UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(DALLAS DIVISION)

UNITED STATES OF AMERICA, and the STATE OF TEXAS, Plaintiffs, v. AETNA, INC., and THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Defendants.	)	Civil Action No.: 3-99 CV 1398-H Filed: June 21, 1999

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, and the State of Texas, acting under the direction of the Texas Attorney General, bring this action to enjoin defendant Aetna, Inc. ("Aetna") from acquiring certain health insurance-related assets of its competitor, defendant The Prudential Insurance Company of America ("Prudential"), in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and alleges as follows:

1. Aetna is the largest health insurance company in the United States, providing health care benefits to approximately 15.8 million people in 50 states and the District of Columbia. Prudential is the ninth largest health insurance company in the nation, providing health care benefits to approximately 4.9 million people in 28 states and the District of Columbia.

2. Aetna and Prudential each offer a wide range of managed health insurance plans, including health maintenance organization ("HMO") plans and point of service ("POS") plans.

Aetna and Prudential compete against each other in part by offering HMO and HMO-based POS ("HMO-POS") plans in Houston and Dallas, Texas, providing consumers with increased quality and lower prices for HMO and HMO-POS plans in those areas. Aetna's acquisition of Prudential will eliminate the direct competition between them and will give Aetna the ability to increase prices paid for these products or to reduce their quality in Houston and Dallas.

3. In addition, Aetna and Prudential purchase physician services for their health plan members. Aetna's acquisition of Prudential will consolidate their purchasing power and will give Aetna the ability to depress physicians' reimbursement rates in Houston and Dallas, which is likely to lead to a reduction in the quantity or a degradation in the quality of physician services provided to patients in those areas.

I.
JURISDICTION AND VENUE

4. This Complaint is filed pursuant to Section 15 and 16 of the Clayton Act, as amended, 15 U.S.C. §§ 25 and 26, to prevent and restrain the defendants' violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

5. Aetna and Prudential are engaged in interstate commerce and in activities substantially affecting interstate commerce.

6. This Court has subject matter jurisdiction over this action and jurisdiction over the parties pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1331 and 1337(a).

7. Venue is proper in this District under 15 U.S.C. § 22 and 28 U.S.C. § 1391(c), in that each of the defendants is a corporation that transacts business and is found in the Northern District of Texas.

II.
THE DEFENDANTS

8. Aetna is a Connecticut corporation with its principal place of business in Hartford, Connecticut. Aetna is a leading provider of health and retirement benefits and financial services. Aetna's subsidiary, Aetna U.S. Healthcare, offers an array of health insurance products, including indemnity ("fee for service"), preferred provider organization ("PPO"), POS, and HMO plans. In 1998, Aetna U.S. Healthcare had revenues of over $14 billion.

9. Prudential is a New Jersey mutual life insurance company with its principal place of business in Newark, New Jersey. The Prudential HealthCare Plan, Inc. ("Prudential HealthCare"), a Texas corporation, is a wholly owned subsidiary of PRUCO, Inc., which is itself a wholly owned subsidiary of Prudential. Prudential HealthCare offers HMO, POS, PPO, and indemnity plans. In 1998, Prudential HealthCare reported total revenues of about $7.5 billion.

III.
THE PROPOSED ACQUISITION

10. Aetna and Aetna Life Insurance Company, a Connecticut life insurance company and wholly owned subsidiary of Aetna, entered into the Asset Transfer and Acquisition Agreement (the "Agreement") with Prudential and PRUCO, Inc., dated as of December 9, 1998, for the purchase of substantially all of Prudential's assets related to the business of issuing, selling, and administering group medical and dental indemnity and managed care plans.

11. The stated purchase price in the Agreement is $1 billion, consisting of $465 million in cash, $500 million in three-year promissory notes, $15 million in cash payable under a Coinsurance Agreement, and $20 million in cash to be paid under the Risk-Sharing Agreement.

12. The proposed transaction is part of a trend towards increasing consolidation among health insurance companies. Aetna itself has made a number of acquisitions over the past few years. It purchased U.S. Healthcare, Inc. in July 1996 and NYLCare Health Plans, Inc. in July 1998.

IV.
REDUCTION IN COMPETITION IN THE SALE OF HMO AND HMO-POS PLANS

13. Managed care companies, such as Aetna and Prudential, contract with employers and other group purchasers to provide health insurance services or to administer health care coverage provided to employees and group members. For managed care companies to attract substantial enrollment, they must offer networks composed of a variety of health care providers (i.e., physicians, hospitals, and other health care professionals and facilities) within a local area. Employees who obtain health plan coverage for themselves and their families from these companies receive access to a provider network that offers them a menu of physician and hospital options for medical treatment.

14. To control the cost of health care services provided to employees, managed care companies contract with health care providers to provide health care services covered by the plan at an agreed-upon rate, subject to certain utilization review and management requirements. Managed care products, including HMO, PPO and POS plans, have become increasingly popular options for employers, largely because of the managed care companies' ability to obtain competitive rates from health care providers and to control utilization, allowing them to offer more affordable health insurance than traditional indemnity plans.

15. While each type of managed care plan offers a network of providers, the types of plans differ by structure, price, licensing requirements, and benefit configurations. Thus, for example, HMOs provide better benefits with respect to health maintenance or preventative care, but they place greater limits on treatment options, restrict access to out-of-network providers, and use a primary care physician as a "gatekeeper" to control access to specialty care. In contrast, PPO plans do not emphasize health maintenance or preventative care, but they put fewer restrictions on utilization, provide some reimbursement for out-of-network services, and permit self-referral to network specialists without using a gatekeeper. As a result, PPO plans are generally more expensive than HMOs. POS plans can be based on either an HMO or PPO network and generally fall between HMO and PPO plans in terms of access and cost. That is, POS plans offer patients greater access to health care providers and cost more than HMO plans, but they generally do not provide as much access or cost as much as PPO plans.

16. Managed care companies compete to be chosen by employers by developing and selling health insurance plans primarily on the basis of the breadth and quality of their provider networks, the level of benefits provided to employees, and their price (including premiums, deductibles, copayments, and coinsurance).

A. <u>Relevant Product Market</u>

17. By virtue of the benefit design differences, pricing differentials, and other factors, PPOs and indemnity plans are not reasonable substitutes for HMO and HMO-POS products. Neither employers nor employees view HMOs and PPOs as the same product, and enrollees who leave an HMO disproportionately select another HMO, rather than a PPO, for their next plan.

18. A small but significant increase in the price of HMO and HMO-POS products would not cause a sufficient number of customers to shift to other health insurance products to make such a price increase unprofitable. HMO and HMO-POS plans, therefore, are an appropriate relevant product market within which to assess the likely effects of the proposed acquisition.

B. Relevant Geographic Market

19. Patients seeking medical care generally prefer to receive treatment close to where they work or live, and many employers require managed care companies to offer a network that contains a certain number of health care providers within a specified distance of each employee's home. As a result, virtually all managed care companies establish provider networks in the localities where employees live and work, and they compete on the basis of their local provider networks. The relevant geographic markets in which HMO and HMO-POS health plans compete are thus no larger than the local areas within which managed care companies market their respective HMO and HMO-POS plans.

20. The relevant geographic markets for which relief is sought here are the United States Department of Commerce Metropolitan Statistical Areas ("MSAs") in and around Houston and Dallas, Texas. In Houston, the geographic market consists of an area no larger than the following counties: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties. In Dallas, the geographic market consists of an area no larger than the following counties: Collin, Dallas, Denton, Ellis, Grayson, Henderson, Hood, Hunt, Johnson, Kaufman, Parker, Rockwall, and Tarrant counties. A small but significant increase in the price of HMO and HMO-POS products in these two geographic areas would not cause a sufficient

number of customers to switch to health plans outside of these areas to make such a price increase unprofitable. The Houston and Dallas areas are, therefore, the relevant geographic markets within which to assess the likely effects of the proposed acquisition.

C. Concentration, Entry, and Expansion

21. Aetna and Prudential are among each other's principal competitors in the HMO and HMO-POS markets in Houston and Dallas, and are considered by employers to be close substitutes in their product attributes and quality.

22. In Houston, Aetna currently has 44% of the HMO and HMO-POS enrollees, and Prudential has 19%. (Aetna's share of HMO and HMO-POS enrollees increased from 13% to 44% with its purchase of NYLCare.) After the merger, Aetna will have 63%. In Dallas, Aetna currently has 26% of the HMO and HMO-POS enrollees, and Prudential has 16%. (Aetna's share of HMO and HMO-POS enrollees increased from 11% to 26% with the NYLCare transaction.) After the merger, Aetna will have 42%.

23. For managed care companies, the costs in time and money of setting up HMO and HMO-POS plans (e.g., licensing costs, network construction costs, and utilization management costs) are substantially higher than those required for setting up PPO or indemnity plans. Effective entry -- entry and growth to minimum viable scale -- for an HMO or HMO-POS plan in either Houston or Dallas typically takes two to three years and costs up to $50 million. It is unlikely that de novo entry would defeat a price increase over the short term in these areas. It is also unlikely that a company that currently provides PPO or indemnity health insurance in either Dallas or Houston would shift its resources to provide an HMO or HMO-POS plan in either of

these geographic markets in the event of a small but significant price increase, because of the costs and difficulties of doing so.

24. Due not only to these costs and difficulties, but also to advantages that Aetna and Prudential hold over their existing competitors -- including nationally recognized quality accreditation, product array, provider network and national scope and reputation -- existing HMO and HMO-POS competitors in Dallas or Houston are unlikely to be able to expand or reposition themselves sufficiently to restrain anticompetitive conduct by Aetna in either of these geographic markets.

25. For these reasons, neither entry by new sellers nor expansion by existing sellers would be timely, likely, or sufficient to counteract an anticompetitive price increase.

D. Effects of the Proposed Transaction

26. The existing competition between Aetna and Prudential in providing HMO and HMO-POS plans in Houston and Dallas has benefitted consumers through lower prices and increased quality of such plans in those areas. Aetna's acquisition of Prudential would eliminate this competition, allowing the merged entity to increase the prices and to reduce the quality of these products in Houston and Dallas.

V. CONSOLIDATION OF PURCHASING POWER OVER PHYSICIAN SERVICES

A. Relevant Product Market

27. There are no purchasers to whom physicians can sell their services other than individual patients or the commercial and government health insurers who purchase physician services on their behalf. Simply put, physicians have no good alternatives to these buyers. A

small but significant decrease in the prices paid to physicians by these buyers would not cause physicians to seek other purchasers of their services or to otherwise change their activities (away from providing physician services towards other uses or leisure) in numbers sufficient to make such a price reduction unprofitable. Physicians' services, therefore, also constitute an appropriate relevant product market within which to assess the likely effects of the proposed transaction.

B. Relevant Geographic Market

28. The patient preferences that define a localized geographic market for the sale of HMO and HMO-POS products also define a localized geographic market for physicians' services. Moreover, for an established physician who has invested time and expense in building a practice, the costs associated with moving his or her practice to a new geographic market are considerable, including paying for new office space and equipment and building new relationships with hospitals, other physicians, employees, and patients in the new area.

29. A small but significant decrease in the prices paid to physicians would not cause physicians to relocate their practices outside of the Houston and Dallas markets in numbers sufficient to make such a price reduction unprofitable. Similarly, a reduction in the quantity or quality of physician services as a result of a small but significant decrease in the prices paid to physicians would not cause patients to seek physicians' services outside of these markets, in numbers sufficient to make such a price reduction unprofitable. The relevant geographic markets within which to assess the likely effects of the proposed acquisition on the sale of physician services are, therefore, no larger than the geographic markets described in paragraph 20, above.

C. Effects of the Proposed Transaction

30. The contract terms a physician can obtain from a managed care company such as Aetna or Prudential depend on the physician's ability to terminate (or credibly to threaten to terminate) their relationship if the company demands unfavorable contract terms. A physician's ability to terminate a provider relationship depends on the ability to make up that plan's lost business and on how long it would take to do so. Unlike certain tangible products, physician services cannot be stored; therefore, failing to replace lost business expeditiously imposes a permanent loss of revenue.

31. Physicians have a limited ability to encourage patients to switch plans or physicians, because the patients would have to switch to another employer-sponsored plan in which the physicians participate (which might not be an option), or to pay considerably higher out-of-pocket costs, either in the form of increased copayments for use of out-of-network physicians (if allowed), or by absorbing the total cost of the physicians' services as unreimbursed medical expenses.

32. Replacing a discontinued plan's lost business in a timely manner is more difficult when the plan accounts for a large share of the physician's total business. Aetna's "all products clause" -- which requires a physician to participate in all of Aetna's health plans if he or she participates in any Aetna plan -- significantly increases the volume of business that a physician would lose if he or she rejected Aetna's offered reimbursement rates on any given plan, such as an HMO. Terminating the provider relationship thus would mean that a physician not only would lose his or her own patients that participated in that plan, but also access to other patients who participate in the plan. Replacing lost business in a timely manner is more difficult when

the managed care company accounts for a large share of all business in that locality (not only of that physician's business), because a physician's alternative sources of patients are more limited.

33. As a result of Aetna's prior acquisition of NYLCare and its proposed acquisition of Prudential, Aetna will account for a large share of all payments to physicians in the Houston and Dallas areas, and a particularly large share of revenue of individual physicians for a substantial number of physicians in those areas. In light of physicians' limited ability to encourage patient switching, a significant number of physicians will be unable to reject Aetna's demands for contract terms that are more adverse than would result if Aetna and Prudential remained independent. Thus, the proposed acquisition will give Aetna the ability to depress physicians' reimbursement rates in Houston and Dallas, likely leading to a reduction in quantity or degradation in quality of physicians' services.

VI.
VIOLATIONS ALLEGED

34. Aetna's proposed acquisition of Prudential may substantially lessen competition in the sale of HMO and HMO-POS products and will consolidate purchasing power over physician services in Houston and Dallas, Texas, in violation of Section 7 of the Clayton Act.

35. Unless enjoined, the transaction will eliminate competition between Aetna and Prudential, and likely have the effects in the Houston and Dallas geographic markets of :

a. substantially lessening competition in the sale of HMO and HMO-POS products, and increasing prices for or decreasing the quality of these products; and

b. giving Aetna the ability to depress physicians' reimbursement rates, which is likely to lead to a reduction in the quantity or a degradation in the quality of physician services provided to patients.

VII.
REQUESTED RELIEF

WHEREFORE, plaintiffs, the United States of America and the State of Texas, request:

1. That the proposed acquisition by Aetna and Prudential be adjudged to violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18;

2. That the defendants be permanently enjoined from and restrained from carrying out the Asset Transfer and Acquisition Agreement dated as of December 9, 1998, or from entering into or carrying out any agreements, understanding, or plan, the purpose or effect of which would be to combine the health insurance businesses or assets of Aetna and Prudential;

3. That plaintiffs have such other relief as this Court may deem just and proper; and

4. That plaintiffs recover the costs of this action.

DATED this 21st day of June, 1999.

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UNITED STATES OF AMERICA

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