Written Testimony of David A. Balto

Hearing Regarding the Proposed Merger of Cigna Corporation into Anthem Inc.

Before the California Department of Insurance

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Commissioner Dave Jones, I appreciate the opportunity to come before the California Department of Insurance ("CDI") today and testify about healthcare industry consolidation. As a former antitrust enforcement official and someone who represents everyday consumers and healthcare providers I know that highly concentrated healthcare markets, especially health insurance markets, can result in escalating healthcare costs for the average consumer, decreased innovation, decreased quality and consumer satisfaction, and decreased choice.

My comments in this testimony are based on my 30 plus years of experience as a private sector antitrust attorney and an antitrust enforcer for both the Department of Justice and the Federal Trade Commission ("FTC"). From 1995 to 2001, I served as the Policy Director for the FTC's Bureau of Competition and the attorney advisor to Chairman Robert Pitofsky. Currently, I work as a public interest antitrust attorney in Washington, DC. I have represented consumer groups, health plans, unions, and employers. I have testified before Congress and many state legislatures on healthcare competition issues, and was asked to present before the National Association of Insurance Commissioners in November 2015 concerning the mergers of Anthem-Cigna and Aetna-Humana..

My testimony makes the following points:

- These health insurance mergers are taking place during a critical time in our healthcare system. Workers' contributions to premiums have greatly outpaced wage growth since 2000 and consumers are regularly putting off care due to costs. This increase in consolidation is threatening to undo the progress made by the Affordable Care Act.
- California will be substantially effected by the Anthem-Cigna merger. The merger would create the largest insurer in the state and substantially harm competition in the administrative services only market and commercial insurance competition in nine metropolitan areas.
- The merger will hurt Californians' pocketbooks. Numerous studies show that premiums rise as concentration rises. Concentration is also shown to impact consumer satisfaction, a fact important to Californians considering the many grievances against Anthem and Cigna in the state.
- The efficiencies claimed to result from the merger are unlikely to benefit Californians. There is no evidence that shows these efficiencies are passed on to consumers. Indeed, without competition there is little pressure on the parties to do so.
- This deal is a "just say no" type of deal. The harm to consumers created by this merger will not be resolved through remedies - especially divestitures, which have been shown to be ineffective in the health insurance industry.

In considering its recommendations for the merger, the CDI should ask the following questions:

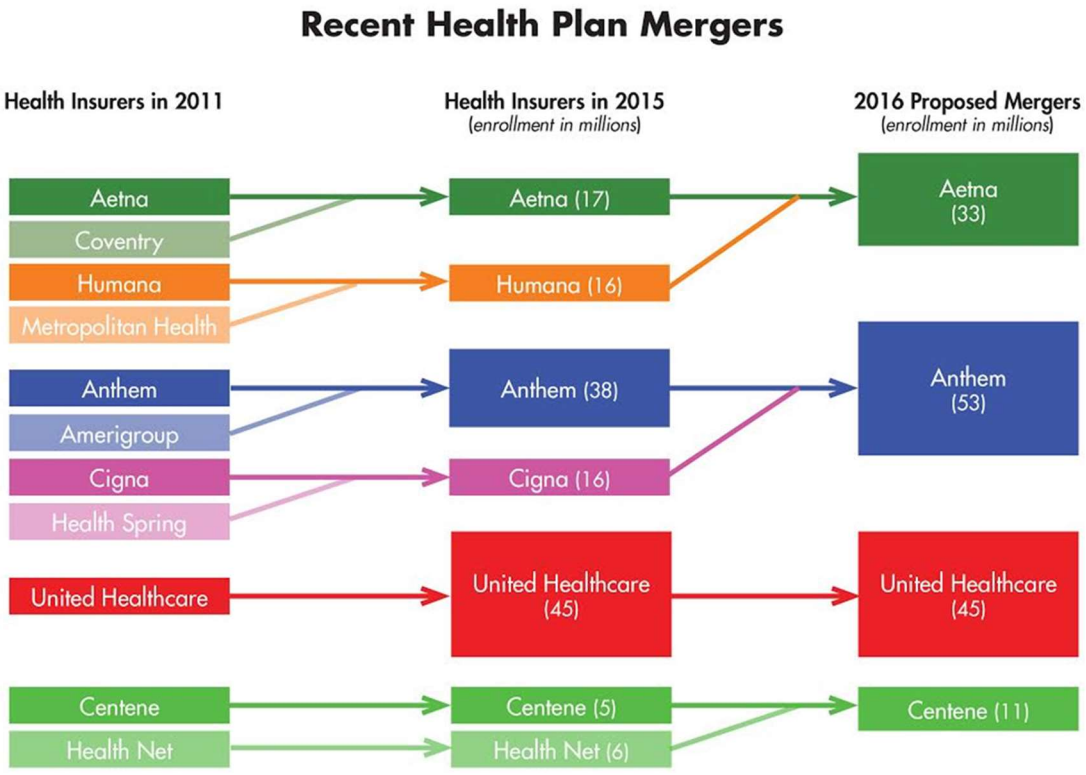
1. Will the proposed merger harm Californians?
2. Can this harm be remedied through conditions?

Background[1]

The Anthem-Cigna merger is taking place during alarming trends in the health insurance market. In 2007, President Obama stated that "95% of insurance markets in the United States are now highly concentrated and the number of insurers has fallen by just under 20% since 2000. These changes were

[1] I would like to thank Consumers Union Health Care Value Hub for the charts used in this section.

supposed to make the industry more efficient, but instead premiums have skyrocketed, increasing over 87% over the past six years." Things have not improved since then.



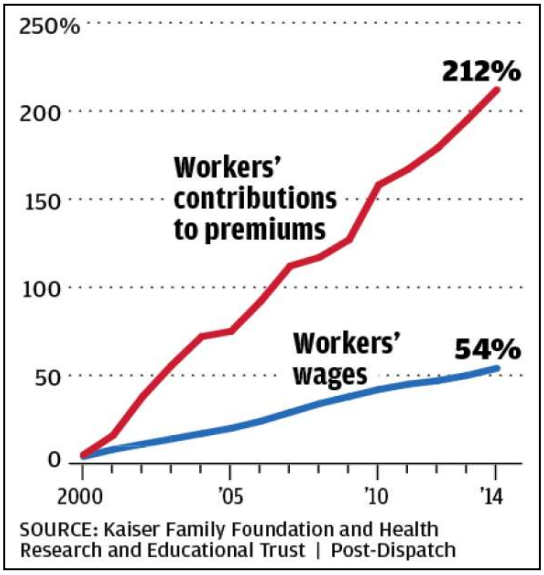
Source: Chart adapted from "The New Era of Mega-Plans, Managed Care (September 2015). Company enrollment estimates: various sources.

The merger between Anthem and Cigna would create an entity that covers 8.2 million lives, making it the largest insurer in California.[2] According to the American Medical Association, along with lessening competition statewide, the Anthem-Cigna merger would substantially harm competition for different commercial insurance products in metropolitan statistical areas of Santa Cruz-Watsonville, Santa Ana-Anaheim-Irvine, Santa-Barbara-Santa Maria, Salinas, Oxnard-Thousand Oaks-Ventura, Los Angeles-Long Beach-Glendale, Bakersfield, El Centro, and Modesto.[3] The merger between Anthem-Cigna would also substantially lessen competition within the administrative-services-only ("ASO") market, where larger employers cover their employees' health care costs, but purchase access to provider networks and other services from insurers. A combination of Anthem and Cigna would create an entity with 61 percent market share of the 6.4 million lives in the California ASO market.[4]

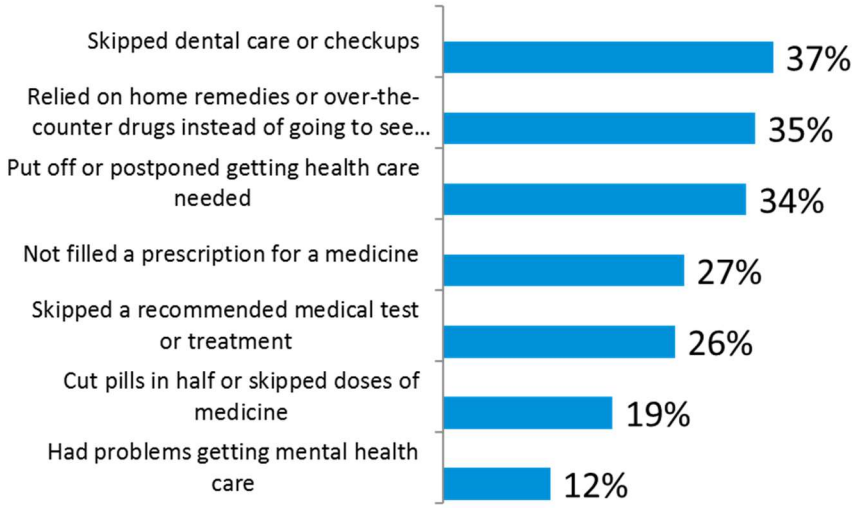
This proposed merger is taking place during a concentration trend in the California market. California has just approved the merger of Centene-Health Net and is also considering the proposed

[2] *California Health Insurers Enrollment 2014*, CAL. HEALTHCARE FOUND. (Jan. 2016), *available at* http://www.chcf.org/publications/2016/01/california-health-plans-insurers.
[3] American Medical Association, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015).
[4] *California Health Insurers Enrollment 2014*, *supra* note 4.

merger of Aetna-Humana. Meanwhile, the growth in worker's contribution to premiums have greatly outpaced wage growth since 2000.



It is no wonder that consumers are regularly putting off care due to their costs.



Californians are no stranger to the impact of concentration on premiums. From 2011 to 2016, premiums in the California individual market have gone up on average 8.5 percent per year.[5] Anthem, the largest insurer on the Covered California Exchange operating in all 19 regions, received double-digit rate increases for products in five different regions.[6] The CDI has found many of these rate increases to be unreasonable:

[5] *See* Katherine B. Wilson, *Individual Health Insurance Premium Growth in California*, CAL. HEALTHCARE FOUND. (Nov. 2015), *available at* http://www.chcf.org/publications/2015/11/individual-premiums-growth-california (for 2016, rates increased by 3.8 percent).

[6] *See* Covered California, *Health Insurance Companies and Plan Rates for 2016* (Oct. 29, 2015), *available at* https://www.coveredca.com/PDFs/7-27-CoveredCA-2016PlanRates-prelim.pdf (Anthem along with California Blue

- In April 2015, CDI found Anthem failed to justify the average 8.7 percent premium increase it imposed on consumers with individual grandfathered health insurance policies, affecting 170,000 people. Anthem refused to lower the rate increase, which would have saved California consumers approximately $33.6 million.
- In 2014, CDI found Anthem's 9.8 percent average rate increase on small employers, which affected 120,000 consumers, was excessive and unreasonable. Anthem adjusted its rate increase to 8 percent, which CDI continued to find unreasonable. In this instance, consumers would have saved $33 million had Anthem revised its rate increase to the 2.1 percent requested by CDI.
- In 2013, CDI found Anthem's 10.5 percent average rate increase for small group products to be unreasonable. This increase impacted nearly 250,000 consumers. Consumers would have saved $38 million had Anthem not pursued this unreasonable rate increase.
- In 2012, Anthem proceeded with a 6.5 percent increase deemed to be unreasonable, affecting 284,000 over the course of 2012.

Any further increase in consolidation could exacerbate this trend, leading to even higher consumer costs.

The Anthem-Cigna Merger Will Have a Substantial Impact on Californians

Virtually all credible studies and retrospective analysis has concluded that increased concentration leads to increased premiums, decreased quality, and decreased innovation. According to David Lazarus, 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."[7] Three separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger. A study by professor Leemore Dafny found that the 1999 Aetna-Prudential merger had resulted in an additional seven percent premium increase in 139 separate markets throughout the United States.[8] Another study by Jose Guardado found that the 2008 United-Sierra merger had resulted in an additional 13.7 percent premium increase in Nevada.[9] Finally, a study by the Center for American Progress of the Humana-Arcadian merger found a substantial increase in premiums despite remedies.[10]

There is economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.[11] Increases in costs are not limited to higher premiums.

Shield are the only two insurers to offer individual insurance products in all 19 regions on the Covered California Exchange).

[7] David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), http://www.latimes.com/business/la-fi-lazarus-20150710-column.html.

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

[9] *See* 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).

[10] Topher Spiro, Maura Calsyn, Meghan O'Toole, *Divestitures Will Not Maintain Competition in Medicare Advantage*, CENTER FOR AMERICAN PROGRESS (Mar. 8, 2016), https://www.americanprogress.org/issues/healthcare/report/2016/03/08/132420/divestitures-will-not-maintain-competition-in-medicare-advantage/.

[11] Eugene Wang and Grace Gee*, Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), *available at* http://techscience.org/downloadpdf.php?paper=2015081104.

Evidence shows that insurance mergers can impact out-of-pocket costs as patients see increases in deductibles or other insurance-related costs.[12]

Concentration also impacts quality. A recent report by J.D. Power concludes that there is lower consumer satisfaction and patient engagement in areas where there is lower competition.[13] The study analyzed member plan satisfaction among 135 health insurance plans throughout 18 regions, using six characteristics: provider choice, medical claims processing, pricing of health plans, customer service, communication, and information access. The report found that member plan satisfaction with regards to communication, information access, and pricing was reduced in regions where one health plan possesses over 50% of the market share.

These non-price effects are especially important in California, where Anthem and Cigna already have shortcomings. The Consumers Union reported the following bad practices in its testimony to the Department of Managed Healthcare:[14]

- In 2012, the California Department of Insurance (CDI) brought legal action against Cigna, (and Health Net), in response to IMR requests by Cigna policyholders who were—inappropriately, in the determination of CDI—denied coverage for Autism therapy. The CDI and Cigna reached an agreement obligating Cigna to cover behavioral therapy for autism for the period of time leading up to enactment of SB 946, which requires health care service plan contracts and health insurance policies to provide coverage for behavioral health treatment for autism or other development disorders.
- In 2013, Anthem had the highest rate of Independent Medical Review (IMR) requests among health plans operating in California with 400,000 or more enrollees. Among all the health plans in the state, of any size, Anthem had the third-highest rate of IMRs.
- In 2013, Cigna was middle of the pack for IMR requests among plans with fewer than 400,000 enrollees. However, Cigna's rate of consumer complaints increased by 15% in 2014, causing the health plan to become the third highest rate of IMR requests.
- Like Cigna, Anthem had a higher rate of IMR requests in 2014 than in 2013. In 2014, Anthem continued to have the highest rate of IMR requests among health plans operating in California with 400,000 or more enrollees. Nearly half of decisions involving Anthem that went through the IMR process for experimental/investigational care were overturned by DMHC and about 60% of IMRs for medical necessity or ER reimbursement were either overturned by DMHC or reversed by the plan. In 2014, Anthem also had the highest rate of IMR requests for all plans.

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[12] *See generally* Leemore Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND (Nov. 20, 2015), http://www.commonwealthfund.org/publications/issue-briefs/2015/nov/evaluating-insurance-industry-consolidation; see also Korin Miller, *6 Ways the Big Health Insurance Mergers Will Affect Your Coverage*, YAHOO HEALTH (July 24, 2015), https://www.yahoo.com/beauty/6-ways-the-big-health-insurance-mergers-will-124932195967.html (noting that "out-of-pocket payments could increase" because insurance coverage could limit certain services or number of visits forcing patients to pay more).

[13] Vera Gruessner, *Plan Member Satisfaction Reduced in Less Competitive Markets*, HEALTHPAYER INTELLIGENCE (Mar. 18, 2016), http://healthpayerintelligence.com/news/plan-member-satisfaction-reduced-in-less-competitive-markets.

[14] Statement of Dena Mendelsohn Staff Attorney Consumers Union to the Department of Managed Health Care on the Proposed Acquisition of Cigna Corporation by Anthem, Inc. (March 9, 2016), *available at* http://consumersunion.org/wp-content/uploads/2016/03/ProposedMergerAnthemCignaComments.pdf.

- In 2014, Anthem had:
    - The highest rate of complaints regarding access issues among plans with 400,000 or more enrollees and the second highest rate of complaints for all DMHC-regulated plans.
    - The second highest rate of complaints to DMHC regarding claims and financial of all the plans with 400,000 or more enrollees.
    - The second highest rate of complaints to DMHC related to enrollment of all plans, as well as for the sub-category of plans with 400,000 or more enrollees, nearly tied with the plan that had the highest rate of complaints for this category.
    - The most complaints to DMHC regarding the "attitude" or service of the health plan among plans with 400,000 or more enrollees, and the second-most complaints for the same category among all plans (second only to the Chinese Community Health Plan).
- In 2014, Cigna had the third highest rate of consumer complaints regarding attitude/service among plans with fewer than 400,000 members.
- In 2014, DMHC conducted a non-routine survey of Anthem Blue Cross provider networks and directories for the individual market and took enforcement action against the plan. Fining the plan $250,000, the Department in its press release stated that Anthem would be required to "improve the accuracy of their provider directories and reimburse enrollees who may have been negatively impacted by inaccuracies in provider directories."
- The California Office of the Patient Advocate (OPA) found, in its Health Care Quality Report Cards 2015-2016 Edition, based on surveys of HMO and PPO policyholders:
    - Anthem Blue Cross PPO was rated Poor (one star out of four) for the product overall and that its HMO was rated Poor for Getting care easily.
    - Cigna PPO was rated Poor for Getting care easily and PPO helps members get answers and its HMO was rated Poor for both Getting care easily and for Heart care.
- Out of 507 ranked private plans, the NCQA ranked Anthem Blue Cross HMO/POS #317, Anthem Blue Cross PPO #329, and Anthem Blue Cross Life and Health Insurance #330.
- In the NCQA scoring, the Anthem Blue Cross HMO/POS product earned a below-average score for customer satisfaction, earning only 2 out of 5 for getting care and the lowest score possible, a 1 out of 5, for how consumers rated satisfaction with the product's specialists. Also troubling, the HMO/POS product received low scores for well-child visits and access to pediatricians. In fact, the product earned only a single star when consumers were asked whether children age 15 months got the recommended up to six well-child visits since birth.
- Failure to adequately ensure consumer privacy and data security
    - In 2013, Anthem (at the time called Wellpoint), the parent firm of Anthem Blue Cross Blue Shield in Virginia and Empire BlueCross BlueShield in New York, agreed to settle a claim of potential HIPAA violations by paying a $1.7 million fine. According to HHS, "more than the health records of more than 600,000 individuals were found to be vulnerable to Internet breach" and that Wellpoint had inadequate technical safeguards against such a breach.
    - In Spring 2015, after waiting four months after they discovered it, Anthem disclosed a data breach affecting as many as 80 million past and current policyholders. Through a cyberattack on its IT system, hackers may have gained access to policyholders' names, birthdays, Social Security numbers, health care ID numbers, home addresses, email addresses, employment information, and income data. Anthem estimated that the breach occurred over the course of several weeks in December 2014. Experts said Anthem was a

likely target for hackers because "they have been slower to adopt measures" to protect consumers and are "generally less secure than financial service companies who have the same type of customer data."

- On September 3, 2014, DMHC issued a Preliminary Report to Anthem Blue Cross, in which the Plan was cited for seven deficiencies (shown below). In its 2015 Final Routine Survey, the Department found that Anthem had not corrected any of the noted deficiencies. Those were:
    - Grievances and appeals: (1) failure to maintain a grievance system that consistently ensures any written or oral expression of dissatisfaction; (2) impermissible processing of standard grievances pertaining to coverage disputes, disputed health care services involving medical necessity, and experimental or investigational treatment through its exempt grievance process; (3) impermissible processing of standard grievances that are not resolved by the close of the next business day through its exempt grievance process; (4) failure to maintain a grievance system that consistently ensures adequate consideration of enrollee grievances and rectification where appropriate.
    - Grievances and appeals (behavioral health only): their grievance system does not consistently ensure compliance with all acknowledged letter requirements.
    - Utilization management: for decisions to deny, delay, or modify health care service requests by providers based in whole or in part on medical necessity, the Plan does not consistently include in its written response: a clear and concise explanation or the reasons for the decision, a description of the criteria or guidelines used, and the clinical reasons for the decision.
- In 2015, DMHC fined Anthem more than $1.5 million for the Plan's failure to pay for an important screening for pregnant women when the only provider able to conduct that screening was out-of-network.
- In 2015, the Missouri Department of Insurance fined Cigna subsidiaries $140,800 for "using unapproved forms, incorrectly denying chiropractic claims, charging copayments of more than 50 percent and failing to send an explanation of benefits to members."
- In 2016, CMS issued an enforcement action prohibiting Cigna from enrolling new Medicare beneficiaries and from marketing activities to Medicare beneficiaries. In its enforcement notice, CMS stated that Cigna "substantially failed to comply with CMS requirements" and that Cigna's failures were "widespread and systemic. Violations resulted in enrollees experiencing delays or denials in receiving medical services and prescription drugs, and increased out of pocket costs for medical services and prescription drugs."[15]

Current market regulations will not fix these problems with the merger. Some supporters of this merger have argued that the medical loss ratio ("MLR") limits the level of insurer profits thus protecting consumers from price increases. While MLR is an important tool that requires health insurers to spend 80 to 85 percent of net premiums on medical services and quality improvements, it will not adequately protect consumers from anticompetitive harm. MLR, as health antitrust expert Professor Jamie King has

[15] *Id.* (citations omitted).

observed, "does not guarantee that dominant insurers will not raise premiums and as such, it is not a substitute for the pressures toward lower costs and higher quality created by a competitive market."[16]

The Merger Will Reduce Future Competition as it is Difficult for New Insurers to Enter the California Market

The likely prospect of new competitive entry into a market can potentially "alleviate concerns about a merger's adverse competitive effects."[17] However, as former Assistant Attorney General of the Justice Department Antitrust Division Christine Varney has observed "entry defenses in the health insurance industry will be viewed with skepticism and will almost never justify an otherwise anticompetitive merger." [18]

Entry will only alleviate concerns if the entry "will *deter or counteract* any competitive effects of concern."[19] 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 studied and discussed above, there was new entry, but that entry did not prevent significant harm to competition from resulting from those mergers.

The merging companies here have previously argued that there is sufficient existing competition and new entry in a number of insurance product markets. But analysis of available data shows that new entry and competition within insurance markets has been severely limited. The Department of Justice ("DOJ") has found that 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."[20] 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.

With these entry barriers, a key remaining potential source of new competition is established national insurers – such as Anthem and Cigna. 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."[21] Professor Thomas Greaney, a health

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[16] *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* https://judiciary.house.gov/hearings/?Id=020363B9-F9EF-4623-8E67-28A0B260675A&Statement_id=30A83B11-7A89-4261-9773-DCF6593808FF.

[17] U.S. Dep't. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines at § 9 (2010), *available at* https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[18] 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* https://www.justice.gov/atr/speech/antitrust-and-healthcare.

[19] Horizontal Merger Guidelines, *supra* note 17 at § 9.

[20] U.S Dep't of Justice & Fed. Trade Comm'n, *Improving Health Care: A Dose of Competition* at 254 (2004), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/204694.pdf.

[21] *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,

antirust scholar, 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."[22]

Any Efficiencies Gained by the Merger Are Unlikely to Benefit Californians

The merging parties have not fully documented their claimed efficiencies but have generally stated that their merger would create substantial efficiencies leading to improved health care quality and lower costs for consumers. It is for CDI to carefully examine these claims and determine if they are fully substantiated. However, the law is clear that efficiencies, even if proven, do not count unless (1) they clearly outweigh the anticompetitive effects, (2) it is necessary for the insurers to merge to achieve the stated efficiencies, and (3) the stated efficiencies will actually benefit consumers.[23]

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. Assistant Attorney General Bill Baer from the DOJ's Antitrust Division raised questions regarding the alleged cost efficiencies that would result from health insurance mergers. Baer noted that "consumers do not benefit when sellers . . . merge simply to gain bargaining leverage."[24]

That makes sense. Most large insurers are beyond the point where another merger would help them achieve any legitimate economies of scale. And there is little evidence that consumers would ever actually benefit from giving insurers increased bargaining power. In fact, Professor Greaney has noted that there is actually "little incentive [for an insurer] to pass along the savings to its policyholders."[25] As Consumers Union has suggested, a more likely result would be fewer choices for consumers, and providers being pressured to cut corners on quality of care in order to meet the insurer's demands – the opposite of what consumers need.[26] The American Antitrust Institute, the leading non-profit antitrust

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Professor Northwestern University), *available at* http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf.

[22] *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://www.antitrustinstitute.org/sites/default/files/greaney-testimony%20pdf.pdf (citation omitted).

[23] Horizontal Merger Guidelines, *supra* note 17 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").

[24] Speech by Assistant Attorney General Bill Baer, Remarks as Prepared for the Delivery at The New Health Care Industry Conference: Integration, Consolidation, Competition in the Wake of the Affordable Care Act at Yale University (Nov. 13, 2015), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-new-health-care-industry-conference.

[25] *See* Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), http://healthaffairs.org/blog/2015/07/16/examining-implications-of-health-insurance-mergers/.

[26] *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://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Slover%20Testimony.pdf ("[b]ut a dominant insurer could force doctors and hospitals to go beyond

think tank, recently concluded that economic studies and evidence indicate that "consumers do not benefit from lower healthcare costs through enhanced bargaining power."[27]

A more abstract argument raised by the merging insurers is that the merger will allow for more innovation. Innovation in health care delivery can be very beneficial and should be encouraged. For one thing, there is the effort 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. However, in California the merger would do little more than increase and entrench the combined insurer's market power, reducing its 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 pro-consumer innovation.[28] Moreover, at a recent conference, Professor Dafny noted that statistical evidence shows concentrated insurance markets often have less innovative insurance product offerings, meaning mergers between insurers will not likely lead to higher quality or more innovative insurance products.[29]

All of these studies prove what hundreds of years of capitalism have already taught us - that companies need the fear of losing customers to competitors in order to improve their products and pass along savings to customers. Without this fear, any efficiencies will only benefit the merged Anthem-Cigna.

The California Department of Insurance Should Not Rely on Divestiture Remedies to Solve the Problems in This Deal

As part of its review, the CDI should consider whether any remedies would properly protect Californians and ensure the merger is in the public interest. Frequently, mergers have been approved conditioned on the imposition of specific remedies such as divestitures or additional conduct regulation.[30] In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *fully restore* the competition that would otherwise be lost, or must otherwise effectively prevent the harm that would result.[31]

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.[32] Divestitures require that the merging insurance

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trimming costs, to cut costs so far that it begins to degrade the care and service they provide below what consumers value and need").

[27] 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://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr_1.11.16.pdf.

[28] *Id.*

[29] Leemore Dafny, Comments at The New Health Care Industry: Integration, Consolidation, Competition in the Wake of the Affordable Care Act (Nov. 13, 2015), *available at* https://www.law.yale.edu/solomon-center/events/inaugural-conference.

[30] *E.g.*, 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://floir.com/Sections/LandH/AetnaHumanaHearing.aspx.

[31] *E.g.*, *See* Ford Motor Co. v. United States, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" (citation omitted))

[32] *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).

companies spin off subscribers or operations to another, independent insurance company that is fully capable of restoring the same competition. In California, the scope, breadth, and market shares of the merging companies' operations are significant. These overlap problems are exacerbated by the proposed merger of Aetna-Humana and the approved merger of Centene-Health Net. Constructing any remedy involving divestitures will likely be an impossible task.

Furthermore, the DOJ's traditional approach of divestiture has a poor track record of solving problems in health insurer mergers. For example, the DOJ has previously used divestitures to resolve competitive concerns from mergers in Medicare Advantage markets. Recent studies by the Center for American Progress and the Capitol Forum found that the divestitures had largely failed to address the competitive concerns, with 2 of the 3 firms failing and a substantial increase in premiums. [33] Moreover, no remedy in this case could address the loss of potential competition. That is why the American Antitrust Institute has come out against both mergers, urging the DOJ to "just say no."[34]

Indeed, because of such concerns, DOJ, the FTC, and the courts have rejected divestitures as a remedy in other merger enforcement matters as well. For example, the enforcement agencies rejected the divestitures offered as remedies in their reviews of the proposed mergers of Comcast-Time Warner Cable and Sysco-US Foods, instead blocking the mergers. When Sysco pursued its merger anyway, the court agreed with the FTC and enjoined the merger.[35]

There is little evidence that the benefits of competition are effectively restored after divestitures in health insurance markets. The merged companies in the three previously cited retrospective studies of health insurer mergers were still able to raise premiums by significant margins. This is not surprising. For any divestiture to be successful, the purchaser of the assets needs to have and maintain a cost-competitive and attractive network of hospitals and physicians. In addition, divestitures are not effective in health insurance markets in the long term because what is divested amounts to nothing more than contracts with specific policyholders. It is all too easy for a divested policyholder to return to the previous insurer in the next open season. For all these reasons, 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") rejected divestitures as a potential remedy in the Aetna-Humana merger.[36] The OIR noted that the divestitures were "not in the best interests of Florida policyholders and also may be short term in nature."[37] The OIR noted that such divestitures may "result in unwanted changes in quality of services [and] benefits," and furthermore,

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[33] Topher Spiro et al, *supra* note 10.
[34] Greaney & Moss, *supra* note 27.
[35] 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* https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department; *see also* Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/07/following-syscos-abandonment-proposed-merger-us-foods-ftc-closes.
[36] Consent Order, In the Matter of Application for the Indirect Acquisition of Humana Health Insurance Company of Florida Inc. by Aetna Inc. at 9, Florida Office of Insurance Regulation (Feb. 15, 2016), *available at* http://www.floir.com/siteDocuments/AetnaHumanaAcquisition185926-16-CO.pdf.
[37] *Id.* at 8.

that policyholders can switch insurance every year which would "lessen the effectiveness of divestitures as a means to manage market concentration."[38]

Without effective structural remedies, California loses its best bet at resolving the competitive problems in this merger. The DOJ has noted that conduct remedies have shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.[39] This is a deal that cannot be fixed and therefore the CDI should recommend a denial of the merger.

Conclusion

At the beginning of my testimony I suggested that the CDI ask two important questions in considering its recommendations for this merger: (1) will the proposed merger harm Californians; and (2) can this harm be remedied through conditions? I believe that my testimony, based on the facts on the ground, makes it clear that this merger will harm Californians and that harm cannot be remedied. A merger between two of the largest, most dominant, national health insurers will substantially lessen competition for different insurance products in the State of California. Credible scholarly evidence shows that consumers will lose - facing higher costs, less choice, and diminished quality and innovation.

I urge the California Department of Insurance to recommend that the deal be denied. I am happy to address any of the points raised in this comment. Please do not hesitate to contact me with any questions.

[38] *Id.* at 9.

[39] Dep't of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), *available at* v (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.").