Evaluating the Anthem-CIGNA merger impact – it may be bigger than you think
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As part of its ongoing efforts to help physicians and other health care providers safely navigate the evolving healthcare delivery system, Whatley Kallas is pleased to provide the following general overview of the Anthem-CIGNA proposed merger.

Physicians and their advocates are well aware of the problems caused by monopolization of the health insurance market. Not only do premiums and patients’ cost-sharing increase, but physicians also suffer from lower fee-schedules and increased administrative expense. Thus, those in states where Anthem and CIGNA both have significant market shares are likely already working to block this merger, or otherwise seeking regulatory relief to reduce the negative consequences should this merger be allowed to proceed.¹

However, this merger is more complex than most. There are three reasons why all physicians, including those in states where Anthem has no presence, need to be concerned:

1. Anthem is part of the Blue Cross Blue Shield Association (BSBSA);
2. The Anthem-CIGNA merger is being proposed at the same time as the Aetna-Humana merger; and
3. The move from fee-for-service to value-based payment will make it increasingly difficult for new entrants.

The BCBSA impact on the Anthem-CIGNA merger

All Blues plans, including Anthem, are bound by the BCBSA rules and entitled to the BSBCA benefits. The BCBSA rules impose three restrictions that will have a major impact on Anthem’s ability to incorporate CIGNA into its business:

1. Anthem cannot complete as a Blue in any state where it does not own a license to do business as a Blue plan;
2. Anthem cannot earn more than 20% of its revenue in any state in which it is a Blue licensee from doing business as a non-Blue brand; and
3. Anthem cannot earn more than one-third of its total revenue from doing business as a non-Blue brand.²

¹ According to the American Medical Association (“AMA”), the Anthem-Cigna merger would be presumed likely to enhance market power in the commercial, combined (HMO+PPO+POS) markets in 10 of the 14 states (NH, IN, CT, ME, VA, GA, CO, MO, NV, KY) in which Anthem is licensed to provide commercial coverage, and it potentially raises significant competitive concerns and would often warrant scrutiny in the other four states where Anthem operates (OH, CA, NY, WI). See AMA September 8, 2015 press release, “AMA Releases Analyses on Potential Anthem-Cigna and Aetna-Humana Mergers.”
² See Anthem’s Form 10-K.
This means that for Anthem to operate CIGNA as an Anthem plan in any state where it does not currently have a Blue license, it must buy the Blue plan in that state, thus further increasing its size. To the extent Anthem instead decides to operate CIGNA under a non-Blue brand in these states like it operates its Unicare subsidiary, it must be mindful of the one-third total revenue limit. If it would exceed that revenue limit, it may cede some or all of the CIGNA business to the Blue that currently owns the license in that state, thus further increasing the market power of both that Blue and the entire Blue’s enterprise.

The BCBSA benefits include access to the Blues’ national PPO system, the Blue Card program, known to most physicians as the “suitcase PPO.” The Blue Card program gives every Blue plan the benefit of the lower rates each Blues’ plan has negotiated in every state, while at the same time ensuring that the Blue that issued the policy continues to control all the payment, utilization and benefit rules applicable to their insureds. Thus, to the extent the Anthem CIGNA merger results in increases to Anthem’s book of Blue’s business, it will have a dramatic affect on all physicians who contract with any Blue plan, not just those that contract with an Anthem Blue.

The Aetna-Humana merger’s impact on the Anthem-CIGNA merger

To analyze the competitive landscape, one must consider all the competitors in each market. As a general matter, the more competitors there are, the better it is for consumers. In the health insurance market specifically, expert economists have determined that it takes a minimum of six competitors to ensure optimal competitive conditions.

Therefore, to understand the implications of an Anthem-CIGNA merger, it is also necessary to consider the resulting landscape if the Aetna-Humana merger also proceeds. States that currently enjoy the benefits of three or more of these health insurers may see their market consolidate dramatically more than if only one of those mergers is considered in isolation. Physicians and their advocates need to consider the worst-case scenario, that is, how their market would look if both mergers were allowed to proceed. As noted above, this analysis should take into account the resulting consolidation using the Department of Justice’s consolidation measurements (the Herfindahl-Hirschman Index or HHI), as well as whether their will be fewer than six remaining health insurers.

3 Ibid.
5 According to the AMA, an Aetna-Humana merger would be presumed likely to enhance market power in the commercial, combined (HMO+PPO+POS) markets in the state of Kentucky, and potentially raises significant competitive concerns which often warrant scrutiny in four additional states (TX, GA, UT, FL). See AMA September 8, 2015 press release, “AMA Releases Analyses on Potential Anthem-Cigna and Aetna-Humana Mergers.”
6 The HHI, the measure of market concentration used by the DOJ in evaluating proposed horizontal mergers, is the sum of the squared market shares of all firms in a market. The higher the HHI, the greater the concentration. Under the DOJ/FTC’s current merger guidelines:
   • MSAs with HHIs less than 1500 are unconcentrated; mergers are unlikely to raise competitive concerns.
   • MSAs with HHIs between 1500 and 2500 are moderately concentrated; mergers that increase the HHI by more than 100 points potentially raise significant competitive concerns and often warrant scrutiny.
The impact of the transition to value-based payment on the Anthem-CIGNA merger

Finally, no analysis of a merger is complete without considering the potential for new entrants. Any concern about increasing market concentration would be significantly blunted if it were easy for new companies to enter the health insurance market.

However, there are many reasons to doubt the likelihood new health insurers will be created to compete in this market. Indeed, the recent failures of over half of the CO-OPs created by the Affordable Care Act highlight the challenges any such new entrant faces. Even with enormous government subsidies and the establishment of the Exchanges – a whole new market channel for health insurance – these companies were unsuccessful. Moreover, the transition to value-based payment, which requires not only contracted networks of health care providers, but contracted networks of providers that have integrated to the point that they can manage populations of health insurance beneficiaries, exponentially increases these challenges. Even if a new competitor could amass the capital required for an insurance license and a contracted network, it is highly unlikely that they could also transition that network to value-based payment without years of experience and effort.

8 steps to evaluating the Anthem-CIGNA merger

For all these reasons, physicians and their advocates should do all the following:

Step 1 – calculate Anthem’s market share in each MSA and product line (Medicare Advantage, Managed Medicaid, workers comp, self-insured, commercial (large group, small group and individual and HMO, PPO and POS), etc.) in which they practice;

Step 2 – calculate CIGNA’s market share in each MSA and product line in which they practice;

Step 3 – calculate any non-Anthem Blue’s market share in each MSA and product line in which they practice;

Step 4 – calculate Aetna’s market share in each MSA and product line in which they practice;

• MSAs with an HHI of more than 2500 are highly concentrated; mergers that increase the HHI by 100 to 200 points potentially raise significant competitive concerns and often warrant scrutiny, and those that increase it by more than 200 points will be presumed likely to enhance market power.

8 See AMA press release and proposed merger analyses, above; see also AMA’s publication entitled “Competition in Health Insurance – A comprehensive study of U.S. markets 2015 Update,” which contains a sophisticated analysis of the data on the degree of competition in health insurance markets across the country.
Step 5 – calculate Humana’s market share in each MSA and product line in which they practice;

Step 6 – calculate the HHI increase in each MSA and product line were either or both mergers to proceed (wherever one or more of these companies is a market participant);

Step 7 – calculate the reduction in the total number of remaining health insurer competitors assuming one or both mergers proceed; and

Step 8 – report your results – and any specific concerns you may have based on your current experience with one or more of these companies – to your representatives in Congress, the Department of Justice, the Federal Trade Commission and your state Insurance Commissioner.

These are high stakes mergers. You owe it to your patients – and your practice – to evaluate the implications and make your concerns known.

The attorneys at WhatleyKallas, LLP are skilled and experienced in addressing healthcare antitrust issues. If you are interested in speaking with one of our attorneys for more information, please contact us at 1-800-745-8153 or by email at info@whatleykallas.com.

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