



POLICY & ACTION FROM CONSUMER REPORTS

**Answers to Questions for the Record
From George Slover
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September 22, 2015 Hearing on
“Examining Consolidation in the Health Insurance Industry
And Its Impact on Consumers”
Subcommittee on Antitrust, Competition Policy and Consumer Rights
Senate Judiciary Committee**

Questions from Senator Lee

- 1) What is your view of the necessity for the parties to merge in order to realize the benefits and efficiencies they claim will result from the transactions?

Answer: While we do not prejudge the outcome of the Justice Department’s investigation, which will consider that question as part of its analysis, we are skeptical of the need for the parties to merge to realize legitimate benefits that would reach consumers. These giant insurers are well beyond the size in which new pro-consumer economies of scale are achieved. The fact that parallel operations of the two companies can be combined into one operation is true of virtually any merger, even a merger to monopoly. The fact that merging expedites the “entry” of each merging company into the other’s markets comes at the expense of the increased competition and consumer choice that would result if the two companies entered those markets without merging. Buying an entire company is not the only way to obtain experience and expertise – these can be hired.

- 2) How do consumers view “affordability” and “quality” when shopping for health insurance? What do consumers value when selecting a health insurance plan?

Answer: Consumers care about what they pay and what they get in return. As reflected in multiple studies, many consumers struggle to afford health coverage – affordability of coverage is a top-of-mind concern for them. For some, being able to stay with the doctor they know is important; for others, less so. But most consumers want choices. They also want costs to be kept down, without sacrificing quality of care. They want reliable coverage, with no unwanted gaps or surprise costs. Regulation can help secure some of these benefits. But competition can help create additional incentives for insurers to provide them.

Questions from Senator Tillis

- 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?

Answer: Congress has a legitimate and important role in helping illuminate the issues that are important for the Justice Department to consider. The Justice Department is uniquely situated and empowered to gather the information it needs to make a careful evaluation of how these mergers are going to affect competition and consumer choice. Any decision to challenge a merger is ultimately subject to the Department being able to meet its burden to prove in court that the merger would be likely to substantially lessen competition in violation of section 7 of the Clayton Act.

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

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.

Answer: We do not believe the solution to harm from market power is to create more market power. It is equally ill-conceived to create more insurer market power to combat provider market power as it is to create more provider market power to combat insurer market power. Consumers benefit when there is meaningful choice at all levels of the market – both with insurers and with provider networks. Antitrust enforcers need to be vigilant and aggressive in stopping mergers from creating, increasing, or entrenching market power whether among providers or insurers. There is a fundamental difference between an insurer being large enough to offer provider networks the advantages of access to a large number of consumers, and an insurer being so powerful that it can dictate take-it-or-leave-it terms to providers. The former encourages healthy competition that can benefit consumers; the latter undermines competition and can result in fewer health care choices for consumers and lower quality of care. Rather than allow both insurers and providers to amass market power, antitrust enforcers should work to promote healthy competition among insurers and providers alike.

In our view, enactment of the Affordable Care Act did not change the motivations for mergers in any fundamental way. The law encourages consideration of various kinds of integration in how health care services are provided, but that is generally different from the kind of market concentration that the antitrust laws concern themselves with.

Questions from Senator Vitter

The ACA's medical loss ratio (MLR) requirement mandates that insurers spend at least 85 percent of premium revenues for large groups on claims or "activities that improve health care quality." In doing so, the MLR shields incumbents from competition. The need for sufficient scale to comply with MLRs is an impediment to start-up insurance providers while, at the same time, mergers of existing insurers is incentivized by the requirement to minimize administrative and operating costs as a percentage of revenue.

MLRs are also likely to limit the capacity of small insurers to invest in overhead needed to expand, serving as punishment for retaining funds unused for medical expenses, which, in turn, is likely to make external funding necessary.

Caps on operating expenses can also work to the advantage of hospital run health plans, where the cap is set at 20% of revenue. On the other hand, the cap on operating expenses for for-profit health insurers is set at 15%. This variance gives an advantage to hospital run health plans, which have an easier time staying under the cap because they can shift costs between medical care and administrative overhead. For-profit health insurers, since the provision on medical care is not an option, must spread their fixed operating costs over a larger base of members in order to sustain themselves while meeting the government imposed caps. They must grow larger through mergers and acquisitions.

- 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?

Answer: We support the MLR requirements. They have resulted in billions of dollars in savings for consumers, and in disciplining of insurer pricing, and in constructive incentives to improve health care quality. We do not believe the MLR requirements disadvantage market entry by new insurers. There are significant barriers to entry, but the MLR requirements are not one of them. We also believe insurers can achieve sufficient economies without merging to levels that harm competition. The MLR requirements do not fundamentally change the motivations for merging, and it remains as important as ever that antitrust enforcers be vigilant to prevent anticompetitive mergers.

- 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?

Answer: We do not see the MLR requirements as creating an impediment to offering high-deductible health plans where they are otherwise an attractive option for consumers.

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

Answer: Consumers benefit from having the meaningful choice that effective competition helps provide. Research is quite strong that competitive hospital and insurer markets, featuring several significant players, results in better outcomes for consumers. That's why it's important for antitrust enforcers to remain active in protecting competition in all parts of the health care marketplace.

Question from 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?
- In your view, what would be the impact on consumers if the permanent antitrust exemption for the health insurance industry is kept in place during a period of industry consolidation?

Answer: The antitrust laws are important for protecting competition and consumer choice, which leads to incentives on businesses to create better, more affordable, and more innovative products and services. Consumers Union has for many years supported efforts to remove the exemption for the business of insurance that was enacted in 1945, originally conceived as a temporary, three-year delay in applying the antitrust laws to insurance to give the industry time to adjust. In our view, the insurance industry should not be exempt from the fundamental rules of fair play on which our free-market economy is premised.

The exemption does not apply to merger enforcement, as that is not considered part of the business of insurance. But the maintenance of the exemption means that the problems associated with high market concentration are far more difficult to address. Consumers would benefit from having the antitrust laws apply in the health insurance industry as they do elsewhere in our economy. Meanwhile, it is all the more essential that mergers that lessen competition in the insurance marketplace be stopped.