

Written Testimony of David A. Balto

**Hearing Regarding the Proposed Merger of Cigna Corporation into Anthem
Inc.**

Before the Virginia State Corporation Commission

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Commissioner Cunningham, I appreciate the opportunity to come before the Virginia State Corporation Commission (“SCC”) today and testify about healthcare industry consolidation. As a former antitrust enforcement official and someone who represents everyday consumers and healthcare providers I know that highly concentrated healthcare markets, especially health insurance markets, can result in escalating healthcare costs for the average consumer, decreased innovation, decreased quality and consumer satisfaction, and decreased choice.

My comments in this testimony are based on my 30 plus years of experience as a private sector antitrust attorney and an antitrust enforcer for both the Department of Justice and the Federal Trade Commission (“FTC”). From 1995 to 2001, I served as the Policy Director for the FTC’s Bureau of Competition and the attorney advisor to Chairman Robert Pitofsky. Currently, I work as a public interest antitrust attorney in Washington, DC. I have represented consumer groups, health plans, unions, and employers. I have testified before Congress and many state legislatures on healthcare competition issues, and testified before the state insurance commissioners in Nevada and Pennsylvania in health insurance mergers. In addition, I was asked to testify before the National Association of Insurance Commissioners in November 2015 concerning the mergers of Anthem-Cigna and Aetna-Humana.

On January 11, I submitted testimony on behalf of Consumers Union, Virginia Consumer Voices for Healthcare, The Commonwealth Institute, US PIRG, SEIU Virginia 512, Virginia Organizing, Consumer Action, Consumer Watchdog, Virginia Rural Health Association, and DC 37 Health & Security Plan outlining consumer concerns about the Aetna-Humana and Anthem-Cigna mergers. The letter made the following important points:

- Virginia law gives the Virginia State Corporation Commission (SCC) broad powers to fully investigate insurance mergers to determine their effects on competition. The SCC also has a sweeping mandate to determine whether a merger is in the public interest.
- Virginia’s health insurance markets are already highly concentrated. Anthem Blue Cross Blue Shield is by far the largest insurer in the state.
- A report by Health Affairs found that the Anthem-Cigna and Aetna-Humana mergers would increase concentration by 34% in the commercial insurance market. The Anthem-Cigna merger alone could eliminate competition for different commercial insurance products in Winchester, Richmond, Blacksburg, Roanoke, Lynchburg, Danville, Harrisonburg, Virginia Beach, and Charlottesville.
- The Anthem-Cigna merger would also reduce competition in the administrative-services-only (ASO) market. A combined Anthem-Cigna company would possess almost 72% of Virginia’s ASO market.
- Studies of past health insurance mergers show that mergers harm consumers by leading to higher premiums. There is also evidence that a dominant insurer can increase rates 75% higher than smaller insurers competing in the same state, and that mergers could increase out-of-pocket costs.
- By contrast, there is no scholarly evidence indicating that insurance mergers lead to lower prices for consumers, or that consumers will receive any of the potential savings. More likely, post-merger companies would use their power to benefit only themselves, reducing choices, and pressuring healthcare providers to cut corners on the quality of care in order to meet their demands.
- The Anthem-Cigna merger could affect network adequacy. A study by the Leonard Davis Institute of Health Economics and the Robert Wood Johnson Foundation found 58% of all individual plans offered in Virginia use narrower networks that only include 25% or fewer of all area providers.

- New entry into and competition within health insurance markets is limited. In Virginia, on average consumers only have access to plans from 3.2 insurers, and 30% of them have access to only one or two insurers.
- In Virginia, Anthem is a Blue plan and the state's largest insurer, but it does not compete in northern Virginia because that territory belongs to CareFirst, another Blue mark holder. The Blue rules could prevent a combined Anthem-Cigna from expanding competition in CareFirst's territory, or even require it to close down Cigna's current operations there.
- Divestitures are an inadequate remedy for health insurance mergers—they usually fail to restore competition. To restore competition in this case, divestitures would have to be very large. However, the Virginia SCC has the power to implement regulatory remedies to protect consumers, if the merger is allowed to proceed.

My written testimony will supplement the consumer letter and focus on the following points:

- These health insurance mergers are taking place during a critical time in our healthcare system. Workers' contributions to premiums have greatly outpaced wage growth since 2000 and consumers are regularly putting off care due to costs. This increase in consolidation is threatening to undo the progress made by the Affordable Care Act.
- The merger will hurt Virginians' pocketbooks. Numerous studies show that premiums rise as concentration rises. Concentration is also shown to impact consumer satisfaction.
- The efficiencies claimed to result from the merger are unlikely to benefit Virginians. There is no evidence that shows these efficiencies are passed on to consumers. Indeed, without competition there is little pressure on the parties to do so.
- This deal is a "just say no" type of deal. The harm to consumers created by this merger will not be resolved through remedies - especially divestitures, which have been shown to be ineffective in the health insurance industry.

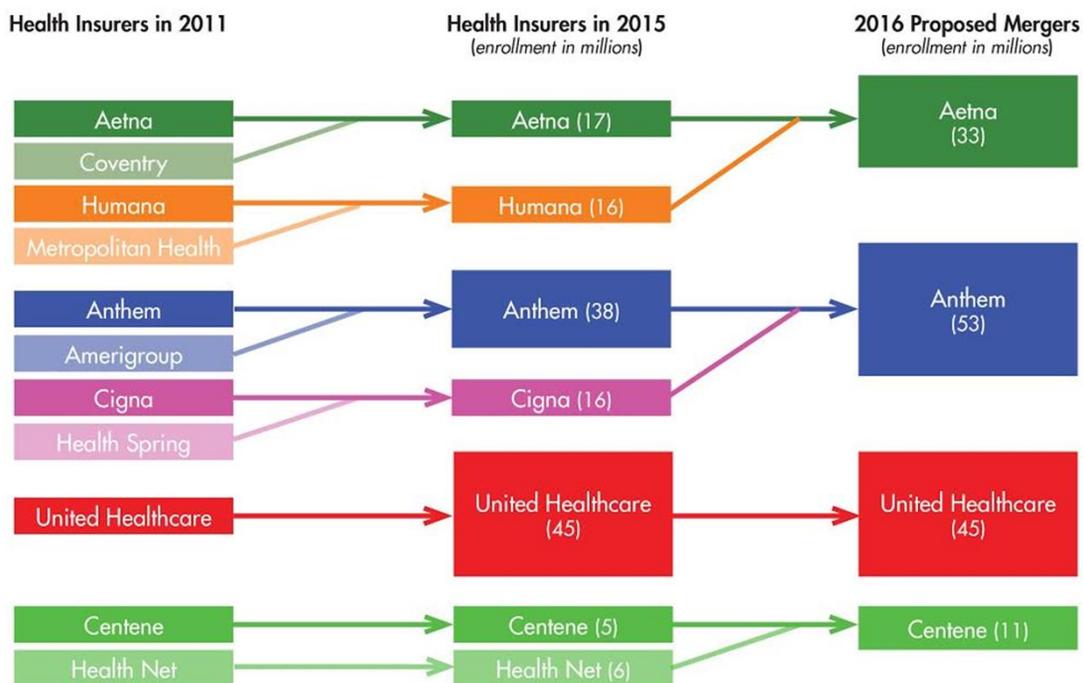
In considering the merger, the SCC should ask the following questions:

1. Will the proposed merger harm Virginians?
2. Can this harm be remedied through conditions?

The Merger Will Have a Significant Impact in Virginia

The Anthem-Cigna merger is taking place during alarming concentration in the health insurance market, leading to higher premiums. In 2007, President Obama stated that "95% of insurance markets in the United States are now highly concentrated and the number of insurers has fallen by just under 20% since 2000. These changes were supposed to make the industry more efficient, but instead premiums have skyrocketed, increasing over 87% over the past six years." Things have not improved since then.

Recent Health Plan Mergers



Source: Chart adapted from "The New Era of Mega-Plans, Managed Care (September 2015). Company enrollment estimates: various sources.

This concentration has impacted Virginia, where most insurance markets are already highly concentrated, with the three largest commercial insurers for individual, small group, and large group markets enrolling 89% of all Virginians. Anthem is by far the largest insurer. In Virginia, the HHI for the large group market is 2,539, the HHI for the small group market is 2,759, and the HHI for the individual market is 5,672.¹

The merger of Anthem-Cigna raises serious concerns under both state and federal antitrust statutes. Anthem currently covers over 1.8 million people in Virginia, and if the merger is approved, it will gain another 538,000 covered lives.² Statewide, the merger will result in a combined market share of 40.8 percent in the fully insured employer group and a combined market share of 71.9 percent in the ASO (also known as self-insured employer group) markets.³ A recent report for Health Affairs relying on data from the NAIC found that the Anthem-Cigna and Aetna-Humana mergers would increase concentration

¹ Insurance Market Competition, Kaiser Family Foundation, <http://kff.org/state-category/health-insurance-managed-care/insurance-market-competitiveness/>.

² Letter to Commissioner of Insurance Jacqueline L. Cunningham, Virginia Hospital and Healthcare Association (Jan. 8, 2016).

³ *Effects on Competition of Proposed Health Insurer Mergers: Hearing before Comm. on the Judiciary Subcomm. on Regulatory Reform, Commercial and Antitrust Law, 114th Cong. (Sept. 29, 2015)* (testimony of Edmund F. Haislmaier, Heritage Foundation), available at <http://www.heritage.org/research/testimony/2015/effects-on-competition-of-proposed-health-insurer-mergers>.

by 34% in Virginia's commercial insurance market, greatly exceeding thresholds for concerns under federal and state antitrust law.⁴

Locally, the merger could eliminate competition for different commercial insurance products in Winchester, Richmond, Blacksburg, Roanoke, Lynchburg, Danville, Harrisonburg, Virginia Beach, and Charlottesville.⁵ I estimate that there are about 1.9 million enrollees in impacted local commercial markets and about 1.2 million enrollees in impacted local ASO markets. There are also substantial buyer power concerns in Richmond, Lynchburg, Danville, Winchester, Roanoke, Blacksburg-Christiansburg-Radford, and Harrisonburg, where a combined Anthem-Cigna will account for over 30 percent of the aggregate provider revenue share.⁶ Anticompetitive buyer power can result in a reduction in provider output and a decrease in quality.

Virtually all credible studies and retrospective analysis have concluded that increased concentration leads to increased premiums, decreased quality, and decreased innovation. According to David Lazarus, health economics expert at the University of Southern California's Schaeffer Center for Health Policy and Economics, "when insurers merge, there's almost always an increase in premiums."⁷ Three separate, retrospective economic studies on health insurance mergers found significant premium increases for consumers post-merger. A study by Professor Leemore Dafny found that the 1999 Aetna-Prudential merger had resulted in an additional seven percent premium increase in 139 separate markets throughout the United States.⁸ Another study by Jose Guardado found that the 2008 United-Sierra merger had resulted in an additional 13.7 percent premium increase in Nevada.⁹ Finally, a study by the Center for American Progress of the 2012 Humana-Arcadian merger, which occurred under the Affordable Care Act protections, found that over half of the plans divested to remedy the merger had an average monthly premium increase of 44 percent.¹⁰

There is economic evidence that a dominant insurer can increase rates 75 percent higher than smaller insurers competing in the same state.¹¹ Increases in costs are not limited to higher premiums. Evidence shows that insurance mergers can impact out-of-pocket costs as patients see increases in

⁴ Douglas Hervey, David Muhlestein, & Austin Bordelon, *How Might Proposed Payer Mergers Impact State Insurance Markets?*, HEALTH AFFS. (Dec. 1, 2015), <http://goo.gl/OT70NI>.

⁵ American Medical Association, *Markets where an Anthem-Cigna merger warrants antitrust scrutiny* (Sept. 8, 2015).

⁶ *Anthem/Cigna; Aetna/Humana: Ongoing DOJ Physician Interviews Focus on Buyer Power Issues; Capitol Forum Analysis Shows Monopsony Enforcement Risk*, THE CAPITOL FORUM (Mar. 11, 2016), <https://thecapitolforum.com/>.

⁷ David Lazarus, *As Health insurers merge, consumers' premiums are likely to rise*, L.A. TIMES (July 10, 2015 4:00 AM), <http://www.latimes.com/business/la-fi-lazarus-20150710-column.html>.

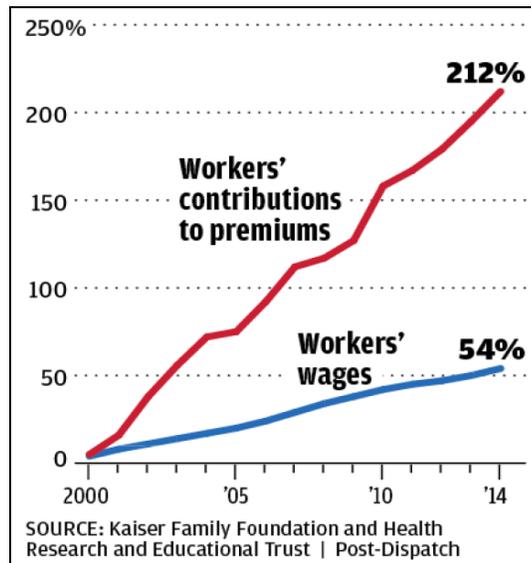
⁸ See Leemore Dafny et al., *Paying a Premium on Your Premium? Consolidation in the US Health Insurance Industry*, 102 AM. ECON. REV. 1161 (2012).

⁹ See Jose Guardado et al., *The Price Effects of a Large Merger of Health Insurers: A Case Study of United-Sierra*, 1(3) HEALTH MANAGEMENT, POL'Y & INNOVATION 1 (2013).

¹⁰ Topher Spiro, Maura Calsyn, Meghan O'Toole, *Divestitures Will Not Maintain Competition in Medicare Advantage*, CENTER FOR AMERICAN PROGRESS (Mar. 8, 2016), <https://www.americanprogress.org/issues/healthcare/report/2016/03/08/132420/divestitures-will-not-maintain-competition-in-medicare-advantage/>.

¹¹ Eugene Wang and Grace Gee, *Larger Insurers, Larger Premium Increases: Health insurance issuer competition post-ACA*, TECH. SCI. (Aug. 11, 2015), available at <http://techscience.org/downloadpdf.php?paper=2015081104>.

deductibles or other insurance-related costs.¹² These cost increases are of great concern, as the growth in worker's contribution to premiums are already greatly outpacing wage growth.



Concentration can also impact quality. A recent report by J.D. Power concludes that there is lower consumer satisfaction and patient engagement in areas where there is less competition.¹³ The study analyzed member plan satisfaction among 135 health insurance plans throughout 18 regions, using six characteristics: provider choice, medical claims processing, pricing of health plans, customer service, communication, and information access. The report found that member plan satisfaction with regards to communication, information access, and pricing was reduced in regions where one health plan possesses over 50% of the market share.

The Proposed Efficiencies Will Not Overcome a Finding That the Merger is Anticompetitive

No anticompetitive merger has ever been permitted because of potential efficiencies. Indeed, a recent Ninth Circuit case questioned whether an efficiencies defense even exists.¹⁴ The courts that have considered the defense have stated that merging parties prove the acquisition results in “significant economies and that these economies ultimately would benefit competition and, hence, consumers.”¹⁵

¹² See generally Leemore Dafny, *Evaluating the Impact of Health Insurance Industry Consolidation: Learning from Experience*, COMMONWEALTH FUND (Nov. 20, 2015), <http://www.commonwealthfund.org/publications/issue-briefs/2015/nov/evaluating-insurance-industry-consolidation>; see also Korin Miller, *6 Ways the Big Health Insurance Mergers Will Affect Your Coverage*, YAHOO HEALTH (July 24, 2015), <https://www.yahoo.com/beauty/6-ways-the-big-health-insurance-mergers-will-124932195967.html> (noting that “out-of-pocket payments could increase” because insurance coverage could limit certain services or number of visits forcing patients to pay more).

¹³ Vera Gruessner, *Plan Member Satisfaction Reduced in Less Competitive Markets*, HEALTHPAYER INTELLIGENCE (Mar. 18, 2016), <http://healthpayerintelligence.com/news/plan-member-satisfaction-reduced-in-less-competitive-markets>.

¹⁴ *St. Alphonsus Medical Center-Nampa et al v. St. Luke's*, 778 F. 3d 775, 789 (9th Cir. 2015).

¹⁵ See *FTC v. University Health, Inc.*, 938 F. 2d 1206, 1223 (11th Cir. 1991) (respondent must prove the acquisition results in “significant economies and that these economies ultimately would benefit competition and, hence, consumers.”).

“[C]ourts only consider efficiencies that are verifiable and merger-specific, and it is incumbent upon the court to undertake a rigorous analysis of the kinds of efficiencies being urged by the parties in order to ensure that those efficiencies represent more than mere speculation and promises about post-merger behavior.”¹⁶ The Merger Guidelines set three requirements for efficiencies: 1) the efficiencies must be merger specific and unlikely to occur in the absence of the merger; 2) the efficiencies can’t be vague or speculative and must be verifiable through reasonable means; 3) the efficiencies must benefit consumers and be sufficient to reverse the merger’s potential to harm customers in the relevant market.¹⁷

The most important case for the SCC to consider is the FTC’s case against St. Luke’s in the Ninth Circuit. This case has a lot in common with the Anthem-Cigna merger in Virginia. In St. Luke’s, a dominant hospital wanted to acquire a physician practice 60 miles away. Their claimed efficiencies mostly revolved around being able to move the physician practice onto their computer system, which would allow them to better integrate their care.¹⁸ The Ninth Circuit was explicit that “the Clayton Act does not excuse mergers that lessen competition or create monopolies simply because the merged entity can improve its operations.”¹⁹ If Anthem or Cigna need to improve their operations, they can go and do it themselves. That is what the free market system is based on; they don’t need a merger to accomplish that.

Thus, the key question is whether the claimed efficiencies are truly merger specific.²⁰ Do Anthem and Cigna need a merger to achieve the efficiencies that they claim will result from this deal? One efficiency the parties have claimed will result from the deal is enabling Anthem to transition to value based approaches to healthcare. However, California Department of Insurance Commissioner Jones challenged the companies on why the merger was necessary to accomplish this in a recent hearing. The representatives from Anthem and Cigna could not clearly answer this question, stating only that the complimentary natures of the companies will help them to do it in a way that they haven’t been able to do on their own.

Consumers benefit most when competitors have to roll up their sleeves and develop a better product. If one of these firms has a better product in one area, then all other companies in the market should have to learn how to do better to compete against that product. It does not benefit consumers for companies to consolidate simply to fill in their weaknesses.

There is also no evidence or scholarly studies showing that insurance mergers lead to savings for consumers. In fact, as previously noted, evidence indicates that health insurance mergers lead to higher consumer costs, not increased consumer savings. Acting Associate Attorney General Bill Baer from the DOJ’s Antitrust Division raised questions regarding the alleged cost efficiencies that would result from

¹⁶ FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1088-89 (N.D. Ill. 2012) (internal quotes omitted).

¹⁷ Merger Guidelines § 10.

¹⁸ St. Luke’s, 778 F. 3d at 791.

¹⁹ *Id.* at 792.

²⁰ *Id.*

health insurance mergers. Baer noted that “consumers do not benefit when sellers . . . merge simply to gain bargaining leverage.”²¹

That makes sense. Most large insurers are beyond the point where another merger would help them achieve any legitimate economies of scale. And there is little evidence that consumers would ever actually benefit from giving insurers increased bargaining power. In fact, Professor Greaney has noted that there is actually “little incentive [for an insurer] to pass along the savings to its policyholders.”²² As Consumers Union has suggested, a more likely result would be fewer choices for consumers, and providers being pressured to cut corners on quality of care in order to meet the insurer’s demands – the opposite of what consumers need.²³ The American Antitrust Institute, the leading non-profit antitrust think tank, recently concluded that economic studies and evidence indicate that “consumers do not benefit from lower healthcare costs through enhanced bargaining power.”²⁴

A more abstract argument raised by the merging insurers is that the merger will allow for more innovation. However, in Virginia the merger would do little more than increase and entrench the combined insurer’s market power, reducing its incentives to compete and improve care. As noted by the American Antitrust Institute, excessive concentration created by the proposed merger *is likely to reduce incentives* for engaging in pro-consumer innovation.²⁵ Moreover, at a recent conference, Professor Dafny noted that statistical evidence shows concentrated insurance markets often have less innovative insurance product offerings, meaning mergers between insurers will not likely lead to higher quality or more innovative insurance products.²⁶

All of these studies prove what hundreds of years of capitalism have already taught us - that companies need the fear of losing customers to competitors in order to improve their products and pass along savings to customers. Without this fear, any efficiencies will only benefit the merged Anthem-Cigna.

Remedies Will Not Fix This Merger

²¹ Speech by Acting Associate Attorney General Bill Baer, Remarks as Prepared for the Delivery at The New Health Care Industry Conference: Integration, Consolidation, Competition in the Wake of the Affordable Care Act at Yale University (Nov. 13, 2015), <https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-new-health-care-industry-conference>.

²² See Thomas Greaney, *Examining Implications of Health Insurance Mergers*, HEALTH AFFS. (July 16, 2015), <http://healthaffairs.org/blog/2015/07/16/examining-implications-of-health-insurance-mergers/>.

²³ See *Health Insurance Industry Consolidation: Hearing before the Sen. Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy, and Consumer Rights*, 114th Cong. (Sept. 22, 2015) (testimony of George Slover, Consumers Union), available at [http://www.judiciary.senate.gov/imo/media/doc/09-22-](http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Slover%20Testimony.pdf)

15%20Slover%20Testimony.pdf (“[b]ut a dominant insurer could force doctors and hospitals to go beyond trimming costs, to cut costs so far that it begins to degrade the care and service they provide below what consumers value and need”).

²⁴ Letter from the American Antitrust Institute, Thomas Greaney, and Diana Moss, to William J. Baer, Assistant Attorney General Dep’t of Justice (Jan. 11, 2016), available at http://www.antitrustinstitute.org/sites/default/files/Health%20Insurance%20Ltr_1.11.16.pdf.

²⁵ *Id.*

²⁶ Leemore Dafny, Comments at The New Health Care Industry: Integration, Consolidation, Competition in the Wake of the Affordable Care Act (Nov. 13, 2015), available at <https://www.law.yale.edu/solomon-center/events/inaugural-conference>.

As part of its review, the SCC should consider whether any remedies would properly protect Virginians and ensure the merger is in the public interest. In evaluating any proposed remedy, it is important to remember that the law requires that a remedy must *fully restore* the competition that would otherwise be lost, or must otherwise effectively prevent the harm that would result.²⁷

In nearly every health insurance merger enforcement action during the last two decades, DOJ has relied on the structural remedy of divestiture.²⁸ Divestitures require that the merging insurance companies spin off subscribers or operations to another, independent insurance company that is fully capable of restoring the same competition. In Virginia, the scope, breadth, and market shares of the merging companies' operations are significant. I estimate that over 175,000 lives may have to be divested in the commercial market and over 160,000 lives may have to be divested in the ASO market. These overlap problems are further exacerbated by the proposed merger of Aetna-Humana. Constructing any remedy involving divestitures will likely be an impossible task.

Furthermore, the DOJ's traditional approach of divestiture has a poor track record of solving problems in health insurer mergers. Recent studies by the Center for American Progress and the Capitol Forum found that the divestitures in the Humana-Arcadian merger had largely failed to address the competitive concerns, with 2 of the 3 firms failing and a substantial increase in premiums.²⁹ And as previously mentioned, health insurance mergers have resulted in higher premiums despite remedies. Moreover, no remedy in this case could address the loss of potential competition. That is why the American Antitrust Institute has come out against both mergers, urging the DOJ to "just say no."³⁰

Indeed, because of such concerns, DOJ, the FTC, and the courts have rejected divestitures as a remedy in other merger enforcement matters as well. For example, the enforcement agencies rejected the divestitures offered as remedies in their reviews of the proposed mergers of Comcast-Time Warner Cable, Staples-Office Depot, and Sysco-US Foods, instead blocking the mergers. When Staples and Sysco pursued its merger anyway, the court agreed with the FTC and enjoined the merger.³¹

Most recently, the Florida Office of Insurance Regulation ("OIR") rejected divestitures as a potential remedy in the Aetna-Humana merger.³² The OIR noted that the divestitures were "not in the best

²⁷ *E.g.*, See *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.'" (citation omitted))

²⁸ See, *e.g.*, Revised Final Judgment, *United States v. Aetna Inc. and Prudential Insurance Co. of Am.*, No. 3-99-cv-1398-H (N.D. Tex. Dec. 7, 1999); Final Judgment, *United States v. UnitedHealth Group Inc. and Sierra Health Servs. Inc.*, No: 1:08-cv-00322 (D.D.C. Sept. 24, 2008); Final Judgment, *United States v. Humana Inc.*, No. 1:12-cv-00464 (D.D.C. March 27, 2012).

²⁹ Topher Spiro et al, *supra* note 10.

³⁰ Greaney & Moss, *supra* note 27.

³¹ Press Release, DOJ, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and Federal Communications Commissions Informed Parties of Concerns (Apr. 24, 2015), *available at* <https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department>; see also Press Release, FTC, Following Sysco's Abandonment of Proposed Merger with US Foods, FTC Closes Case (July 1, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/07/following-sycos-abandonment-proposed-merger-us-foods-ftc-closes>.

³² Consent Order, In the Matter of Application for the Indirect Acquisition of Humana Health Insurance Company of Florida Inc. by Aetna Inc. at 9, Florida Office of Insurance Regulation (Feb. 15, 2016), *available at* <http://www.floir.com/siteDocuments/AetnaHumanaAcquisition185926-16-CO.pdf>.

interests of Florida policyholders and also may be short term in nature.”³³ The OIR noted that such divestitures may “result in unwanted changes in quality of services [and] benefits,” and furthermore, that policyholders can switch insurance every year which would “lessen the effectiveness of divestitures as a means to manage market concentration.”³⁴

Conduct remedies present their own problems. The DOJ has noted that conduct remedies have shortcomings for effectively protecting competition and consumers against the abuse of market power resulting from a merger.³⁵ The Nevada Insurance Commissioner required additional conduct remedies in the 2008 acquisition of Sierra Health by UnitedHealth. In order for the merging companies to receive approval from the Commissioner, they had to agree that no acquisition costs would be passed along to consumers or providers, that there would be no premium increases, that there would be no scaling back of benefits, and that UnitedHealth would take specified actions to limit the number of uninsured within the state.³⁶ Even with these additional remedies, the people of Nevada were not fully protected against price increases.³⁷

This is likely not a deal that can be fixed through either divestitures or conduct remedies, and therefore the SCC should deny the merger if it finds that it will harm consumers.

Conclusion

The SCC should thoroughly investigate the Anthem-Cigna merger to determine its impact on Virginians. In doing so, it will likely find that the merger will lead to the harms outlined above, that Anthem and Cigna’s claimed efficiencies are either not recognizable as merger specific, will not flow to consumers, or will not be significant enough to overcome the merger’s harms. We believe that the SCC will also likely find that remedies will not be able to fix the deal.

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³³ *Id.* at 8.

³⁴ *Id.* at 9.

³⁵ Dep’t of Justice, *Antitrust Division Policy Guide to Merger Remedies* (2011), available at [v](#) (conduct remedies can be “too vague to be enforced, or that can easily be misconstrued or evaded, fall short of their intended purpose and may leave the competitive harm unchecked”); see also Deborah L. Feinstein, *Editor’s Note: Conduct Remedies: Tried But Not Tested*, 26 ANTITRUST at 5, 6 (Fall 2011) (“Divestitures continue to be the remedy of choice—and with extremely rare exceptions—the only remedy for horizontal mergers at both the FTC and DOJ.”).

³⁶ Healthcare Check-Up: The UnitedHealth Group Acquisition of Sierra Health Services, NEVADA BUS. (Nov. 1, 2007), <http://www.nevadabusiness.com/2007/11/healthcare-check-up-the-unitedhealth-group-acquisition-of-sierra-health-services/>.

³⁷ Guardado et al., *supra* note 9.