

## Senator Lee

- 1) Defenders of the Aetna/Humana and Anthem/Cigna mergers have identified several new entrants in the health insurance industry as evidence of the ease and likelihood of entry. What is your view of these entrants? Do they actually compete with the merging parties? Are they likely to impose any competitive restraint on them? Are they likely to survive long-term?

### Ginsburg Response:

New entrants with the greatest potential to compete with the merging parties are the large health systems that are either creating their own health plans or creating health plan products in collaboration with an insurer. The shift towards more limited networks has created a more attractive environment for such plans in which networks are limited to the health care system's circle of providers. The trend towards public and private insurance exchanges is also making this type of entry into insurance markets more feasible. Entry of large health systems into the Medicare Advantage market will also be important. This will be relevant to the Aetna-Humana merger. It is less relevant to Anthem-Cigna, where the competitive concerns are mostly in the national market for large self-insured employers, where plans associated with health systems are likely to be less important.

I do not see the newly formed Co-op plans as a significant threat to compete with the merging parties.

- 2) Utah is home to strong regional competition in the health insurance space, especially from companies such as Intermountain Healthcare/SelectHealth. Do you believe the proposed mergers may result in lower payments to providers, which the providers may seek to cost-shift to such regional health plans?

### Ginsburg Response:

Intermountain Healthcare/SelectHealth is a good example of the phenomenon that I was discussing in response to your first question.

Insurer mergers do lead to lower prices to providers, although this will not apply to prices to hospitals in the Medicare Advantage market due to the presence of the traditional Medicare program as an alternative for beneficiaries and Medicare regulations on balance billing. But outside of Medicare Advantage, I do not see lower rates from the merging parties leading to higher rates charged to other insurers. The recent research literature on hospital cost shifting, which is focused on reactions to changes in Medicare payment rates to hospitals, suggests that hospitals respond to lower rates from Medicare by reducing their costs, which leads to lower rates charged private insurers. While economists are not all in agreement about hospital cost

shifting, although the recent research I mentioned might change that, I not aware of any who believe in physician cost shifting.

### **Senator Vitter**

1. What role do the ACA's medical loss ratio requirements play in calculations and decisions of health insurers to consolidate? Does the cap on operating expenses incentivize scale over competition, driving insurance industry consolidation?

### **Ginsburg Response:**

I believe that medical loss ratios are playing a role in decisions of health insurers to consolidate. This may lead to less competition among insurers. In a sense, the MLR restrictions are substituting regulation for competition. That does not necessarily make them the wrong policy. The issue is which is more effective at lowering premiums for the purchasers of insurance. If insurance markets are not that competitive, restrictive MLRs could lead to lower premiums for consumers. Rural areas are examples of where there tends not to be much insurer competition.

2. Do MLRs make market competition-driving high deductible health plans harder to provide, forcing insurers to avoid markets with greater moral hazard that may also have a greater need for higher administrative costs?

### **Ginsburg Response:**

MLR regulations are more constraining for high-deductible products because the medical losses are lower while the administrative costs are roughly the same. This is one of the areas where the current approach to MLRs may be too blunt. Perhaps the minimums need to be varied according to actuarial value. Another difficult area is administrative costs devoted to managing chronic disease. We do not want to restrain resources going into ensuring better care for those with chronic diseases.

3. Does this lack of competition result in higher health care costs for consumers? Will it do so in the future?

**Ginsburg Response:** Possible reduction in competition needs to be weighed against what MLR regulations can accomplish in areas where competition is not sufficient.

## **Senator Tillis**

### Question 1:

What can Congress do to ensure that the United States Department of Justice objectively examines these proposed mergers, free from undue influence from the Administration, and without predetermining the outcome of their analysis?

Ginsburg Response: This hearing and others like it are the most effective way for Congress to achieve these objectives. Such hearings increase the public's awareness of issues and engagement, which in turn makes departing from an objective analysis more costly. But it is inevitable that the perspective of the Administration will play a role.

### Question 2:

Much has been said of the potential ability of larger health insurers to act as a check on larger provider networks. In short, the argument goes that larger insurers can better negotiate with larger provider chains, thus creating a balance that will ultimately benefit consumers.

Do you agree with this justification?

Ginsburg Response: More concentration in insurance markets does lead to lower prices paid to providers. When insurance markets are competitive enough, this will likely benefit consumers. But when the markets are not competitive enough, the benefits will not be passed on to consumers. So review of insurer mergers is important, but the potential for lower provider process should have some influence on the review.

Further, do you believe that consolidation in the health insurance market is the inevitable result of consolidation in the provider market?

Ginsburg Response: I am not sure. To the degree that increased provider consolidation increases the difference in rates charged to insurers of different sizes, that might increase what insurance mergers can accomplish. But I have not seen any data on whether that is the case. I do not see provider consolidation as an important factor behind the two mergers that the Subcommittee examined at its hearing.

Finally, please opine as to whether **the Affordable Care Act has hastened consolidation in health care markets**, and if so, identify the features of the Act that are most responsible for this result.

Ginsburg Response: It has had some impact. The most controversial portions of the ACA—tax credits for private insurance and Medicaid expansion—have not increased consolidation in a significant way. Indeed the market for individually-purchased insurance has become more competitive as a result of the public exchanges and the structure of tax credits.

Some of the less controversial provisions may be leading to more provider consolidation. For example, Medicare’s initiatives to promote alternative payment approaches such as accountable care organizations and bundled payment, which have a great deal of potential to increase efficiency and quality, have increased provider motivations to become larger to be able to engage in these arrangements.

**Senator Leahy:**

Since 1945, the insurance industry has enjoyed a permanent statutory exemption from the antitrust laws. I have long been skeptical of statutory exemptions from the antitrust laws because of the important role these laws play in protecting consumers and promoting competition. Permanent antitrust exemptions are particularly troublesome because they limit the Congressional oversight that comes as part of the reauthorization process.

Is there any justification for leaving this permanent antitrust exemption in place in its current form?

Are there any concerns that you raised with respect to these particular mergers that could be exacerbated by leaving the permanent health insurance industry antitrust exemption in place?

Ginsburg Response: The McCarran-Ferguson Act exempts the “business of insurance” from federal anti-trust law, but does not exempt the companies. So the Justice Department is appropriately reviewing the two mergers under discussion at this hearing. Some states have applied their own anti-trust laws to insurers. From what I have read over the years on this issue, it appears that health insurers now get little benefit from this exemption. So repealing it would not have much impact on insurers or on the public.