Inc.), *available at* http://goo.gl/TokebO (noting that the merger will lead to "lower costs").
[30] *See* Victoria R. Fuchs and Peter V. Lee, *A Health Side of Insurer Mega-Mergers*, WALL ST. J. (Aug. 26, 2015, 6:36 PM), http://goo.gl/hMhuzI.
[31] *See* Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), http://goo.gl/ETT1DB.
[32] *See Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. (Sept. 22, 2015) (testimony of George Slover, Consumers Union), *available at* http://goo.gl/s16PSj ("[b]ut a dominant insurer could force doctors and hospitals to go beyond trimming costs, to cut costs so far that it begins to degrade the care and service they provide below what consumers value and need").
[33] Letter from the American Antitrust Institute, Thomas Greaney, and Diana Moss, to William J. Baer, Assistant Attorney General Dep't of Justice (Jan. 11, 2016), *available at* http://goo.gl/BD1zTL.
[34] *E.g.*, Bertolini, *supra* note 29.

premiums and as such, it is not a substitute for the pressures toward lower costs and higher quality created by a competitive market."[35]

IV. There are Significant Concerns over Network Adequacy

Another focus of review should be the impact of the merger on provider network adequacy. For many consumers, the provider networks offered in a plan are as important a consideration as cost. The merging insurance companies have claimed that the merger will expand access for consumers by allowing for a more extensive network of hospitals, physicians, services, and health care professionals. We are concerned, however, that the opposite could actually result, that consumers could find their options limited to plans with overly restrictive provider networks.

Narrower insurance networks are intended to give consumers the option of lower-cost insurance in exchange for limiting the number of providers. Offering the *choice* of narrower-network plans, assuming they meet network adequacy standards and contain providers of good quality, can be consumer-friendly, since these plans will likely cost consumers less. But if the market becomes so concentrated that dominant insurers are able to eliminate or unduly restrict broader-network options, that would be harmful for consumers who are willing to pay more and want a broader network – and it could even potentially lower quality of care, for example if higher quality providers are excluded.

We are concerned that the proposed Aetna-Humana merger and the resulting increase in market concentration could lead to narrower networks. We urge your careful attention to network adequacy in analyzing this proposed merger and as part of any public hearing; we also urge you, in the event the merger is permitted, to consider the undertakings we suggest in Section VII to help ensure maintenance of adequate network choices for consumers.

V. Difficulty of New Entry by Competitors, and Loss of Potential Competition

The likely prospect of new competitive entry into a market can potentially "alleviate concerns about a merger's adverse competitive effects."[36] However, as the former Assistant Attorney General of the Justice Department Antitrust Division has observed "entry defenses in the health insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger."[37]

Entry will only alleviate concerns if the entry "will deter or counteract any competitive effects of concern."[38] It is not enough that new firms might emerge; those firms must be forceful and committed enough to successfully constrain anticompetitive conduct. Indeed, in the mergers

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[35] *Effects on Competition of Proposed Health Insurer Mergers: Hearing Before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 29, 2015) (testimony of Jamie S. King, Professor University of California, Hastings College of Law), *available at* http://goo.gl/Gje3Ci.
[36] U.S. Dep't. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines at § 9 (2010), *available at* https://goo.gl/Hh3dks.
[37] Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, Remarks as Prepared for American Bar Association/American Health Lawyers Association Antitrust Healthcare Conference (May 24, 2010), *available at* http://goo.gl/rzPC0G.
[38] Horizontal Merger Guidelines, *supra* note 36 at § 9 (emphasis added).

studied and discussed above, there was new entry, but that entry did not prevent significant harm to competition from resulting from those mergers.

In Illinois, entry either on the Exchange or within the Medicare Advantage markets has been limited and has not offset anticompetitive harm. Additionally, there is no evidence of entry in small group, large group, or the ASO markets. As previously noted, Illinois insurance markets remain highly concentrated and prices continue to rise in a number of insurance markets. Along with a further reduction in *current* competition, this merger may result in a significant loss of *potential* competition. As the Department of Justice ("DOJ) has found, entry into a new health insurance market requires "a large provider network to attract customers, but they also need a large number of customers to obtain sufficient price discounts from providers to be competitive with incumbents."[39] This "Catch 22" makes it nearly impossible for new, competitive entry to occur, particularly in markets dominated by one or a small handful of incumbent insurers.[40]

With these entry barriers, a key remaining potential source of new competition is established national insurers – such as Aetna and Humana. These insurers have national footprints and have sufficient resources to enter new insurance markets. Unfortunately, by merging, these insurers would be foreclosing the possibility of their own future entry into each other's markets and improving competition. As noted by Professor Dafny, "consolidation even in non-overlapping markets reduces the number of potential entrants who might attempt to overcome price-increasing (or quality-reducing) consolidation in markets where they do not currently operate."[41] Professor Greaney has further stated that the "lessons of oligopoly are pertinent here: consolidation that would pare the insurance sector down to less than a handful players is likely to chill the enthusiasm for venturing into a neighbor's market... [o]ne need look no further than the airline industry for a cautionary tale."[42]

VI. Health Insurance Merger Efficiencies are Unlikely in Illinois

As a general matter, one potential benefit of mergers is the enhancement of the new company's ability to compete, by strengthening its capacity to bring down price, improve quality, enhance services, or create new products – collectively referred to as "efficiencies."[43]

The insurers involved in the merger have argued that their merger would create substantial efficiencies leading to improved health care quality and lower costs.[44] But these kinds of

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[39] U.S Dep't of Justice & Fed. Trade Comm'n, *Improving Health Care: A Dose of Competition* at 254 (2004), *available at* http://goo.gl/GzIuvL.
[40] *See* Varney, *supra* note 37.
[41] *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. 15 (Sept. 22, 2015) (testimony of Professor Leemore Dafny, Professor Northwestern University), *available at* http://goo.gl/mhExI6.
[42] *The State of Competition in the Health Care Marketplace: The Patient Protection and Affordable Care Act's Impact on Competition, Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, 114th Cong. (Sept. 10, 2015) (testimony by Professor Thomas Greaney, Saint Louis University School of Law), *available at* http://goo.gl/bceVxi (citation omitted).
[43] Horizontal Merger Guidelines, *supra* note 36 at § 6.4.
[44] *See* Bertolini, *supra* note 29 (section labeled "Benefits of the Acquisition for Consumers and Providers.").

efficiencies cannot help justify a merger unless (1) it is really necessary for the insurers to merge to achieve the stated efficiencies, and (2) the stated efficiencies will actually benefit consumers.[45]

The parties have claimed significant cost-savings. According to Aetna, its merger with Humana would create $1.25 billion in "synergy opportunities" and "operating efficiencies."[46] However, while the merging insurers have offered little details about these supposed savings, the bigger question is if consumers would see any benefit themselves from these savings, if they do result, in the form of lower costs or greater value. There is no evidence or scholarly studies showing that insurance mergers lead to savings for consumers. In fact, as previously noted, evidence indicates that health insurance mergers lead to higher consumer costs, not increased consumer savings.[47]

A more abstract argument raised by the merging insurers is that the merger will allow them to improve innovation. Innovation in health care delivery is critical. For one thing, there is a need to change health care from the current volume-based system to a patient-oriented, value-based delivery model that incentivizes insurers and providers to improve care and lower costs. But we are concerned that, in Illinois, the merger would further entrench preexisting market power, reducing their incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed merger *is likely to reduce incentives* for engaging in innovation.[48]

We urge the DOI to carefully examine whether these supposed efficiencies would in fact be realized, and if so, whether they can overcome the likely anticompetitive effects of the merger.

VII. Divestitures and Other Remedies

It is also important for the DOI to consider what actions would help properly protect consumers and ensure the proposed merger, if approved, is in the public interest. If the DOI and Director decide that a merger is not in the public interest, it has the power to simply disapprove the merger. Indeed, state insurance commissioners have disapproved health insurance mergers in the past, such as Pennsylvania's 2009 decision to deny Highmark's acquisition of Independence Blue Cross.[49]

In other cases, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation. Both of these types of remedies have significant limitations and risks that should be carefully evaluated. In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *restore* the

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[45] Horizontal Merger Guidelines, *supra* note 36 at § 10 (to rebut a presumption of competitive harm, efficiencies must be merger-specific, cognizable, and substantiated); *St. Alphonsus Med. Ctr. v. St. Luke's Health Sys.*, 778 F.3d 775, 789 (9th Cir. 2015) (efficiencies must demonstrably prove "that a merger is not, despite the evidence of a prima facie case, anticompetitive").
[46] 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.
[47] *See* Section III.
[48] Greaney & Moss, *supra* note 33 (emphasis added).
[49] *See Highmark Merger Timeline*, PENNSYLVANIA INSURANCE DEP'T, http://goo.gl/0b6827 (last visited Jan. 8, 2015).

competition that would otherwise be lost, or must otherwise effectively prevent the harm that would otherwise result.

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.[50] Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company fully capable of restoring the same competition. Given the potential size and scope of divestitures that would be required, including those that would likely be required in Illinois, the American Antitrust Institute has come out against the mergers of both Aetna-Humana and Anthem-Cigna, urging the DOJ to "just say no."[51] Recent economic research by Professor John Kwoka supports the concerns regarding the effectiveness of divestitures, finding that divestitures often fail to restore competition to the marketplace.[52] Indeed, skepticism regarding divestiture has led DOJ, the Federal Trade Commission ("FTC"), and the courts to reject divestitures as a remedy in other merger enforcement matters. In their reviews of the proposed mergers of Comcast-Time Warner Cable and Sysco-US Foods, the enforcement agencies rejected the divestitures offered as remedies, and instead blocked the mergers. When Sysco pursued its merger anyway, the court agreed with the FTC and enjoined the merger.[53]

Regarding health insurance markets, there is little evidence that the benefits of competition are effectively restored after divestitures. In fact, in the previously cited two retrospective studies on health insurance mergers, both matters involved divestitures of covered lives for different insurance products, but the merged companies were still able to raise premiums by significant margins.[54] Additionally, for any divestiture in these matters to be successful, the purchaser of the assets will need to have and maintain a cost-competitive and attractive network of hospitals and physicians; ensuring this will require scrutiny and continued monitoring from DOJ.[55] With the lack of competition in a number of Illinois markets already, it may be difficult to genuinely preserve the competitive benefits of the pre-merger market structure through divesting subscribers or operations to a competitor.

Most recently, the Florida Office of Insurance Regulation ("OIR") disregarded divestitures as a potential remedy to health insurance mergers. In their consent order to the Aetna-Humana merger, the OIR noted that the divestitures were "not in the best interests of Florida policyholders and also may be short term in nature."[56] The OIR noted that such divestitures may

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[50] *See, e.g.*, Revised Final Judgment, *United States v. Aetna Inc. and Prudential Insurance Co. of Am*., No. 3-99-cv-1398-H (N.D. Tex. Dec. 7, 1999); Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No: 1:08-cv-00322 (D.D.C. Sept. 24, 2008); Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).
[51] Greaney & Moss, *supra* note 33.
[52] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S POLICY, MIT PRESS (2015).
[53] 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; *see also* Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* https://goo.gl/XfwPsW.
[54] Dafny, *supra* note 17; Guardado, *supra* note 17.
[55] *See* Greaney, *supra* note 42.
[56] Consent Order at 8, In the Matter of Application for the Indirect Acquisition of Humana by Aetna, No. 125926-16-C0 (Feb. 15, 2016), *available at* http://goo.gl/AvXzED.

"result in unwanted changes in quality of services [and] benefits," and furthermore, that policyholders can switch insurance every year, which would "lessen the effectiveness of divestitures as a means to manage market concentration."[57]

While the DOJ (and the Illinois Attorney General's Office, using its own antitrust authority) may be considering divestitures, the DOI and Director are also empowered to develop additional remedies for a health insurance merger. These remedies can be in addition to any remedies, including divestitures, ordered by the DOJ or the Illinois Attorney General. For example, in the 2008 acquisition of Sierra Health by UnitedHealth, the DOJ required divestiture of MA plans in Las Vegas,[58] but the Nevada Insurance Commissioner required additional remedies. In order for the merging companies to receive approval from the Commissioner, they had to agree that no acquisition costs would be passed along to consumers or providers, that there would be no premium increases, that there would be no scaling back of benefits, and that UnitedHealth would have to take specified actions to limit the number of uninsured within the state.[59]

Regulatory remedies also have their shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.[60] Nevertheless, such remedies could play an important role in limiting harm to consumers and to the health care marketplace. In the event either merger is permitted to go forward, here is a short list of possible regulatory steps the Illinois Department of Insurance might consider, among others that could help limit the harm:

- (1) Requiring premium stability or heightened rate control for a number of years post-merger.
- (2) Requirements ensuring that the merged company cannot scale back plan benefits and options.
- (3) Improving access to providers throughout the state and within local areas.
- (4) Ensuring that the merged company continues to provide the differentiated insurance products offered previously by the two companies, within the state and local areas, for a number of years.
- (5) Ensuring that consumer access to adequate networks and network options is preserved and strengthened, including in rural and underserved areas.
- (6) Requiring that the merged company pass along any cost savings associated with the merger to consumers, in the form of lower premiums and deductibles.

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[57] *Id.* at 9.

[58] Final Judgment, *UnitedHealth Inc. and Sierra Health Servs.*, No: 1:08-cv-00322.

[59] *Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services*, NEVADA BUS. (Nov. 1, 2007), http://goo.gl/Uztt13.

[60] Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), *available at* http://goo.gl/cm0gBI (conduct remedies can be "too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked"); *see also* Deborah L. Feinstein, *Editor's Note: Conduct Remedies: Tried But Not Tested*, 26 ANTITRUST at 5, 6 (Fall 2011) ("Divestitures continue to be the remedy of choice—and with extremely rare exceptions—the only remedy for horizontal mergers at both the FTC and DOJ.").

VIII. The Department Should Consider Holding a Public Hearing on the Merger

Given the significant competitive concerns involved, and the statutory authority afforded to the Illinois Department of Insurance and its Director, we believe the DOI should consider holding a hearing on the Aetna-Humana merger. The DOI's review of this merger could benefit significantly from holding a public hearing. Public hearings not only offer the merging companies an opportunity to defend the merger, but also allow third parties and the public to raise concerns and enable the DOI to gather critical information, aired in an open forum. Furthermore, hearings could also provide additional useful information for federal and state antitrust investigators.

Conclusion

The undersigned organizations are concerned by the potential for this merger, between two of the largest, most dominant national health insurers, to substantially lessen competition for different insurance products in the State of Illinois and adversely impact price, access, and quality of care. Although the merging companies are claiming various supposed benefits associated with the merger, all scholarly evidence suggests that consumers will see limited to no benefits and instead will face higher costs, less innovation, and potentially lower quality of care.

With the prospect that the Aetna-Humana merger might go forward, and recognizing the shortcomings of divestitures as an effective remedy, we urge the Illinois Department of Insurance and the Director to carefully analyze this merger, and to consider holding a public hearing, and to be prepared to consider imposing additional requirements to better protect consumers from harm.

We would be happy to address any of the points raised in this comment. Please do not hesitate to contact us with any questions.

Respectfully submitted,

Consumers Union
U.S. PIRG
SEIU Healthcare Illinois and Indiana
Illinois PIRG
Health & Medicine Policy Research Group
Consumer Federation of America
Consumer Watchdog
Citizen Action of Illinois
Consumer Action
Citizen Advocacy Center
Sergeant Shriver National Center on Poverty Law

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