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Aetna/Humana: A Closer Look at DOJ's Most Recent Medicare Advantage Merger Enforcement Action—Substantial Member Losses, Rapid Market Exits, CMS Sanctions Raise Questions about Divestiture Solutions' Viability

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Divestiture Case Study Update

In the event DOJ opts to clear Aetna's proposed $37b acquisition of Humana, the Division will almost certainly require divestiture of Aetna or Humana's Medicare Advantage (MA) business in a substantial number of overlap markets, very likely involving hundreds of thousands of members across hundreds of counties. Critics of the deal, however, contend that wide-ranging divestitures, for a number of reasons, are unlikely to fully restore competition in affected markets. The outcome of the Division's most recent Medicare Advantage merger enforcement action is likely to provide deal critics with additional ammunition for these arguments.

DOJ cleared Humana's $150m Arcadian acquisition in March 2012, subject to divestitures of roughly 12,700 Medicare Advantage members across 51 counties in five states. Three separate buyers, each of whom DOJ indicated "would be a long-term, viable competitor capable of preserving competition in the relevant markets," acquired portions of the business. A *Capitol Forum* analysis of the affected markets, including review of applicable CMS data, and conversations with company sources and insurance brokers, however, indicates that two of the three approved buyers largely failed to restore competition:

- Vantage Health Plan, which acquired Arcadian's roughly 4,000 member Medicare Advantage business in 12 Louisiana parishes, enjoyed a fairly smooth transition in integrating the acquired business, and continues to compete robustly with Humana in the relevant markets.

- By contrast, WellCare Health Plans, Inc., which acquired Arcadian's roughly 4,000 member MA business in Arizona, lost 50% of its acquired membership in less than two years, and exited the relevant markets entirely in January 2015.

- Like WellCare, Cigna, which acquired 4,500 Humana/Arcadian members in 32 counties in Texas, Oklahoma, and Arkansas, lost members rapidly, and by January 2015, had exited the majority (56.2%) of the markets in which it acquired members. On January 21, 2016, CMS suspended Cigna's MA enrollment and marketing activities, due to "widespread and systemic failures impacting Cigna enrollees' ability to access medical services." Owing to this suspension, there is a real chance that Cigna will be a competitive alternative in none of the 32 divestiture markets when the Medicare Open Enrollment Period commences on October 15, 2016.

A divestiture solution sufficient to remedy the Aetna/Humana deal's competitive harm would prove an extremely significant project. And, given WellCare and Cigna's performances, the Humana/Arcadian experience will provide DOJ little comfort that wide-ranging divestitures, which in this case would be substantially larger in scope and scale than those undertaken in Humana/Arcadian, will serve to adequately restore competition.

In-Depth Look at Humana/Arcadian Divestiture Buyers

Vantage Health Plan reports relatively smooth transition, robust ongoing competition with Humana. Vantage Health Plan, a Monroe, Louisiana-based insurer that today boasts about 35,000 members, acquired Arcadian's Medicare Advantage business in 12 Louisiana parishes, involving roughly 4,000 members.

Unlike the WellCare and Cigna-HealthSpring acquisitions, the Vantage sales have largely proven a success. Billy Justice, Vantage Health Plan's director of marketing and sales, describes the Arcadian acquisition as involving "a fairly smooth transition" for affected members. "All in all, the membership was taken care of, there were no network changes for the members, and the benefits changes were minimal," says Justice. "It always could've gone faster, and a little bit more smoothly, but all in all, I think all the objectives from everyone were obtained," Justice continues.

Perhaps more importantly, Vantage has maintained competition in the markets at issue, and competes today in all 12 acquired markets. "Some of those people a year later wanted to go back to Humana and they went, a lot of them liked what they had and stayed, and now in those markets we compete robustly with Humana—we've been able to compete head to head with all the carriers that are in those regions," Justice concludes.

The Vantage scenario represents an ideal divestiture outcome—a relatively smooth transition of members to a competitor that continues to compete in the acquired markets. Unfortunately, at least as it relates to Humana/Arcadian, the Vantage acquisition's success appears to be the exception rather than the rule.

WellCare loses members rapidly, exits acquired markets in January 2015. In order to address DOJ's competitive concerns, Humana divested Arcadian's roughly 4,000 member Medicare Advantage business in Arizona's Mohave and Yavapai counties to WellCare Health Plans, in a sale that became effective January 1, 2013.

At the time, WellCare appeared to be a strong, well-positioned buyer. Based in Tampa, Florida, WellCare is a publicly traded, $7.4b revenue (2012) company that focuses exclusively on government managed care, including Medicaid, Medicare Advantage, and Medicare Part D. As of December 31, 2012, WellCare enrolled 213,000 Medicare Advantage members in 12 states, including 39,000 members in Arizona-adjacent California.

Furthermore, the existing Arcadian business WellCare had agreed to acquire appeared to be robust and competitively significant. Pre-merger, Arcadian enrolled 40.6% of individual Medicare Advantage members in Mohave County, just slightly trailing Humana's 41.7% share. In short, given the strength of the buyer and the acquired business, a successful divestiture solution appeared to be the most likely outcome.

After acquiring Arcadian's 3,268 members in Mohave County in January 2013, however, WellCare's business deteriorated quickly. By January 2014, WellCare's MA membership had declined by 26.8%, to 2,393, and by December 2014, WellCare enrolled just 1,172 members—a 47.6% membership in decline in fewer than two years. Presumably owing to this rapid degradation in business, WellCare exited the Mohave County individual Medicare Advantage market entirely in January 2015.

As a result of WellCare's exit, consumers in Mohave County today benefit from a less than robust competitive situation. According to Medicare.gov's Medicare Plan Finder, Mohave County residents have the choice of just two individual Medicare Advantage carriers—Humana and Phoenix Health Plans. "They're just not available in Mohave County," explains a Mohave County-area insurance broker. "When WellCare purchased

Arcadian…bottom line was, they just went away, and the only people that wanted to do business here are Humana and Phoenix—that's it, unfortunately," the broker continues.

WellCare's performance in Yavapai County, where it acquired 610 members, proved even less successful than its Mohave experience. Just one year after the acquisition, in January 2014, WellCare's membership in Yavapai had declined by 35.9%, to 391 members. And by December 2014, WellCare's membership had dwindled to just 229 members—a 62.5% decline in fewer than two years. WellCare, unsurprisingly, exited the Yavapai County Medicare Advantage market effective January 2015.

In both Mohave and Yavapai counties, WellCare's loss proved to be Humana's gain. Between January 2013 and December 2014, Humana increased its Mohave County Medicare Advantage membership by 32.8%, from 5,679 to 7,539. And over the same time period Humana increased its membership by 35.7% in Yavapai County, from 4,145 to 5,625.

Cigna-HealthSpring exits majority of acquired markets by January 2015, including wholesale exits in Oklahoma, Arkansas, and Texas areas. Cigna, through its Medicare subsidiary HealthSpring, acquired the third tranche of divested MA business effective January 1, 2013. Although the sale technically involved Humana/Arcadian business in 37 counties in Texas, Oklahoma, and Arkansas, Humana/Arcadian, as of December 31, 2012, enrolled Medicare Advantage members in just 32 divestiture counties.

The acquisition included roughly 4,500 Humana and Arcadian Medicare Advantage members in primarily rural counties, including Arcadian's business in the Amarillo and Longview-Marshall areas of Texas, Fort Smith area of Arkansas, and Eastern Oklahoma area of Oklahoma, as well as Humana's business in the Texarkana areas of Texas and Arkansas.

Like WellCare, Cigna appeared to be a strong divestiture buyer. After closing its $3.8b acquisition of HealthSpring in January 2012, Cigna-HealthSpring enrolled 386,000 Medicare Advantage members in 13 states, including Texas. And Cigna like WellCare, was a financially strong buyer, having generated revenue of about $29.1 billion in 2012.

Like WellCare, however, Cigna proved an ineffective competitor in the relevant markets. In fact, of the 32 counties in which it acquired membership, Cigna had exited 19, or 59.4%, as of January 2016. Furthermore, the majority of these market departures occurred fairly quickly— Cigna exited six acquired counties in January 2014, an additional twelve acquired counties in January 2015, and one additional acquired county in January 2016. Put differently, Cigna has proven a long-term, viable competitor in just 13 of the 32 (40.6%) of the markets in which it acquired members.

Eastern Oklahoma—Cigna exits seven markets after rapid decline in business, consumers in four counties today have choice of just one MA carrier. Cigna suffered from particularly acute problems in the Eastern Oklahoma area, where, after acquiring Arcadian's ongoing business in seven counties (Adair, Delaware, Haskell, Le Flore, McCurtain, Ottawa, and Sequoyah), it exited the markets wholesale in January 2015.

Between its January 2013 entry and December 2014, Cigna's business declined significantly in Eastern Oklahoma. Over that time period, Cigna's Medicare Advantage membership fell from 45 to 25 (-44.4%) in Adair, 210 to 148 (-29.6%) in Delaware, 41 to 31 (-24.4%) in Haskell, 378 to 328 (-13.2%) in Le Flore, 84 to 58 (-31.0%) in McCurtain, 37 to 26 (-29.7%) in Ottawa, and 417 to 368 (-11.8%) in Sequoyah. And, as was the case in Mohave and Yavapai counties, Cigna's loss proved to be Humana's gain. From January 2013 to December 2014, Humana increased its Medicare Advantage membership from 63 to 89 (+41.3%) in Adair, 786 to 940 (+19.6%) in Delaware, 86 to 171 (+98.8%) in Haskell, 736 to 902 (+22.6%) in Le Flore, 412 to 482 (+17.0%) in McCurtain, 487 to 571 (+17.2%) in Ottawa, and 721 to 935 (+29.7%) in Sequoyah.

Unfortunately, Cigna's January 2015 exit from the affected markets has resulted in a less than ideal competitive situation for residents of the Eastern Oklahoma counties. According to Medicare.gov's Medicare Plan Finder, consumers residing in four Eastern Oklahoma area counties (Le Flore, McCurtain, Ottawa, and Sequoyah) have just one Medicare Advantage carrier to choose from in 2016—Humana. Residents of Delaware County have the choice of two Medicare Advantage carriers, while Adair and Haskell residents benefit from competition between three individual MA carriers.

Texarkana—Cigna exits six of eleven counties in just one year, many consumers today have only two Medicare Advantage options. Cigna likewise encountered significant challenges in the eight Arkansas (Columbia, Hempstead, Howard, Lafayette, Little River, Miller, Nevada, and Sevier counties) and three Texas (Bowie, Cass, and Titus) counties comprising the Texarkana divestiture area. In fact, these difficulties proved so substantial that Cigna exited six acquired Arkansas counties after just one year, and the remaining two Arkansas counties after just two years.

As was the case in Eastern Oklahoma, Cigna's Texarkana business deteriorated quickly. In the period from January 2013, when it entered the markets, to December 2013, the month before its exit, Cigna's Medicare Advantage membership fell from 137 to 101 (-26.3%) in Columbia, 74 to 55 (-25.7%) in Hempstead, 24 to 20 (-16.7%) in Lafayette, 74 to 57 (-23.0%) in Little River, 35 to 29 (-17.1%) in Nevada, and 69 to 64 (-7.2%) in Sevier. Although Cigna did manage to remain in Howard and Miller counties through the 2014 Open Enrollment Period, it ultimately exited both markets in January 2015 as well.

Prior to the Cigna divestiture, three carriers competed in the sale of Arkansas Texarkana individual Medicare Advantage markets—Humana, Arcadian, and United (Care Improvement Plus). Owing to Cigna's exit, however, many Texarkana residents now have limited competitive options when it comes to purchasing Medicare Advantage plans. Today, consumers in Columbia, Hempstead, Lafayette, Little River, Miller, and Sevier counties, have the option of just two Medicare Advantage carriers—United and Humana. Only in Howard (3) and Nevada (4) counties do consumers benefit from a relatively more robust competitive situation.

Amarillo—Cigna loses substantial share, exits January 2015. Finally, as was the case in Eastern Oklahoma and Texarkana, Cigna proved unable to compete effectively in the Amarillo area of Texas, where it acquired Arcadian's existing individual MA members in Deaf Smith, Potter, and Randall counties. Cigna lost share rapidly in Amarillo after its January 2013 entry—in Deaf Smith, Cigna's MA membership fell from 25 to 17 (-32.0%) by December 2014, while the business in Potter, (206 to 173, -16.1%) and Randall (104 to 68, -34.7%), suffered similar declines. And, in a now familiar story, Humana grew membership in the affected markets during the same time period—from 140 to 167 (+19.2%) in Deaf Smith, 1,216 to 1,460 (+20%) in Potter, and 1,559 to 1,762 (+13.0%) in Randall. Effective January 2015, Cigna exited the Amarillo markets entirely.

Cigna's (and WellCare's) membership decline in the divestiture markets is particularly notable given the overall growth in Medicare Advantage enrollment during the time period. In 2012, 13.1 million Americans enrolled in a Medicare Advantage plan—this number increased to 14.4 million in 2013 (+9.9% from 2012), 15.7 million in 2014 (+19.8%), and, although Cigna (and WellCare) had exited the majority of the acquired markets by this time, 16.8

million (+28.2%) in 2015. At least in a vacuum, then, Cigna and WellCare acquired business with significant prospects for growth—a factor that renders their inability to compete long-term all the more surprising.

CMS letter details "widespread and systematic failures" in Cigna's Medicare Advantage plans; sanctions may drive 2017 exit. Even for consumers in the divestiture markets in which Cigna has remained, however, Cigna's presence has proven problematic. According to a January 21, 2016 CMS letter, Cigna, during the time period dating back to at least 2012, "substantially failed to provide its enrollees with services and benefits in accordance with CMS requirements"—conduct that CMS alleges "poses a serious threat to the health and safety of [Cigna's] Medicare beneficiaries."

The CMS letter goes on to state that, for a number of years, Cigna "experienced widespread and systemic failures impacting Cigna enrollees' ability to access medical services and prescription medications," which, among other things, "resulted in enrollees experiencing delays or denials in receiving medical services and prescription drugs, and increased out of pocket costs for medical services and prescription drugs." As a result, effective January 21, CMS imposed an immediate suspension of all Cigna Medicare Advantage enrollment and marketing activities, pending the violations' correction.

This situation, of course, is unfortunate for Cigna's existing Medicare Advantage members, who appear to have suffered significant access and pricing injury over the past few years. In addition, however, ongoing CMS sanctions have the potential to further harm the competitive situation in the Humana/Arcadian divestiture markets in which Cigna still competes. Similar CMS sanctions have taken affected insurers up to fourteen months to fully address, and, in the event Cigna is unable to cure the deficiencies by October 15, it would be barred from competing for new members when the 2017 Medicare Open Enrollment Period commences. This scenario, which would effectively eliminate Cigna as an independent competitor for 2017, raises the real possibility that, as of October 15, 2016, Cigna will maintain a competitive presence in none of the 37 markets it acquired from Humana in January 2013.