

CPI's North America Column Presents:

Monopsony and Health Plan Mergers: Does Anthem–Cigna Signal a Shift In Policy?

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September 2017



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Anthem's proposed merger with Cigna, the largest in the history of the health insurance industry, has received no shortage of interest as the merging parties have faced off against the government—and, at times, each other—in litigation that resulted in a permanent injunction blocking the merger and Anthem ultimately calling off the deal. The D.C. Circuit opinion upholding the injunction has been getting a lot of recent attention for its discussions of efficiencies. However, a less-noted but very important point raised in Judge Brett Kavanaugh's dissent warrants further examination, as it has huge implications regarding how the Antitrust Division of the Department of Justice ("DOJ") approaches bringing monopsony allegations in the health plan merger context. After focusing much of his dissent on how the merger would clearly be beneficial and procompetitive to downstream employer-consumers, Judge Kavanaugh, surprisingly, observed that the Government could have ultimately blocked the merger based on the merger's monopsony effects on hospitals and doctors in the upstream provider market. Judge Kavanaugh would have remanded to the lower court to decide that issue in the first instance.¹ Judge Kavanaugh's willingness to block the merger on these grounds is notable for multiple reasons. First, Anthem-Cigna represents the first time the DOJ was willing to allege upstream harm to providers that was not merely a predicate for downstream harm to consumers. Second, monopsony often operates on the outer edge of health care antitrust enforcement policy because it is difficult to distinguish from otherwise pro-competitive behavior. Yet, Judge Kavanaugh, one of the most conservative federal judges on antitrust issues, was willing to potentially block the merger based on the DOJ's expansive monopsony theory.

It thus becomes necessary to understand how the DOJ has handled health plan monopsony claims in the past and how Anthem-Cigna will affect that enforcement policy going forward.

DOJ'S PRIOR TREATMENT OF MONOPSONY POWER

Monopsony is often described as the mirror image of monopoly.² On the buy-side of the market, a monopsonist controls the quantity of the input utilized, reducing the price paid for the input by purchasing less than a competitive buyer would. As a result, the monopsonist transfers wealth from the input supplier to itself and creates inefficiency because too little of the input is being used compared to the competitive outcome. In the health plan context, buyer power refers to the potential for reduced reimbursement rates paid by health plans to providers.

There is ample debate as to whether antitrust laws' goal of protecting "consumer welfare" is properly limited to end-consumers in downstream markets or instead refers to the total welfare of all consumers and producers in society.³ This debate is particularly relevant in the monopsony context, where an arrangement's only discernible harm may be upstream suppliers being paid less. If a health plan merger would result in an ability for the plan to negotiate lower reimbursement rates being paid to providers, a portion of those savings can be passed on to downstream end-consumers in the form of lower health insurance premiums. However, if those lowered reimbursements rates paid to upstream providers are treated as a separate violation of the Clayton Act, bringing such allegations could deter plans from engaging in the procompetitive activity of

¹ United States v. Anthem, No. 1:16-cv-01493, 50 (D.C. Cir. Apr. 28, 2017) (Kavanaugh, B., dissenting).

² U.S. Dep't of Justice & Fed. Trade Comm'n, *Improving Health Care: A Dose of Competition*, 13 (2004) [hereinafter *A Dose of Competition*]; U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 1 (2010) [hereinafter *Horizontal Merger Guidelines*]; see also *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 321-22 (2007).

³ Compare Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=975992 (arguing in favor of an aggregate welfare view of "consumer harm" that considers the welfare of all people in the economy), with J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at Weyerhaeuser*, before the 2006 Milton Handler Annual Antitrust Review, New York, NY (2006), available at <http://ftc.gov/speeches/rosch/061207miltonhandlerremarks.pdf> (arguing that "consumer welfare" focuses on the welfare of downstream end-consumers).

lowering health care costs.

And while the case law does not definitively answer whether monopsony claims require a showing of downstream harm,⁴ it suggests that courts should be cautious in condemning arrangements that, on their face, appear to bring low price benefits to consumers.⁵

Indeed, prior to Anthem-Cigna, the DOJ's approach to monopsony-based health care merger enforcement demonstrated a similar sense of caution. Despite DOJ guidance documents acknowledging monopsony as a viable concern in health care markets,⁶ monopsony allegations have not been a common or central theory of harm in the merger cases the DOJ files. Furthermore, in all three of its monopsony-based health plan merger cases⁷ that preceded Anthem-Cigna, the DOJ alleged both upstream and downstream harm despite its guidance stating that upstream harm alone was sufficient to support a monopsony claim.⁸ All these cases alleged that monopsony power would likely result from the merger, but upstream price effects on providers were only a predicate for the downstream quality effects on consumers that would result from depressed reimbursement rates to providers.⁹

Notably, this approach contrasts with how the DOJ has handled monopsony allegations in agriculture industry cases, where the DOJ has demonstrated a consistent position of opposing mergers where buyer power reduced prices paid to farmers without regard to downstream consumers. For example, in a complaint challenging a chicken processor facility merger, the DOJ alleged increased monopsony power in the upstream market for chicken grower services without providing any allegations relating to downstream markets or harm to end-users.¹⁰ It is difficult to reconcile the different approaches from a theoretical and enforcement standpoint, however both the health care and agriculture industries have organized lobbying efforts by providers and farmers, respectively, focused on highlighting the potential for monopsony power to agencies. The apparent discrepancy in the DOJ's approaches might make an interesting addition to the public choice literature.

The DOJ's prior decisions to limit health care merger monopsony claims to instances where downstream quality effects were also allegedly present can perhaps be viewed as the agency's recognition that (1) over-enforcement improperly keeps immediate low price benefits from consumers in the name of preventing only speculative future harm, and (2) the ability to drive down provider reimbursement rates is an essential role of health plans allowing for lower prices for consumers. This approach to enforcing the antitrust laws is also consistent with the DOJ's traditional mission of protecting consumers and is done in a way that does not over-deter beneficial behavior to the detriment of consumer interests.

In light of the foregoing considerations, Anthem-Cigna is a significant shift in enforcement policy.

⁴ See *Kartell v. Blue Shield of Massachusetts, Inc.*, 749 F.2d 922, (1st Cir. 1984) (recognizing the need to alleged downstream effects); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *but see Mandeville Island Farms v. Am. Crystal Sugar, Co.*, 334 U.S. 219 (1948) (condemning a buyers' cartel that had no effect on a downstream market).

⁵ *Kartell*, 749 F.2d at 931.

⁶ *A Dose of Competition*, *supra* note 2; *Horizontal Merger Guidelines*, *supra* note 2, § 12.

⁷ Complaint at 35, *United States v. Aetna Inc.*, No. 3-99CV398-H (N.D. Tex. Jun. 21, 1999); Complaint at 5, *United States v. UnitedHealth Group, Inc.*, No. 1:05CV02436 (D.D.C. Dec. 20, 2005); Press Release, U.S. Dep't of Justice, Blue Cross Blue Shield of Michigan and Physicians Health Plan of Mid-Michigan Abandon Merger Plans (Mar. 8, 2010) [hereinafter *BCBS Michigan Press Release*].

⁸ *A Dose of Competition*, *supra* note 2, at 19-20.

⁹ Complaint at 35, *Aetna*, No. 3-99CV398-H; Complaint at 5, *UnitedHealth Group*, No. 1:05CV02436; *BCBS Michigan Press Release*, *supra* note 7.

¹⁰ Complaint, *United States v. George's Foods, LLC*, No. 5:11-CV-00043-gec (W.D. Va. May 10, 2011); *see also* Complaint, *United States v. Cargill, Inc.*, No. 991875 (D.D.C. July 8, 1999).

TREATMENT OF MONOPSONY IN ANTHEM-CIGNA

Buyer power can be a huge boon to consumers in the form of lower prices; Walmart is the most frequently cited example. But it is difficult to cleanly distinguish that concept from the DOJ's position in Anthem-Cigna—that wielding enhanced negotiating power to push health care providers to accept rates below competitive levels is an unlawful exercise of monopsony power *despite the absence of downstream effects*.¹¹ While it is not clear how lower input prices would harm end-consumers in such a situation, Judge Kavanaugh nevertheless observed that the transaction may be unlawful “if the lower provider rates from this merger turn out to be the fruit of a poisonous tree—namely, the fruit of Anthem-Cigna’s exercise of unlawful monopsony power against hospitals and doctors in the upstream market”¹²

This switch from viewing monopsony through the traditional downstream quality effects lens of harm comes with inherent difficulties of proof because an upstream price effect, *i.e.*, lower provider reimbursement rates, simply looks too much like normal procompetitive health plan behavior. In terms of what actually constitutes monopsony power, Judge Kavanaugh explained that “although both monopsony and bargaining power result in lower input prices, ordinary bargaining power usually results in lower prices for consumers, whereas monopsony power usually does not, at least over the long term.”¹³ However, provider rates and consumer premiums are both affected by a host of causal factors, which would each need to be disentangled and accounted for, creating further evidentiary hurdles and highlighting the need to allege downstream quality effects in monopsony allegations.

CONCLUSION

So what is to be made of the DOJ's apparent policy shift? Does Anthem-Cigna represent a new willingness by the DOJ to bring monopsony-based claims absent evidence of downstream consumer harm, or is this merely a high-water mark? Considering that it was unnecessary for the DOJ to allege the monopsony count at all in Anthem-Cigna (multiple seller-side theories of harm were also alleged), and that the DOJ was willing to have its upstream-only theory be put to its proof at trial, it should be assumed that the DOJ staff will consider upstream-only allegations anytime there is a possibility of charging a monopsony violation. It also remains to be seen whether this administration's conservative antitrust agency appointees will scale back the monopsony approach used in Anthem-Cigna in favor of the less expansive downstream-effects approach previously employed by the DOJ.

Finally, since the lower court did not rule on the Anthem-Cigna monopsony count, it is still unclear how effective the DOJ would be in overcoming the inherent evidentiary hurdles of proving harm solely based on upstream provider rates. It is worth remembering that courts and the DOJ's own guidance acknowledge the difficulty of defining and determining what a reasonable price should be.¹⁴

¹¹ Plaintiffs' Supplemental Memorandum on the Buy-Side Case at 9-10, *Anthem*, No. 1:16-cv-01493.

¹² *Anthem*, No. 1:16-cv-01493, at 60 (Kavanaugh, B., dissenting).

¹³ *Id.* at 65 (Kavanaugh, B., dissenting).

¹⁴ *A Dose of Competition*, *supra* note 2, at 19 (“Health care prices can be defined in a number of different ways, and even with an agreed-upon benchmark for competitive reimbursement, it can be difficult to know whether the price paid to . . . providers has changed.”); see also *Kartell*, 749 F.2d at 927-28 (noting the difficulty of determining what a reasonable or competitive price should be).