April 6, 2016

William J. Baer  
Assistant Attorney General  
U.S. Department of Justice Antitrust Division  
950 Pennsylvania Avenue NW  
Washington, D.C. 20530

Re: Antitrust Review of the Aetna-Humana and Anthem-Cigna Mergers

Dear Assistant Attorney General Baer:

On behalf of the 1,600 members of the American Association of Orthopaedic Executives and the 15,000 physicians we represent, we are writing to urge the Department of Justice to deny the merger requests by insurers Anthem-Cigna and Aetna-Humana. Not only will these mergers prove detrimental to the healthcare industry and the practice of independent medicine, they will adversely affect patient care.

Insurance Markets

Using data from the American Medical Association’s (AMA) *Competition in Health Insurance: A Comprehensive Study of US Markets* (2015), we will present data that demonstrate that the United States’ insurance markets are moderately to significantly concentrated according to the Department of Justice’s own definitions. The approval of these mergers will only increase market concentration for the named insurers.

While the Patient Protection and Affordable Care Act (ACA) resulted in increased access to insurance for Americans, including those who previously could not afford coverage, the ACA has also led to strained relations between providers and insurers. In an effort to control costs, some insurers have narrowed health plan provider networks. As a result, legislation has been developed at the state level to correct practices, like balance billing, which providers have been required to perform because insurers use their market concentration to refuse reimbursement for services rendered to patients in need.

According to the DOJ-Department of Justice, a significantly concentrated insurance market exists when the HHI-Herfindahl-Hirschman Index exceeds 2,500. As of 2013, (the most recent
year for which reliable data is available), 31 states are considered to have significantly concentrated markets.

Currently, Alabama has the highest HHI at 6,865 with Blue Cross Blue Shield dominating the state-wide insurance market with an 82% market share. The next highest HHI states are Hawaii (4,815), Delaware (4,671), Massachusetts (4,671), Alaska (4,267), South Carolina (4,186) Louisiana (4,126), Nebraska (3,744), and Illinois (3,663).1 Secondarily, 16 additional states and the District of Columbia have a total HHI’s between 1,500 and 2,500 which the Department classifies as moderately concentrated. This means nationally that only three states exist in which health insurers do not dominate the market. The situation becomes more ominous as data is examined at the locality level. We are happy to provide this data should DOJ wish to review it while considering these mergers.

Permitting the four insurers in question to continue with their respective mergers would further concentrate market shares and reduce beneficiary choice in the states in which they operate. In testimony before the Senate Judiciary Committee in September 2015, Anthem Chief Executive Officer Joseph Swedish characterized competition in the health insurance industry as “healthy”, stating that the number of health insurers increased by 26% in 2015. Swedish failed to mention the high rate of health insurance co-operative closures that occurred in the third and fourth quarters of 2015 and their effects on health insurance competition. He also omitted the fact that many “new” entrants to a given market are the result of acquisitions.

The failure of these co-operatives is not entirely surprising given the substantial barriers to entry for de novo entrants into healthcare insurance markets. As related by the Commonwealth Fund, “new firms seeking to enter a market face a number of substantial challenges, including those related to:

- building networks of local providers and negotiating competitive reimbursement rates;
- establishing a credible reputation with area employers and consumers;
- developing relationships with brokers, who serve as intermediaries for most purchasers; and
- achieving economies of scale in information technology, disease management, utilization review, and customer-service related functions.”2

This “new” competition Mr. Swedish cites is unlikely then to be a startup that is capable of challenging the current dominating players in a given market but rather a company outside the market, purchasing a smaller company in the market and attempting to build their market share.

In a pro forma analysis conducted by Mark Farrah Associates and presented to the House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Anti-Trust Law, the market share of these combined corporations would increase for each of the products they sell. In the proposed Aetna-Humana merger, combined they would own a market share of 30% or greater in Medicare Advantage plans in 21 states. In the proposed Anthem-Cigna merger, combined they would own a market share of 30% or greater in the self-insured employer group in 13 states. Approving these mergers would set a poor precedent for future mergers in the insurance industry.

Patient Care

Studies have consistently demonstrated that patients pay less when more insurers are operating in a given market. In a 2013 study, Guardado et al., studied the effects of insurance market consolidation on beneficiary premiums and found that following the merger of UnitedHealth Group and Sierra Health Services in 2008, premiums in the Nevada markets increased 13.7%, following the merger, relative to the control group. These results indicate that insurers have and will continue to use their market power to increase costs to beneficiaries.


While not much research exists on insurer consolidation and the quality of care received by patients, we have seen that patient choice in providers has become severely restricted since the enactment of the ACA and thus, it is possible that quality of care has been affected. Many of these insurers have narrowed their provider networks and argue such restricted networks provide high-quality care at a lower cost based on quality measurement. We believe this to be a spurious argument. The reality is that quality measurement in the healthcare field is not only ill-defined, there is a general lack of consensus within the healthcare community and among regulators regarding a true definition of “quality” in healthcare.

Initial attempts at quality measurement through mechanisms such as the Physician Quality Reporting System (PQRS), developed by the Centers for Medicare and Medicaid Services, tend to be broad and try to paint a “quality” picture that takes into account factors which may not be relevant to all physicians. Many of these measures are procedural metrics and promote a one-sized approach to every patient. This is especially true in specialty areas like orthopaedics where “quality” for hand specialists can be vastly different from major joint replacement surgeons, further complicated by social and demographic factors of their typical patients, such as age and comorbidities. A more appropriate metric for “quality” would be gained from using Patient Reported Outcomes. However, few exist in a currently accepted reliable and valid format. For these reasons we believe insurer claims of ensuring “high-quality care” through narrow networks is dubious at best.

We urge the Department of Justice to thoroughly consider the issues raised in connection with the proposed Anthem-Cigna and Aetna-Humana mergers. The further concentration within insurer markets across the vast majority of states will have profound and unintended consequences for our nation’s healthcare system. These include further limiting patient choice of providers and insurers, raising the cost of care by driving more independent providers into larger healthcare systems (which can negotiate higher reimbursement due to their market size resulting in higher premiums for patients as well as charging hospital outpatient department fees to government payers which increases taxpayer burden), and further reducing the likely entrants of new insurers due to even higher costs/barriers to entry into these markets. The best deterrent to higher patient premiums is competition in the health insurance market. The consumer/taxpayer deserves the ability to choose and purchase health insurance and healthcare at the best possible price.
Should you have any questions, please contact AAOE Government Affairs Manager Bradley Coffey, MA at bcoffey@aaoe.net or, 317-749-0629.

Sincerely,

Jim P. Kidd, CMPE
President
American Association of Orthopaedic Executives