VII. New M&A Antitrust Siren: Health Insurance

The year 2015 was the "most active year for insurance mergers" in U.S. history.[728] In particular, health insurance companies participated in mergers in an effort to expand, rather than pursue traditional organic growth.[729] In tandem with this trend, four of the "Big 5"[730] healthcare insurers sought to merge in 2015:[731] Humana into Aetna,[732] and Cigna into Anthem.[733] Despite majority shareholder approval from all four companies,[734] the U.S. Department of Justice (DOJ) filed injunctions against both of the planned transactions.[735] Although for slightly different reasons, the DOJ argued that if allowed, each of the mergers would result in unfair competition by way of undue market concentration, in violation of Section 7 of the Clayton Act.[736]

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[728] Howard Mills et al., *Insurance Regulatory Outlook 2017*, DELOITTE, https://www2.deloitte.com/us/en/pages/regulatory/articles/insurance-regulatory-outlook.html [http://perma.cc/D3KA-6LAR] (stating that in relation to dollar value, 2015 was the most voluminous for insurance mergers).

[729] *See id.* (describing organic market expansion as being limited due in part to longer life expectancies and increased Medicare participation).

[730] *See* Laura Cooper, *Why the Big Five Health Insurers May Soon Be the Big Three*, THE STREET (June 8, 2015), https://www.thestreet.com/story/13178411/1/why-the-big-five-health-insurers-may-soon-be-the-big-three.html [https://perma.cc/6SYX-Z5D3].

[731] Leslie Picker & Reed Abelson, *U.S. Sues to Block Anthem-Cigna and Aetna-Humana Mergers*, N.Y. TIMES: DEALBOOK (July 21, 2016), https://www.nytimes.com/2016/07/22/business/dealbook/us-sues-to-block-anthem-cigna-and-aetna-humana-mergers.html?_r=0 [https://perma.cc/4FND-PQCT].

[732] *Aetna to Acquire Humana for $37 Billion, Combined Entity to Drive Consumer-Focused, High-Value Health Care*, BUS. WIRE (July 3, 2015), http://www.businesswire.com/news/home/20150702005935/en/ Aetna-Acuire-Humana-37-Billion-Combined-Entity [http://perma.cc/Q8QM-CV9N].

[733] Bruce Jaspen, *Anthem, Cigna Shareholders Approve Merger as Antitrust Hurdles Await*, FORBES (Dec. 3, 2015), http://www.forbes.com/sites/brucejapsen/2015/12/03/antitrust-hurdles-await-anthem-cigna-after-shareholders-approve-merger/#1b5cb4d167b0 [https://perma.cc/7H66-E5FU].

[734] *Id.*; Kenneth R. Gosselin, *With No Debate, Aetna Shareholders Approve $37 Billion Deal to Buy Humana*, HARTFORD COURANT (Oct. 19, 2015), http://www.courant.com/business/hc-aetna-humana-merger-shareholder-vote-20151019-story.html [http://perma.cc/ZC28-KQRH].

[735] Picker & Abelson, *supra* note 4.

[736] Clayton Act, 15 U.S.C. § 18 (2012); *see* Complaint at *5, United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563 (D.D.C. Feb. 21, 2017)

This article reviews each of the health insurance companies at issue and their proposed mergers. Section A provides background on the proposed mergers and applicable legal standard for reviewing these particular antitrust concerns. Next, Section B highlights the district court rulings on both mergers, as well as the companies' affirmative defenses. Section C presents various recommendations for similar companies in the future. Finally, Section D provides a prospective outlook for companies with large market shares, seeking to merge with or acquire other similarly situated companies.

A. Background and Legal Standard

1. Proposed Merger

During a three-week span in the summer of 2015, four of the five largest health insurers—Aetna, Cigna, Anthem and Humana—revealed their hopes of completing merger buy-outs.[737] These two transactions involved capital exchanges of $85 billion and a consolidation of four firms into two, potentially converting the "Big 5" into the "Big 3."[738] If allowed to go through, Aetna would have become the second largest insurer with a market value of approximately $65 billion, and Anthem would replace UnitedHealth Group in the number one spot, potentially holding $75 billion in market value.[739]

Although the merger frenzy is credited to 2015, Aetna began implementing its acquisition strategy in 2013 when it acquired Coventry Health Care, making it the fourth largest Medicare Advantage provider.[740] After acquiring Coventry, the Hartford-based company[741] began its pursuit of Humana, "the second largest Medicare Advantage

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(arguing that if the merger proceeds, it "threatens to reduce competition across the country"); United States v. Aetna, Inc., No. 16-1494 (JBD), 2017 WL 325189, at *1 (D.D.C. Jan. 23, 2017); Picker & Abelson, *supra* note 4 (quoting U.S. Attorney General Loretta Lynch stating, "If these mergers were to take place, the competition among insurers that has pushed them to provide lower premiums . . . would be eliminated").

[737] Picker & Abelson, *supra* note 4.

[738] *Id.*

[739] *See* Cooper, *supra* note 3.

[740] *Aetna*, 2017 WL 325189, at *3.

[741] *See Aetna Inc*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?symbol=AET.N [https://perma.cc/BU2C-4KLT].

insurer,"[742] which is located in Louisville.[743] The Aetna-Humana combination would have made Aetna the largest Medicare insurer in the country.[744] The Aetna-Humana deal was a friendly merger, whereby Aetna planned to "acquire all outstanding shares" of Humana "for a combination of cash and stock valued at $37 billion."[745] This deal had a number of purported advantages cited by both companies, including a projected profit of $1.25 billion a year by 2018, due to the companies' synergies.[746] These potential synergies stemmed from combining Aetna's diversified portfolio and commercial prowess, with Humana's share of the Medicare Advantage market.[747] Additionally, Aetna Chairman and CEO Mark T. Bertolini believed that the merger benefited the members of Aetna as well.[748] He iterated that "[t]his combination will allow us to continue to invest in excellent service for our members and strengthen our partnerships with providers to deliver high quality care at an affordable price."[749] However, on January 23, 2017, a District of Columbia federal judge agreed with the DOJ and enjoined the merger from continuing.[750] The judge's swift disproval of

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[742] Diane Bartz, *U.S. Blocks Health Insurer Aetna's $34 Billion Humana Acquisition*, REUTERS: DEALS (Jan. 23, 2017, 5:50 PM), http://www.reuters.com/article/us-humana-aetna-antitrust-idUSKBN1572BF [https://perma.cc/878B-QQCA].

[743] *See Humana Inc*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?symbol=HUM.N [https://perma.cc/5NHD-LL7F].

[744] Brent Kendall & Anna Wilde Mathews, *Federal Judge Blocks Aetna-Humana Merger on Antitrust Grounds*, WALL ST. J. (Jan. 23, 2017), https://www.wsj.com/articles/federal-judge-blocks-aetna-humana-merger-on-antitrust-grounds-1485190239 [https://perma.cc/85A4-ZLVU] (explaining that before the merger, Humana had 16.9 percent of the Medicare market, and by merging with Aetna, the combined company would have over 23 percent of the market).

[745] BUS. WIRE, *supra* note 5.

[746] *Id.*

[747] *See* Anna Wilde Matthews & Joshua Jamerson, *Aetna Profit Slides, but Beats Forecasts*, WALL ST. J. (Jan. 31, 2017), https://www.wsj.com/articles/aetna-profit-slides-on-restructuring-costs-1485864337 [https://perma.cc/NDX8-QYJP].

[748] BUS. WIRE, *supra* note 5.

[749] *Id.*

[750] Eric Kroh, *DOJ Wins Bid to Block $37B Aetna-Humana Merger*, LAW360 (Jan. 23, 2017, 11:59 AM), https://www-law360-com.ezproxy.bu.edu/articles/879134/doj-wins-bid-to-block-37b-aetna-humana-merger [https://perma.cc/ZP6C-T58R].

the companies' self-proclaimed "compelling case"[751] led to the deal's demise.[752] A few weeks after the ruling, Aetna terminated the deal with Humana, paying a $1 billion termination fee and citing the "current environment" as too challenging for the deal to continue.[753]

Three weeks after Aetna announced its proposed merger with Humana, Anthem announced its prospective merger with Cigna.[754] Shareholders resoundingly supported[755] the Indianapolis based[756] Anthem's bid to acquire Cigna Corp., a Bloomfield, Connecticut corporation[757] for a second time, after failing to merge in 2014.[758] In the most recent deal, Cigna agreed to be bought by Anthem for $54 billion.[759] This proposed union would make Anthem the largest healthcare insurer, with over fifty-three million members[760] and give it the highest market value among its competitors.[761] Despite analysts' skepticism regarding Anthem's fate given the Aetna-Humana ruling,[762] Anthem used the Aetna opinion to its advantage by submitting post-trial arguments in an attempt to "bolster" its case.[763] Similar to Aetna's support of its merger, Anthem highlights the merger as benefiting providers and customers alike, because the "2.4 billion in lower bills

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[751] *See id.*

[752] Chelsea Naso, *Aetna, Humana Ditch $37B Tie-Up After Court Blocks Deal*, LAW360 (Feb. 14, 2017, 7:38 AM), https://www-law360-com.ezproxy.bu.edu/articles/891782/aetna-humana-ditch-37b-tie-up-after-court-blocks-deal [http://perma.cc/4DNR-5MHN].

[753] *Id.* (quoting Aetna Chairman, Mark Bertolini).

[754] *See* Picker & Abelson, *supra* note 4.

[755] Jaspen, *supra* note 6.

[756] *Anthem Inc*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?symbol=ANTM.K [https://perma.cc/5CE7-CURU].

[757] *Cigna Corp*, REUTERS, http://www.reuters.com/finance/stocks/companyProfile?rpc=66&symbol=CI [https://perma.cc/A9PU-WVV7].

[758] Picker & Abelson, *supra* note 4.

[759] Jaspen, *supra* note 6.

[760] *Id.*

[761] *Cf.* Cooper, *supra* note 3.

[762] *See, e.g.*, David McLaughlin & Zachary Tracer, *Judge Nixes Aetna's $37 Billion Purchase of Humana, Aetna Considers Appeal*, INS. J. (Jan. 23, 2017), http://www.insurancejournal.com/news/national/2017/01/23/439723.htm [https://perma.cc/Q893-H6SP].

[763] Mara Lee, *Anthem Uses Ruling Against Aetna To Bolster Its Arguments*, HARTFORD COURANT (Jan. 30, 2017) http://www.courant.com/hc-anthem-aetna-20170127-story.html [https://perma.cc/X43S-WUPB].

paid to providers"[764] will be spread to both its corporate and private customers.[765] A few weeks after the Aetna-Humana ruling, Judge Amy Jackson of the District Court of the District of Columbia, ordered the merger between Anthem and Cigna to be enjoined.[766] Disregarding the red light from the courts, Anthem quickly appealed Judge Jackson's ruling in an attempt to salvage the deal and prevent Cigna from walking away.[767]

2. Applicable Legal Standard

In order to assess the validity of the government's claims, courts rely on a consistent and voluminous line of case law.[768] In both cases, the DOJ argued that the two mergers violated Section 7 of the Clayton Act.[769] Courts look to *Brown Shoe Co. v. United States*, which applied the newly amended Section 7 of the Clayton Act and outlined factors used to determine the competitive effects of a merger.[770] Section 7 prohibits mergers and acquisitions that may "substantially . . . lessen competition, or . . . tend to create a monopoly" in a "line of commerce."[771] The government has the initial burden of setting forth the presumption that the merger would result in "undue concentration in the market for a particular product in a particular geographic

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[764] *Id.*

[765] *See id.*

[766] *See generally* United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563 (D.D.C. Feb. 21, 2017); Kroh, *supra* note 23.

[767] Michael Erman, *Anthem Sues Cigna to Block Termination of Merger*, REUTERS (Feb. 15, 2017), http://www.reuters.com/article/us-cigna-m-a-anthem-lawsuit-idUSKBN15U1AQ [https://perma.cc/SJG8-C85V].

[768] *See Anthem*, 2017 WL 685563, at *11; United States v. Aetna, Inc., No. 16-1494 (JBD), 2017 WL 325189, at *18-19 (D.D.C. Jan. 23, 2017).

[769] Complaint at *5, *Anthem*, 2017 WL 685563; *Aetna*, 2017 WL 325189, at *1.

[770] *See* Henry S. Healy, Comment, *More Ado About Mergers: Brown Shoe Co. v. United States*, 4 B.C. L. REV. 159, 159–60 (1962). *See generally* Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962) (finding that the Clayton Act and it's legislative history requires the court to review proposed mergers by examining both "economic and historical factors").

[771] Clayton Act, 15 U.S.C. § 18 (2012) (codifying the rules applicable to horizontal mergers).

area."[772] According to Professor Thorstein Veblen,[773] an economic and sociological innovator during the late nineteenth century, undue concentration arises when there is a "community of vested interests whose vested right is to keep up prices by a short supply in a closed market."[774] In order to shift the burden onto the defendants, the government must show that there is indeed a product market (based on the goods or services at issue) that would suffer from a lack of competition.[775] A relevant product market is "determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[776] When a product is unique and without effective substitutes, the market for such a product lacks "functional interchangeability"[777] because consumer choice and interplay between consumers and sellers is limited.[778] Courts will also look at "the availability of substitute commodities" and "how far buyers will go to substitute one commodity for another."[779] Finally, undue concentration can be shown if a merger would give a company too large of a market share.[780]

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[772] United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990) (positing the presumption the government must establish in order to proceed on horizontal merger antitrust claims).

[773] Francis S. Pierce, *Thornstein Veblen*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/biography/Thorstein-Veblen [https://perma.cc/65VL-Z4TS].

[774] Harold M. Fleming, *"Undue Concentration" in Business*, FREEMAN 33, 34 (Sept. 1959), https://fee.org/media/1971/1959-09.pdf [https://perma.cc/6M-LT-JWAT] (citation omitted) (analogizing the theory of oligopoly and undue concentration within the sphere of American business).

[775] *See Brown Shoe*, 370 U.S. at 325 (finding that a submarket may constitute a product market for antitrust purposes, so long as the effects of the merger would lessen competition within that submarket).

[776] *See* United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 41, 50–51 (D.D.C. 2011) (quoting *Brown Shoe*, 370 U.S. at 325) (finding that a relevant product market search also includes "functionally interchangeable" products).

[777] *See* FTC v. Staples, Inc., 970 F. Supp. 1066, 1074 (D.D.C. 1997).

[778] *See Brown Shoe*, 370 U.S. at 325.

[779] *Staples*, 970 F. Supp. at 1074.

[780] *See* Fleming, *supra* note 47, at 34–35.

B. The "Big 5" and Unfair Competition

Considering the fact that the "Big 5" comprise a majority of the health care insurance market, it is not difficult to comprehend why these mergers give rise to antitrust concerns.[781] Although the Aetna-Humana and Anthem-Cigna mergers were initiated for different purposes and intended for different markets, there are three common issues that the District Court for the District of Columbia relied on to enjoin the proposed mergers: undue concentration in the relevant product markets, loss of competition, and lack of countervailing efficiencies.[782]

1. Relevant Product Market

First, both of the mergers primarily concerned at least one relevant product market that the government successfully defined as "narrow."[783] The court's principal focus in *Aetna* was the Medicare Advantage market, despite Aetna's attempts to include Original Medicare within the product market definition.[784] The court limited the product market to Medicare Advantage for a number of reasons, including, but not limited to (1) Aetna's course of business and its corresponding desire to acquire complete control of the market; (2) Medicare Advantage being the more profitable aspect of Medicare; and (3) the lack of "reasonable interchangeability of use . . . or the

[781] *See* Cooper, *supra* note 3.

[782] *See generally* United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563 (D.D.C. Feb. 8, 2017) (discussing Anthem and Cigna's participation and control within the national accounts market, the disappearance of existing competition within that market post-merger, and the lack of pro-competitive efficiencies); United States v. Aetna, Inc., No. 16-1494 (JBD), 2017 WL 325189 (D.D.C. Jan. 23, 2017) (indicating that the Aetna-Humana merger concerns the narrow market of Medicare Advantage, that existing competition between Aetna and Humana will help cause the decrease in competition overall, and that Aetna's claimed efficiencies are misguided).

[783] *See Anthem*, 2017 WL 685563, at *6–7 (stating that Anthem's market of concern is the national accounts market); *Aetna*, 2017 WL 325189, at *20, 27–30 (stating that Aetna's market of concern is the Medicare Advantage market).

[784] *Aetna*, 2017 WL 325189, at *1–2.

cross-elasticity of demand"[785] within the general Medicare market.[786] Further, because competition is "fierce"[787] among providers, and the "companies' own business documents"[788] support this conclusion, it is evident that undue concentration within the Medicare Advantage market would result, violating Section 7 of the Clayton Act.[789]

Similarly, the *Anthem* court focused on Anthem and Cigna's participation (and ultimately, control) within the national accounts market.[790] The national accounts market is a unique product market limited in scope by the particularity of the product and the geographical reach needed to participate.[791] In fact, there are only four national carriers capable of participating in the market, and two of them are Anthem and Cigna.[792] The irrefutability of the limited number of traditional market participants in the national accounts market forced the defense to argue instead that other types of market participants reduce the market's narrowness.[793] Nevertheless, the DOJ contended and the court held that the proposed merger between Anthem and Cigna would result in undue concentration within the national accounts market, making the merger "presumptively unlawful."[794]

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[785] *See Staples*, 970 F. Supp. at *1073–74 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, at 325 (1962)).

[786] *See Aetna*, 2017 WL 325189, at *20, 27–30 (considering the proper market definition by reviewing the companies' relevant market participation, as well as the "extent of any competition between Original Medicare options and Medicare Advantage").

[787] Kroh, *supra* note 23.

[788] *Id.*

[789] *Id.*; *see supra* Section A.2 (describing the factors from the applicable legal standard applied to Section 7 violations and noting their presence within the Aetna-Humana merger).

[790] United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563, at *1, 12 (D.D.C. Feb. 8, 2017).

[791] *Id.* at *1–3; *see* Matthew Loughran, *Anthem-Cigna $48B Merger Decision Could Doom Future Mega Mergers*, BNA (Feb. 10, 2017), https://www.bna.com/anthemcigna-48b-merger-n57982083662/ [https://perma.cc/XD8U-F24S] ("National accounts are defined as customers with more than 5,000 employees, usually spread over at least two states.").

[792] *Anthem*, 2017 WL 685563, at *1.

[793] *Id.* at *2 (arguing that the "new entrants" to the market include "third-party administrators" and "other specialty firms").

[794] *Id.*

2. Widespread Loss of Competition

The next issue of concern is the overall loss of competition in all markets as a result of two competitors combining.[795] The elimination of competition resulting from a merger has the potential to result in higher prices, a reduction in competition even in markets that are not controlled by the firms at issue, an increase in barriers to entry, and the diminution of innovation.[796] Relying on additional evidence beyond market concentration, the DOJ in *Aetna* argued that existing "head-to-head" competition in both the Medicare and Public Exchange markets "would be lost following the merger," significantly harming consumers.[797]

In opposition to this claim, the companies argued that Aetna and Humana were not competitors, and thus competition between the two firms could not, and would not dissipate as a result of the merger.[798] Aetna further argued that the planned divesture of Medicare Advantage plans to Molina Healthcare would "render any competitive harm unlikely."[799] Similarly, Aetna argued that because there is no head-to-head competition between the two insurers within the public exchange markets, there lacks a "general relationship between competition and plan price."[800] It further pointed out that in counties in which both Aetna and Humana were present, the presence of one insurer had "no statistically significant impact on the prices charged by the other."[801] However, the court did not give weight to these

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[795] *Anthem*, 2017 WL 685563, at *33 (recounting the proposition that the elimination of competition between two competitors resoundingly effects the market at large); United States v. Aetna, Inc., No. 16-1494 (JBD), 2017 WL 325189, at *29 (D.D.C. Jan. 23, 2017) (observing that loss of competition can occur "even where the merging parties are not the only, or the two largest, competitors in the market."); FTC v. Staples, Inc., 190 F. Supp. 3d 100, 131 (D.D.C. 2016) (citing the Horizontal Merger Guidelines, § 6) ("Mergers that eliminate head-to-head competition between close competitors often result in a lessening of competition.").

[796] *See Anthem*, 2017 WL 685563, at *2; *Aetna*, 2017 WL 325189, at *29–31.

[797] *Aetna*, 2017 WL 325189, at *1.

[798] *Id.* at *2, 30.

[799] *Id.* at *2, 43.

[800] *Id.* at *30 (relying on "two regressions performed" by Aetna's economic expert).

[801] *Id.*

affirmative defenses.[802] Rather, it highlighted each of the companies' market shares and their internal documents discussing each other as competitors to indicate the increased likelihood of anticompetitive effects.[803] The court also focused on Aetna's status as a "particularly aggressive Medicare Advantage competitor," since anticompetitive effects are even more probable when a competitor is aggressive.[804]

Anthem emphasized similar concerns, and furthered arguments of restricted choice and barriers to entry.[805] Again, the DOJ argued that a merger between Anthem and Cigna would eliminate vigorous competition between the firms in the markets in which they both participated.[806] Instead of attempting to minimize the issue of existing competition, Anthem indicated that there would be a future influx of "new entrants poised to shake up the market."[807] Anthem also stressed that the transaction would give the new company a "greater ability to command discounts from providers."[808] Yet, the court noted that since the national accounts market is already limited, and smaller or localized insurance companies previously could not enter the market, the possibility of fragmentation (i.e., "slicing" the insurance business between multiple carriers) decreases if competition between the two firms is eliminated.[809] Additionally, the court agreed with the DOJ that "customers should continue to have a choice" between Anthem and Cigna, which would collaborate with providers in order to obtain discounts.[810]

3. Inequitable Efficiencies

The final issue emphasized by both courts was the lack of merger-born efficiencies counteracting the anticompetitive effects.[811]

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[802] *See id.* at *2.
[803] *See id.* at *29.
[804] *Id.* (internal quotations omitted).
[805] *See* United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563, at *2 (D.D.C. Feb. 21, 2017).
[806] *See id.* at *33.
[807] *See id.* at *2.
[808] *See* Eric Kroh, *$54B Anthem-Cigna Merger Spiked by Judge*, LAW360 (Feb. 8, 2017, 7:15 PM), https://www-law360-com.ezproxy.bu.edu/articles/868042 [http://perma.cc/F38A-MTKP].
[809] *See Anthem*, 2017 WL 685563, at *2.
[810] *Id.* at *5; *see* Kroh, *supra* note 81.
[811] *See Anthem*, 2017 WL 685563, at *46–55; United States v. Aetna, Inc., No.

While efficiencies are not explicitly accounted for in the courts' analysis, defendants may proffer evidence of efficiencies to rebut the adverse effects of a merger.[812] In order to be qualified as valid, the efficiencies must be "cognizable," "verifiable," and "merger specific."[813] Relying on expert testimony and the framework used to justify the Coventry merger,[814] Aetna claimed that the proposed merger would result in "$2.8 billion in savings that could be passed onto consumers"[815] as a consequence of benefits of integration of business functions between the two firms.[816] Aetna also argued that because they would be able to lessen fixed costs, "50% of reductions in marginal costs will be passed through to consumers."[817] However, Aetna "undertook a wide-ranging review,"[818] and provided an undetailed analysis.[819] The DOJ offered a counter analysis, arguing that the proposed dollar amounts were not verifiable and that the efficiencies were not actually merger specific.[820] Aetna's claimed efficiencies included some that were "inextricably linked" to the market, but would nonetheless arise outside of the relevant product market.[821] The court refused to accept Aetna's argument, and found that the exception allowing consideration of efficiencies not "strictly in the relevant market" only applies where

16-1494 (JBD), 2017 WL 325189, at *70–74 (D.D.C. Jan. 23, 2017).

[812] *See* United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 89 (D.D.C. 2011) (citing FTC v. H.J. Heinz Co., 246 F. 3d 708, 720 (D.D.C. Cir. 2001)) (stating that courts "must undertake a rigorous analysis of the . . . efficiencies" derived from the Horizontal Merger Guidelines and the cases that interpret it); *see, e.g.*, *Anthem*, 2017 WL 685563, at *3 ("The law is clear that a defendant must both substantiate any claimed efficiencies and demonstrate that they are 'merger-specific' . . . ."); *Aetna*, 2017 WL 325189, at *70 (confirming that the court will consider the proposed efficiencies, but that efficiencies are not determinative).

[813] *Aetna*, 2017 WL 325189, at *71.

[814] *Id.*

[815] Kroh, *supra* note 23.

[816] *See Aetna*, 2017 WL 325189, at *70.

[817] *Id.* at *71.

[818] *See id.* at *70.

[819] *Aetna*, 2017 WL 325189, at *71–72; Lee, *supra* note 36 ("[T]he Aetna ruling rejected that company's claims of cost savings, because Aetna didn't demonstrate the savings would truly benefit customers.").

[820] *Aetna*, 2017 WL 325189, at *71–72.

[821] *Id.* at *72 (citing an exception to the Horizontal Merger Guidelines, which provides "prosecutorial discretion" in considering "efficiencies not strictly in the relevant market").

the anticompetitive effects of the merger are "small," which was not the case for the Aetna-Humana merger.[822]

Following the Aetna-Humana ruling, Anthem filed a supplemental conclusions of law brief that focused on the Anthem-Cigna merger efficiencies and how they differed from Aetna's.[823] According to Anthem and economic expert Mark Israel, the merger savings would result in "2.4 billion in lower bills paid to providers,"[824] almost all of which would flow through to customers.[825] These pro-competitive effects arising from the merger included more effective bargaining, enhanced incentives to innovate, and lower costs for Anthem/Cigna customers regardless of plan type.[826] Anthem stood firmly behind its analysis because Israel "tailored" his calculations to the "markets at issue," ensuring they were "merger specific," as well as "cognizable" and "verifiable."[827] Yet, despite Anthem's best efforts, its arguments during trial and in post-trial briefs were not persuasive.[828] The efficiency argument failed because the calculations were based solely upon Anthem's current customer base, providers, and the discounts provided.[829] The analysis ignored the rise in customer base following the merger, the potential changes to healthcare under the Trump Administration, and the fact that the efficiencies "do not arise out of, or facilitate, competition," as required.[830] The detailed analysis

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[822] *Id.*

[823] Lee, *supra* note 36.

[824] *Id.* ("Anthem said Aetna conceded that only 42 percent of its savings would flow through to customers, while Israel testified that 98 percent of Anthem's merger savings would flow through to large companies . . . ."). *See generally* Supplemental Conclusions of Law Relating to the January 23, 2017 Opinion in United States v. Aetna, United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563 (D.D.C. Feb. 21, 2017).

[825] *See* Eric Kroh, *Anthem Says Aetna-Humana Ruling Supports its Merger Case*, LAW360 (Jan. 25, 2017, 5:57 PM), https://www-law360-com.ezproxy.bu.edu/articles/884860?scroll=1 [http://perma.cc/L776-65GX].

[826] *See* Answer, United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563, at *14–16 (D.D.C. Jan. 23, 2017).

[827] Supplemental Conclusions of Law Relating to the January 23, 2017 Opinion in United States v. Aetna, *Anthem*, 2017 WL 685563, at *2–3; *see* discussion *supra* Section B.3 (discussing merger efficiency analysis).

[828] *See Anthem*, 2017 WL 685563, at *3 ("[I]t is questionable whether they are "efficiencies at all.").

[829] *See id.*

[830] *See id.* at *4–8 (finding that "the antitrust laws are designed to protect

was deemed ineffective since the methods for achieving cost savings are not feasible themselves.[831]

C. Moving Forward

The Federal Trade Commission (FTC) and DOJ regularly challenge mergers and acquisitions between large companies, especially those that participate in restricted markets (e.g. telecommunications, utilities, and airliners), and health insurance companies are no exception.[832] Historically, the DOJ has scrutinized healthcare mergers because the health insurance product market is narrow and market participation is limited.[833] However, it was not until 2017 that the DOJ (or the FTC) successfully enjoined not one, but two health insurance mergers.[834] Only time will tell if the antitrust blockades on Aetna and Anthem are the new "normal," or if healthcare companies can avoid such heavy antitrust scrutiny in the future.[835] It is possible that the "industry may find such deals more feasible in the future with new enforcement priorities and possible legislative changes."[836] Some commentators believe that because each of the orders was narrow in scope, the *Aetna* and *Anthem* outcomes are not necessarily determinative.[837] Others believe that despite the administration's desire to encourage corporate success, the FTC and DOJ will be directed to continue strict enforcement actions regarding

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competition" and if the efficiencies are not byproducts of competition, then they are irrelevant).

[831] *Id.* at *4.

[832] *See generally* Ilene Knable Gotts, *A Busy Year in M&A Antitrust Enforcement*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE FIN. REG. (Dec. 28, 2015), https://corpgov.law.harvard.edu/2015/12/28/a-busy-year-in-u-s-ma-antitrust-enforcement/ [https://perma.cc/YX7G-QTD5].

[833] *See* Jeff Spigel, et al., *A Closer Look at the Aetna-Humana Merger Loss*, LAW360 (Feb. 6, 2017, 10:58 AM), http://www.kslaw.com/imageserver/KS-Public/library/publication/2017articles/2-6-17_Law360.pdf [https://perma.cc/KWF8-H4FB].

[834] *Cf. id.*

[835] Eric Kroh, *Insurance Mega-Merger Blocks No Death Knell for Deals*, LAW360 (Feb. 9, 2017, 7:57 PM), https://www-law360-com.ezproxy.bu.edu/articles/890332/insurance-mega-merger-blocks-no-death-knell-for-deals [https://perma.cc/WH8E-ARZ3].

[836] *Id.*

[837] *Id.* ("[T]he decisions . . . turned on the specific facts of the respective cases . . . .").

health insurance transactions.[838] In combination with the FTC's recent prevention of hospital mergers, the DOJ's wins may help "bolster . . . health care antitrust enforcement."[839] Aggressive antitrust enforcement has been a key agenda under Presidents Clinton, Bush, and Obama, so departure from this trend is unlikely.[840]

Assuming *Aetna* and *Anthem* are not dispositive of the fate of future mergers, companies moving forward should consider several key elements.[841] Most importantly, companies seeking to merge should avoid combinations that involve narrow product markets.[842] Narrow product markets contain products that are not interchangeable,[843] and are of particular concern where the market contains a small number of participants.[844] Secondly, companies should consider divestures in preparation for a merger.[845] Aetna's attempt at such a maneuver as

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[838] *See* Bruce Jaspen, *Sorry, Aetna and Anthem: Trump Won't Stop Antitrust Scrutiny of Healthcare*, FORBES (Nov. 18, 2016), http://www.forbes.com/sites/brucejapsen/2016/11/18/sorry-aetna-and-anthem-trump-wont-stop-antitrust-scrutiny-of-healthcare/#66455035498b [https://perma.cc/24RC-QFMF] ("[D]on't expect any change in policy towards potential monopolies in healthcare . . . ."); Loughran, *supra* note 64 ("These decisions ought to send a strong message to the health-care industry . . . that competition, not assertions of 'efficiencies' . . . is the law of the land").

[839] Spigel, *supra* note 106.

[840] Jaspen *supra* note 105 (arguing against the idea that a political party shift in the White House will also result in a shift in antitrust enforcement); Spigel, *supra* note 106 (highlighting the DOJ and FTC's consistent "health care antitrust enforcement,"). *But see* Kroh, *supra* note 109 (quoting Elai Katz, who reasons that although "incoming administrations have continued on the litigation track taken by their predecessors, but . . . . '[T]his new administration has surprised us in some of their appointments and policies'").

[841] *See* Spigel, *supra* note 106.

[842] *See* United States v. Anthem, Inc., No. 16-1493 (ABJ), 2017 WL 685563, at *2 (D.D.C. Feb. 21, 2017); United States v. Aetna, Inc., No. 16-1494 (JBD), 2017 WL 325189, at *74 (D.D.C. Jan. 23, 2017); Kroh, *supra* note 108 (stating that the government "will continue to be successful in challenging transactions when it can assert a narrow definition of the market that will be affected").

[843] *See Aetna*, 2017 WL 325189, at *11.

[844] Kroh, *supra* note 108 (analogizing the blocked merger between Staples Inc. and Office Depot Inc. because the merger would "harm competition for sales to large companies with a nationwide reach").

[845] *See id.* ("Companies looking to push deals through with divestures and other remedies may find a more willing counterparty in the new administra-

part of its acquisition of Humana failed in part because Molina was not financially prepared to accept the divesture.[846] If Aetna finds a company better equipped to financially handle the divesture, a merger might stand a better chance of survival.[847]

If the *Aetna* and *Anthem* rulings do act as a barrier to mega-mergers, companies seeking to expand or integrate, vertically or horizontally, will be forced "to find other engines for growth, either organically or through smaller scale deals."[848] One potential engine for expansion is the maintenance or creation of strategic partnerships and joint-ventures.[849] Entering into a partnership or joint venture regarding a particular product or service allows the company to remain competitive, while accessing new markets and innovating through collaboration.[850] By aligning with other companies, companies have the chance to increase value, without increasing volume or market share, which would trigger antitrust scrutiny.[851]

D. Conclusion

While mergers and acquisitions among large companies within the same industry are not unique,[852] the Clayton Act enables the government to respond to such proposed mergers with a high level of scrutiny, as evidenced by the blocked Aetna-Humana and Anthem-

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tion.").

[846] *See id.* (arguing that if Aetna were able to find a party that "has the wherewithal to purchase the assets that would be divested," then Aetna and Humana might succeed).

[847] *Id.*

[848] Kendall & Mathews, *supra* note 17.

[849] Gary Reader & Ram Menon, *Getting Strategic About Inorganic Growth: Insurance CEOs Speak,* KPMG (Sept. 22, 2016), https://home.kpmg.com/xx/en/home/insights/2016/09/getting-strategic-about-inorganic-growth-insurance-ceos-speak.html [http://perma.cc/W9AV-6ZGD].

[850] *See id.*

[851] *See id.* ("[T]his is only the beginning of a much more focused shift towards strategy-driven transactions within the insurance sector that will ultimately define the competitive landscape going forward.").

[852] Bourree Lam, *2015: A Merger Bonanza*, THE ATLANTIC (Jan. 9, 2016), https://www.theatlantic.com/business/archive/2016/01/2015-mergers-acquisitions/423096/ [https://perma.cc/GGS7-H7VN] (listing the biggest mergers in 2015, most of which were horizontal mergers, including AB Imbev (beer company) acquiring SABMiller (beer company), and Pfizer (pharmaceuticals) merging with Allergan (pharmaceuticals)).

Cigna mergers.[853] If allowed to proceed, the two mergers would have condensed the health insurance market into three major providers, with the exception of a limited number of smaller firms.[854] While the mergers concerned different markets, both were enjoined for three common reasons: (1) the government successfully defined a narrow product market that would have been affected by the mergers;[855] (2) the mergers would have resulted in a loss of widespread competition that would extend beyond the relevant product markets;[856] and (3) the efficiencies claimed by the companies as a result of the mergers failed to counteract the anticompetitive effects.[857] Companies pursuing mergers should consider these rationales, which reflect a regulatory focus on maintaining competitive markets.[858] Regardless of how the Trump Administration decides to proceed with antitrust enforcement, companies seeking to merge, especially those with large market shares, should be wary.[859] In order to avoid potential antitrust violations, firms with significant market presence in narrow markets should construct deals that circumvent narrow market definitions, improve or maintain competition, and ensure that the deal-born efficiencies are centered on and derived from, competition.

Aly Francini[860]

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[853] *See id.*; Eric Kroh, *3 Lessons From the Anthem-Cigna Opinion*, LAW360 (Feb. 22, 2017, 6:02 PM), https://www-law360-com.ezproxy.bu.edu/articles/894502/3-lessons-from-the-anthem-cigna-merger-opinion [https://perma.cc/3X5H-K5P4].

[854] Picker & Abelson, *supra* note 4.

[855] *See* discussion *supra* Section B.1 (defining relevant product markets).

[856] *See* discussion *supra* Section B.2 (discussing the presence of current competition between merging firms, and resulting loss of competition).

[857] *See* discussion *supra* Section B.3 (discussing ineffective efficiency arguments).

[858] *See* Loughran, *supra* note 64.

[859] *See* Jaspen, *supra* note 111 (stressing the recent history of antitrust enforcement). *But see* Kroh, *supra* note 109 (arguing that because recent mergers were blocked on narrow grounds, they are not dispositive).

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