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Federal antitrust review applies to health insurance mergers

By James M. Burns

Observe these five core principles

On July 9, WellPoint and Amerigroup, two prominent health insurers, announced that they intended to merge in a deal reportedly valued at approximately $5 billion dollars. If consummated, the transaction would be one of the largest mergers of the year, and the first of what many predict will be a series of combinations and consolidations in the health insurance industry going forward as the industry reacts and adapts to the changes mandated by the Patient Protection and Affordable Care Act. With this merger, and predictions of more to come, it is time to review five core antitrust principles that come into play as part of any health insurance merger.

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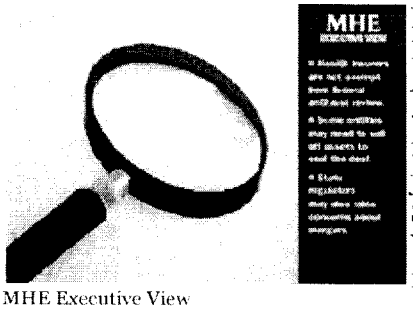
First, and most significantly, health insurance mergers are **not** exempted from federal antitrust review by the McCarran-Ferguson Act, 15 U.S.C. 1012 *et seq.* (the insurance industry's antitrust exemption). Any doubt about this was put to rest on August 22, when Amerigroup publicly acknowledged that it had received a "Second Request" for additional information from the Department of Justice's Antitrust Division. This Second Request will delay any closing of the deal while the Antitrust Division investigates it for possible antitrust concerns.



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Notably, given that many who advocated the repeal of the McCarrran-Ferguson Act over the last several years (during the course of the Affordable Care Act debate and elsewhere) have suggested that McCarran -Ferguson **does** preclude federal antitrust regulators from reviewing insurance industry mergers (and that this constituted a compelling justification for McCarran-Ferguson's repeal), the Antitrust Division's Second Request serves as an excellent reminder that this simply is not so. Whether it will be remembered the next time the McCarran-Ferguson repeal debate reignites remains to be seen. Hopefully, however, the Antitrust Division's Second Request will put to rest a common misconception about McCarran-Ferguson's scope once and for all.

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Second, the Antitrust Division's action provides a basis to refute claims by some healthcare providers that, even if McCarran-Ferguson does not preclude a review by federal regulators, health insurers have typically received a "free pass" with respect to their proposed mergers. While one Second Request cannot completely dispel that contention, the Antitrust Division's investigation of the Wellpoint/Amerigroup transaction is not an isolated event. In the last two years the Antitrust Division has also challenged a

proposed merger between Blue Cross of Montana and New West, a rival plan in Montana, and derailed a proposed merger between Blue Cross of Michigan and Physicians Health Plan of Mid-Michigan.

Only a few years earlier, the Antitrust Division challenged UnitedHealth's acquisition of Sierra Health in Nevada, UnitedHealth's acquisition of Pacificare Health Systems, and Aetna's acquisition of Prudential's health insurance business. Such investigations and challenges unequivocally refute the contention that health insurer mergers have largely been immune from any meaningful antitrust review.

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Third, the Antitrust Division's review of health insurance mergers can be expected to be both detailed and thorough. Reflecting a careful market by market examination of the proposed transaction, the Antitrust Division's concerns have reportedly been narrowed to a single state, notwithstanding that the combined company would operate in nineteen states. Specifically, according to a recent SEC filing by Amerigroup, the Antitrust Division's attention is focused solely on the potential competitive implications of the parties' combined Medicaid business in Virginia, and given that Amerigroup's Virginia operations account for only a small portion of its overall business (50,000 of its more than 2.5 million beneficiaries), the Antitrust Division's decision to issue a Second Request in this matter reflects a careful consideration of the competitive issues. In addition, the Antitrust Division's decision to issue a Second Request also reconfirms that concerns regarding just a single market, no matter how small, can put the brakes on merging parties' larger plans.

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Fourth, because concerns about a single market can result in Antitrust Division action, many merging health insurers in the past have chosen to sell off assets or operations through divestitures to clear potential regulator concerns and obtain approval for larger transactions. In the Blue Cross of Montana/New West transaction, for example, New West's agreement to divest a part of its business to PacificSource paved the way for regulatory approval of the deal.

Similarly, in a deal between Aetna and Prudential, Aetna agreed to divest its commercial HMO business in Houston and Dallas to gain approval to buy the remainder of Prudential's health insurance business. Accordingly, it was not at all surprising when, in late September, Amerigroup announced that it had agreed to divest its Virginia operations to Inova Health System. If past history is an accurate predictor of future conduct, this divest may very well pave the way for approval of the deal from federal antitrust regulators.

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Fifth, and of specific concern to insurance industry transactions, is the recognition that gaining federal antitrust approval is often not the only antitrust hurdle that merging health insurers face before closing. State regulators (both State Attorneys General and State Insurance Commissioners) have, on occasion, also served as potential roadblocks to merging health insurers' plans. Although to date there have been no reports that any state regulators have raised concerns about the proposed Wellpoint/Amerigroup deal, the parties may ultimately still have some additional work to do on the state front.

For example, in the 2004 WellPoint/Anthem merger, even after receiving antitrust approval from federal regulators, the parties were held up by a refusal by the California Insurance Commissioner to approve their deal. Ultimately, they closed the deal after agreeing to additional conditions imposed by the Commissioner. More recently, two Pennsylvania health insurers (Highmark and Independence Blue Cross) received approval from the Antitrust Division to merge but were subsequently unable to satisfy the concerns of the Pennsylvania Insurance Commissioner. Over a year later the parties were no closer to reaching an agreement with the Commissioner, and ultimately decided to abandon their deal.

In still other matters, state regulators have joined forces with the Antitrust Division and jointly challenged insurance industry mergers. This was the case in the UnitedHealth/Sierra merger, for

example, where the Nevada Attorney General's office challenged the transaction jointly with the Antitrust Division, and insisted upon additional conditions as a requirement to closing. Whether WellPoint and Amerigroup will confront any similar obstacles at the state level remains to be seen, but would not be surprising in the circumstances.

Finally, it is important to remember that the Antitrust Division's issuance of a Second Request is not a determination at this point that the Wellpoint/Amerigroup transaction *does* pose competitive risk, of course; rather, it is only a decision that additional information is needed from the parties in order for the Antitrust Division to examine the potential competitive issues more closely (albeit coupled with the requirement that the parties delay closing on their deal pending the completion of the Division's review). Indeed, the Antitrust Division may ultimately clear the transaction without taking any action—particularly now that the parties have decided to divest the business that appeared to be of potential competitive concern.

Either way, however, what can be counted on is that the five core antitrust principles described above will be in play throughout the review process. And rest assured the same principles will remain in play for other predicted mergers, including the recently announced deal between Aetna and Coventry, an even larger health insurer combination.

Editor's Note: This article was updated on September 28, 2012, to reflect Amerigroup's divestiture of its Virginia operations to Inova Health System

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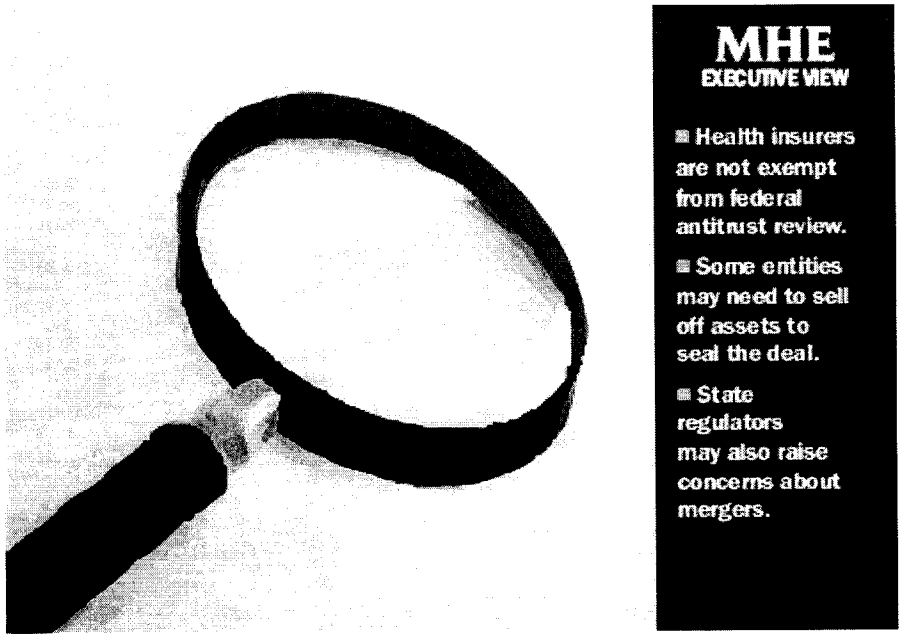

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