



U.S. & Plaintiff States

v.

Aetna Inc. & Humana Inc.

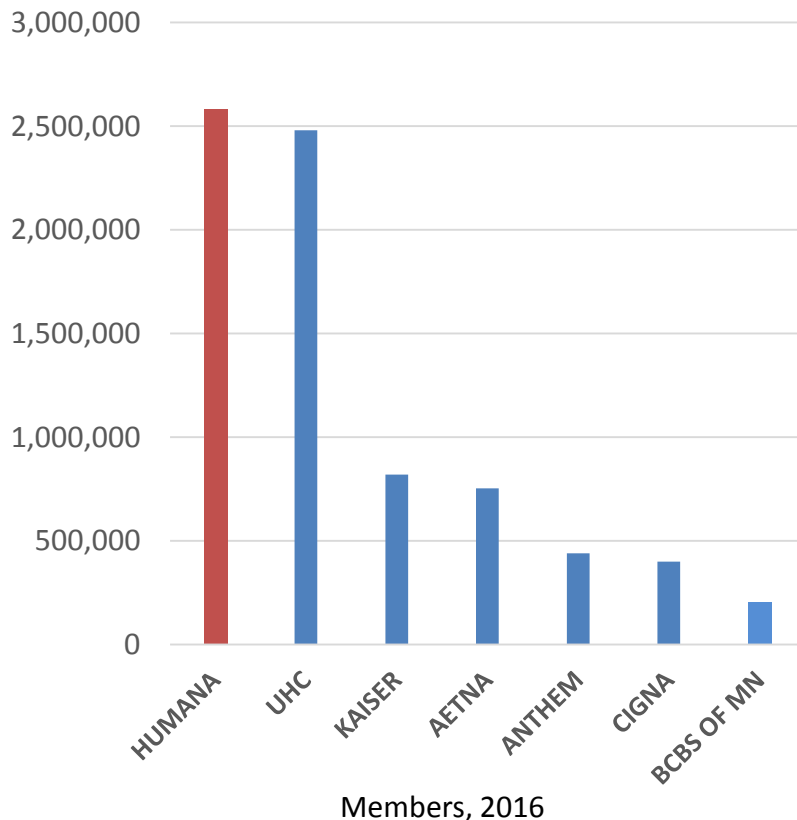
Plaintiffs' Opening Statement

Competition between Aetna and Humana for Medicare Advantage consumers is important and worth preserving

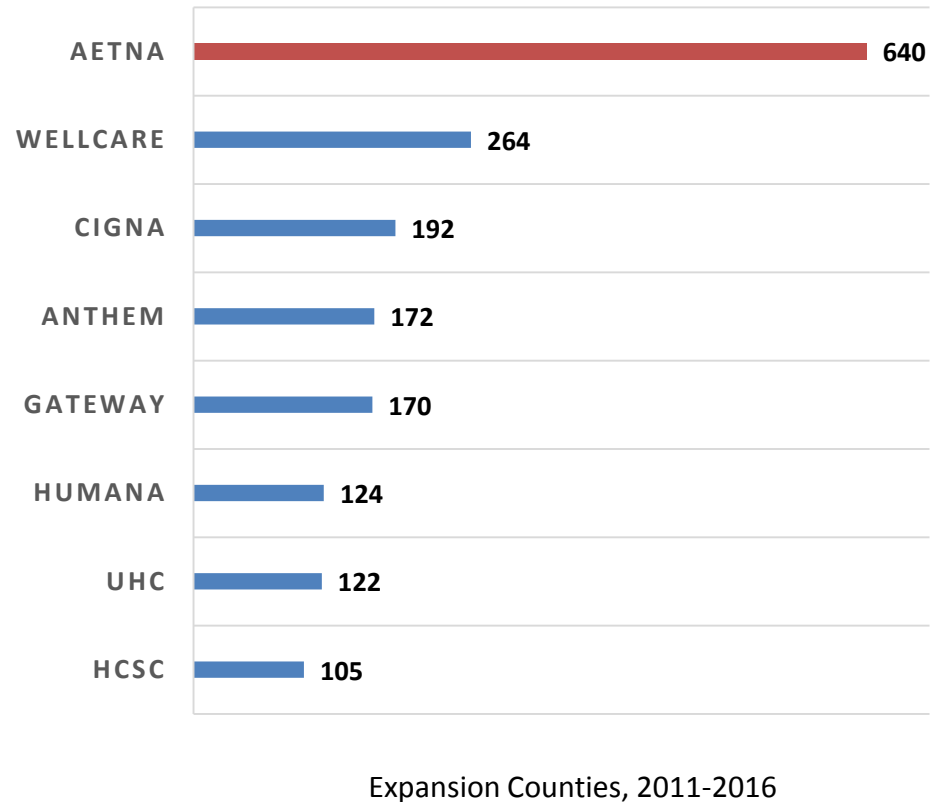


This merger would combine two of the leading Medicare Advantage insurers in the country

Humana is the largest.

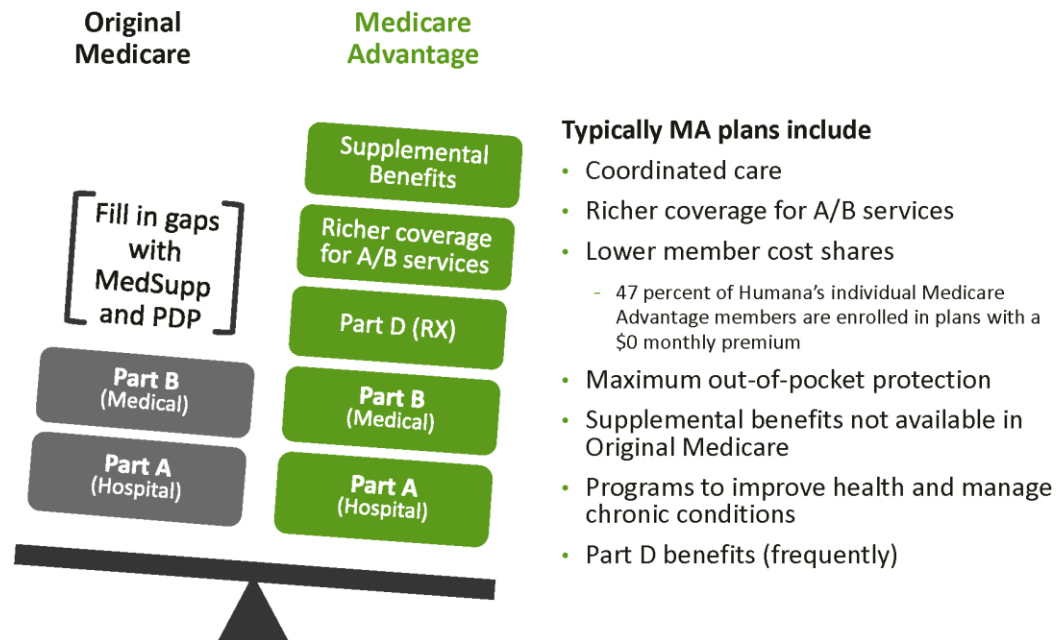


Aetna is the fastest-growing.



The sale of Medicare Advantage is a relevant product market

Medicare Advantage: Better benefits, lower costs



Humana

6

“**Reasonable** interchangeability” is different from “**functional** interchangeability”

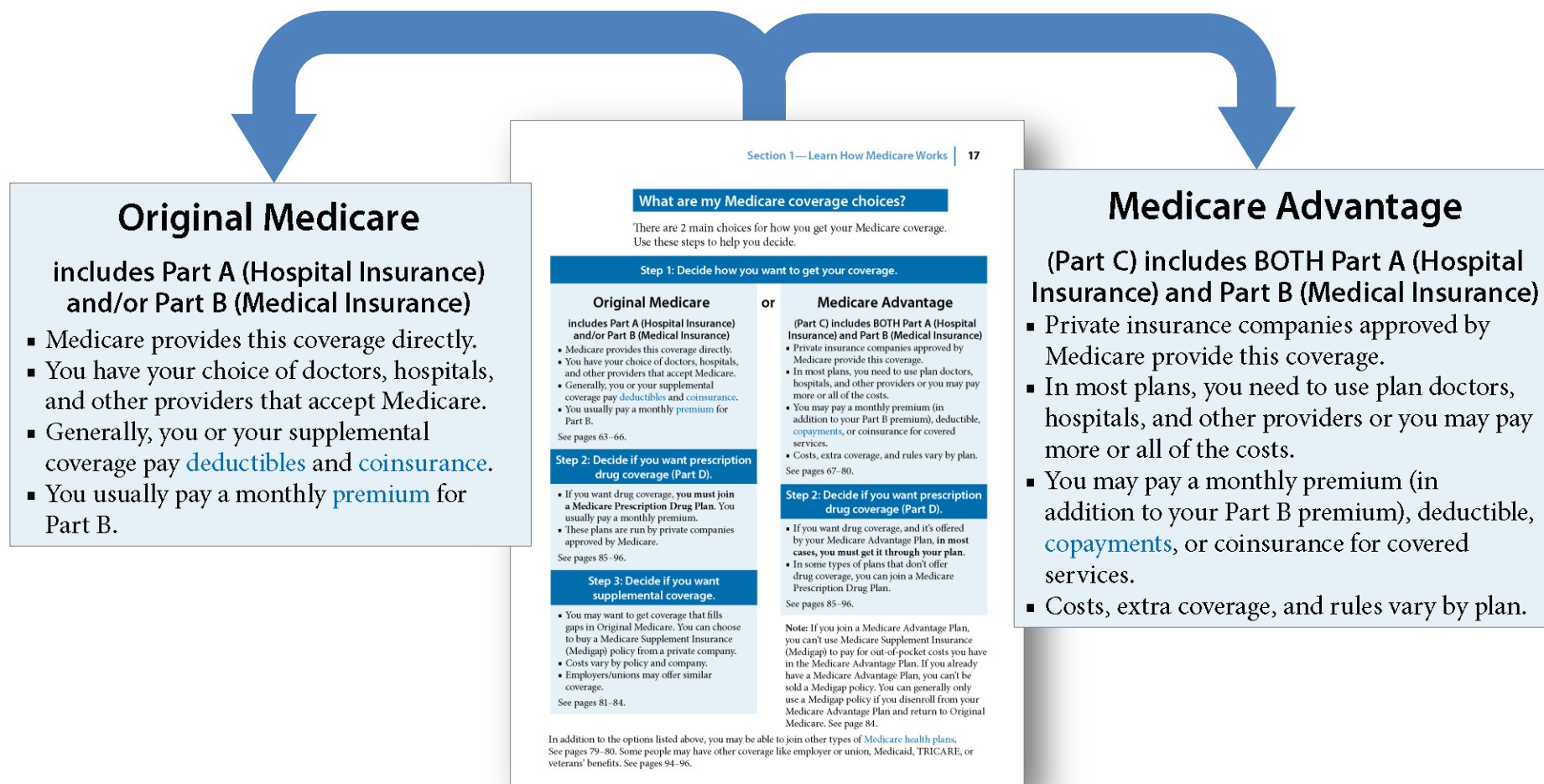
“The outer boundaries of a product market are determined by the **reasonable interchangeability** of use or the cross-elasticity of demand between the product itself and substitutes for it.”

Brown Shoe Co. v. United States,
370 U.S. 294, 325 (1962)

“**[F]unctional interchangeability** should not end the Court’s analysis.”

FTC v. Staples, Inc.,
970 F. Supp. 1066, 1074 (D.D.C. 1997)

Seniors first choose the product segment that is best for them



The availability of multiple choices does not mean that every option is a competitive constraint

“[E]ven though it is true that other beverages quench thirst,” carbonated soft drinks are an “appropriate ‘line of commerce’ for measuring the probable effects” of a merger between Coca-Cola and Dr. Pepper.



FTC v. Coca-Cola,
641 F. Supp. 1128,
1132-33 (D.D.C. 1986),
vacated as moot,
829 F.2d 191
(D.C. Cir. 1987)



“All tax preparation methods provide taxpayers with a means to perform the task of completing a tax return, but each method is starkly different.”

U.S. v. H&R Block, Inc.,
833 F. Supp. 2d 36, 54 (D.D.C. 2011)

Courts look to two main types of evidence: “Practical indicia” and economic experts

<i>Brown Shoe</i> “Practical Indicia”	Industry or public recognition of the market as a separate economic entity
	Product’s characteristics and uses
	Unique production facilities
	Distinct customers
	Distinct prices
	Sensitivity to price changes
	Specialized vendors

See *Brown Shoe*, 370 U.S. at 325.

Medicare Advantage has distinct characteristics

		Medicare Advantage	Original Medicare (with or without supplemental insurance)		
			Parts A & B Only	Parts A & B with Medigap	Parts A & B with Part D
Basic benefits	Medical benefits of Parts A & B	✓	✓	✓	✓
	Visit any medical provider	✗	✓	✓	✓
	Out-of-pocket cap on medical costs	✓	✗	✓	✗
	Care management & coordination	✓	✗	✗	✗
	Star ratings	✓	✗	✗	✓
	Single customer-service hotline	✓	✓	✗	✗
	Private insurer branding	✓	✗	✓	✓
Additional benefits offered by most plans	Outpatient prescription drug coverage	✓	✗	✗	✓
	Dental coverage	✓	✗	✗	✗
	Vision coverage	✓	✗	✗	✗
	Hearing coverage	✓	✗	✗	✗
	Wellness benefits	✓	✗	✗	✗
	Other benefits	✓	✗	✗	✗

Ex. 7, Expert Report of Aviv Nevo, Ph.D. (Oct. 21, 2016)

Aetna and Humana recognize the differences and organize their businesses around them

Med Supp States by Tier + Commentary

From:

"Kilchen, Deirdre C" <kilchend@aetna.com>

To:

"Schild, Molly A" <mschildm@aetna.com>

Cc:

"Kilchen, Deirdre C" <kilchend@aetna.com>, "Woodridge, Tyree S" <ty.woodridge@aetna.com>

Date:

Mon, 22 Sep 2014 20:22:08 +0000

Attachments:

Geography Data Request Template - Med Supp State Tiering added.xlsx (44.35 kB)

Good afternoon Molly,

I have attached the states by tier into the *geography-members by state* tab per your suggestion. The states are tiered 1-3 and color coded accordingly. The key for this tiered approach is found below:

Tier 1 - These are the primary states we focus on competitively and where we see the majority of our growth and membership.

Tier 2 - These states have a combination of small senior populations and a more challenging regulatory environment.

Tier 3 - Tier 3 states are difficult regulatory environments that we are in considering for select partnership opportunities.

There are several factors to take into consideration when looking across all Medicare products and comparing them in this manner, particularly when lining MA and Med Supp up side-by-side in this exercise. As we have discussed, the products are apples and oranges. Outlined a few of the factors that must be considered when our consultants analyze the information we are providing:

1. MA is not everywhere and tends to be found in concentrated areas that are urban in nature, whereas Med Supp (when approved) is state-wide and tends to be a product most prominently sold in rural areas.

“when lining MA and Med Supp up side-by side . . . the products are apples and oranges”

Please let me know if you have any questions about either the tiered states or the 6 bullets listed above.

Thank you!
Deirdre

Deirdre Kilchen
Chief of Staff
Medicare Supplement

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Franklin, TN 37067

aetna

Confidential Pursuant to 15 USC 18a(h)

AET-P002-0001662017

Aetna and Humana recognize the differences and organize their businesses around them

“They run on different platforms. They have dedicated teams, a dedicated leader. You know, they’re different – their business models are different.”

- **Fran Soistman**

Head of Government Business at Aetna

Q. And what do you mean when you said you've kept your Medicare Advantage and Med Supp business separated?

A. Operationally.

They run on different platforms. They have dedicated teams, a dedicated leader.

You know, they're different -- their business models are different.

Q. Do they report financial performance differently?

A. There are subtle differences, sure. Yeah, there are some subtle differences.

Q. When you said that you don't intentionally try to move people from your Med Supp program to your Medicare Advantage program, why is that Aetna's position?

A. Well, we view that most of these members have a relationship with a broker agent, and the broker agent represents the interests of the beneficiary.

Soistman dep. at 251:6-13 (Oct. 13, 2016)

Aetna and Humana's competitive energy focuses on other Medicare Advantage insurers

Quality health plans & benefits
Healthier living
Financial well-being
Intelligent solutions

aetnaSM

Medicare D
March 2015

Nancy Coccozza and Team

IVL Medicare AEP: Competitive Analysis

IN 2015 AEP, Aetna ranked 2nd in growth among our top competitors;
Humana took market share lead away from United

HUMANA
Guidance when you need it most

- Captured 38% of newly eligibles (21% market share); availability to 85% of beneficiaries
- Vast improvement in STAR ratings; 92% of members in 4+ Star plans
- Expanded provider relationships through acquisition and exclusive relationships


UnitedHealth Group

- Continued network reductions and market exits
- Star ratings performance relatively flat year-over-year
- #2 with 19% share

 **Cigna**

- Added 30k enrollees partly due to HealthSpring products
- Improved Star performance; 5 star option in FL

Anthem
BlueCross

- Continued poor Star rating performance
- Increased premiums in most markets

Key Trends

Slightly lower growth than last two years

- Overall MA enrollment over 16 million (30% of Medicare beneficiaries)*
- Industry growth of 4.4% below trend of 5% in 2014 and 2013
- Product exits impacted 5% of MA enrollees or 575k vs. 550k in 2014
- **11.5% of MA enrollees (~2M) in dual eligible programs**

Competitors continue to move toward leaner products

- Value added benefits reduced by ~15%
- Out of pocket costs increased by 5% compared to 10% in 2014

Premiums increased and enrollment in premium products grew

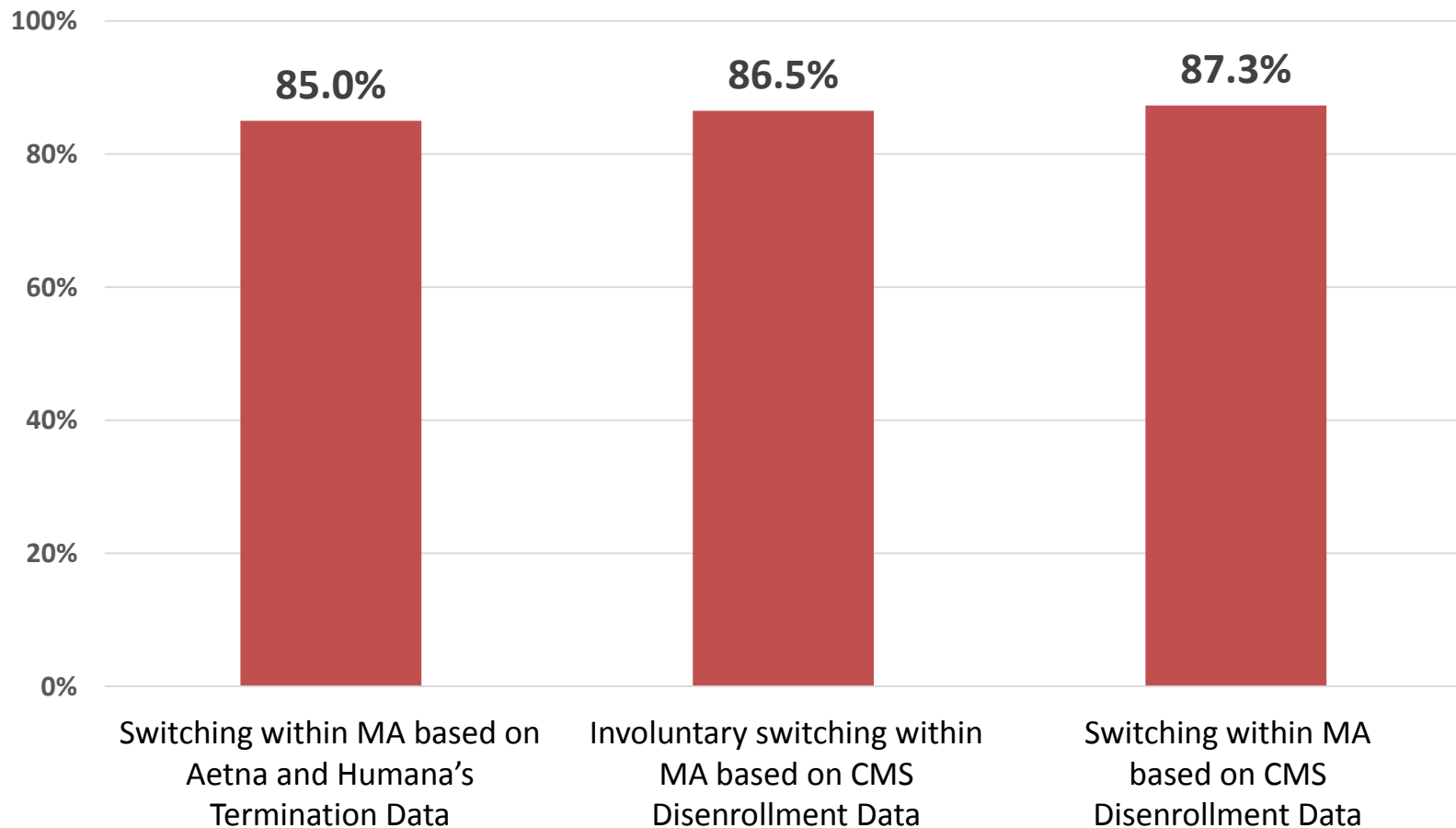
- **44% of enrollees in zero premium plans**, down from 56% in 2014
- Average monthly premium rising 20% to \$41

*CMS Fact Sheet: Fact Sheet: Moving Medicare Advantage and Part D Forward 2/20/2015

March 2015 OC Meeting: Confidential

Aetna Inc. 3

Seniors do not treat Medicare Advantage as being “reasonably interchangeable” with Original Medicare



Econometric evidence consistently finds that the sale of Medicare Advantage is a relevant product market

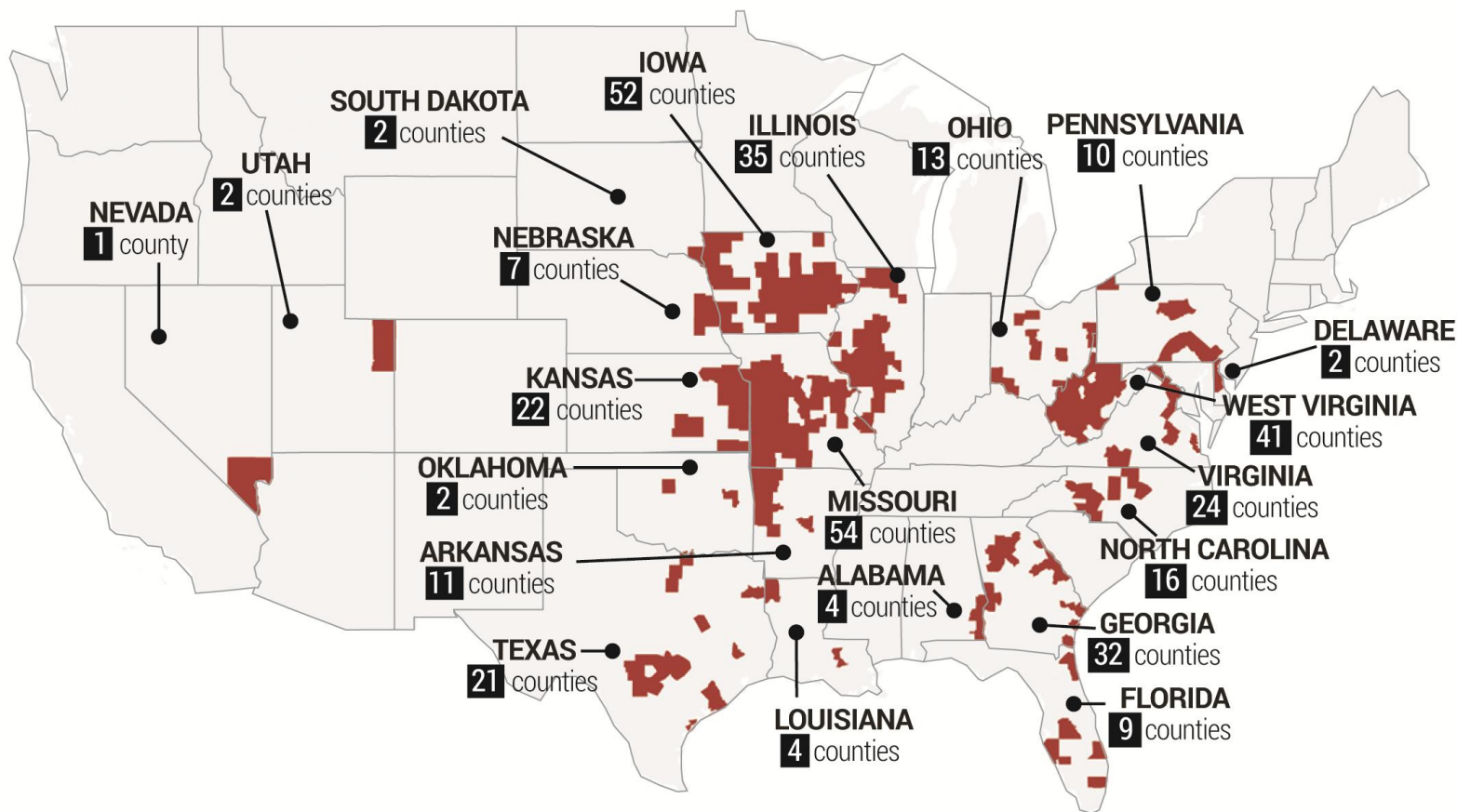
Percentage of Complaint Counties Passing the Hypothetical Monopolist Test	
Using Prof. Nevo's preferred demand estimate	100%
Using eight of Mr. Orszag's preferred demand estimates	98%
	99%
	99%
	99%
	99%
	96%
	99%
	99%
	99%

Ex. 14, Expert Report of Aviv Nevo, Ph.D. (Oct. 21, 2016);
Ex. 3, Supplemental and Rebuttal Report of Aviv Nevo, Ph.D. (Nov. 11, 2016)

Aetna and Humana are close competitors

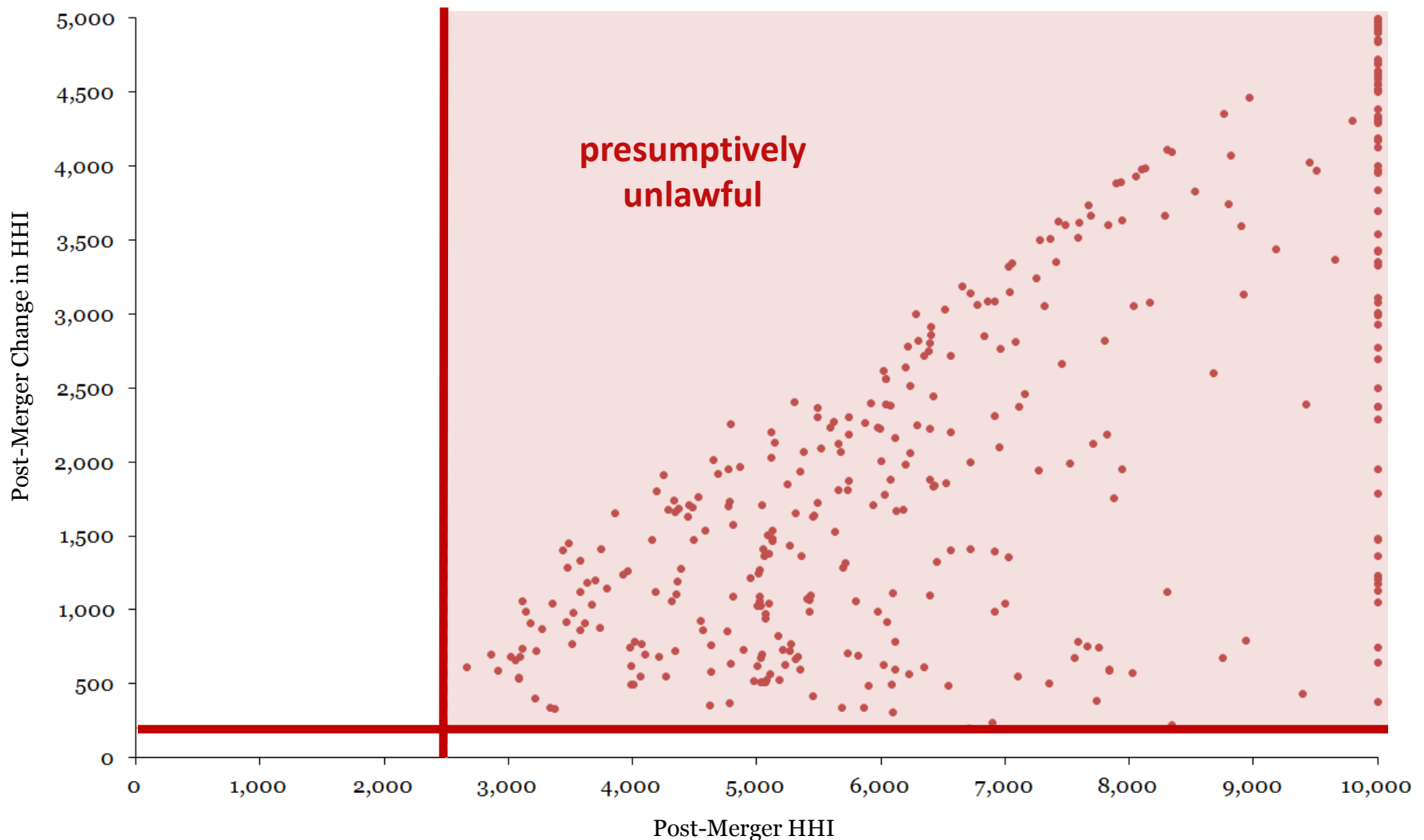


Over 1.6 million seniors are enrolled in Medicare Advantage in these counties

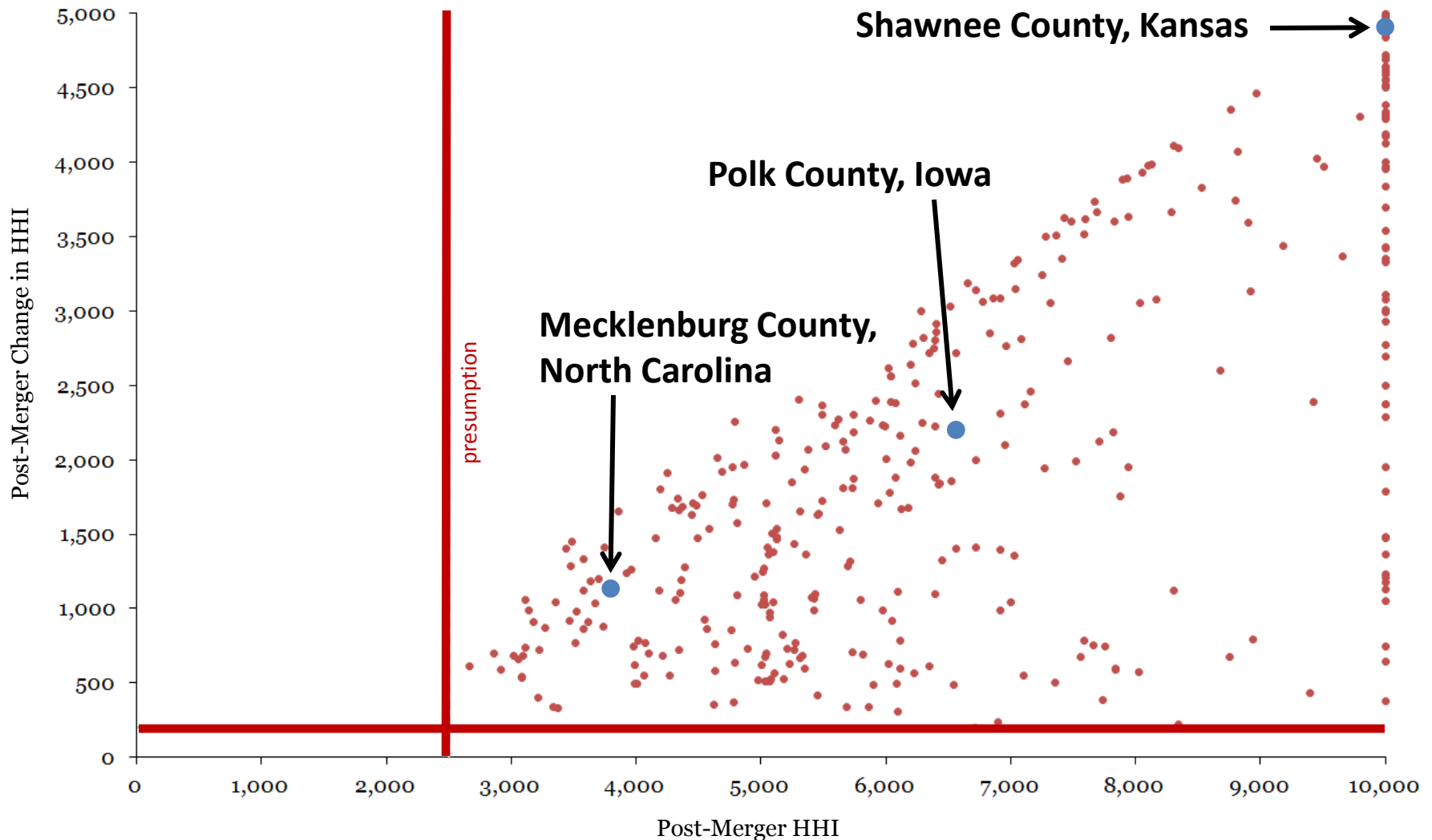


Over 970,000 of them are enrolled in an Aetna or Humana Medicare Advantage plan.

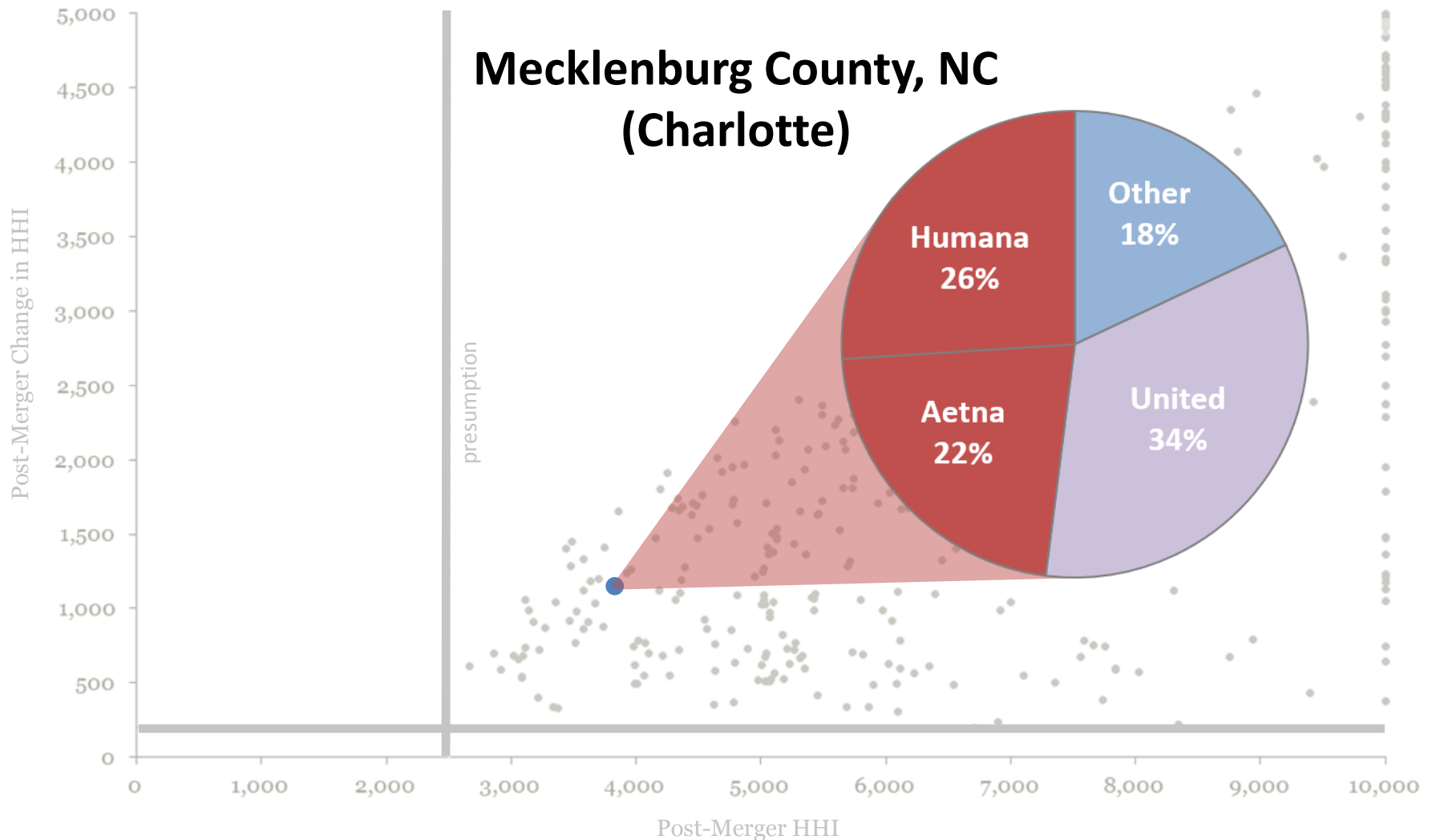
The merger is presumptively unlawful in all 364 counties



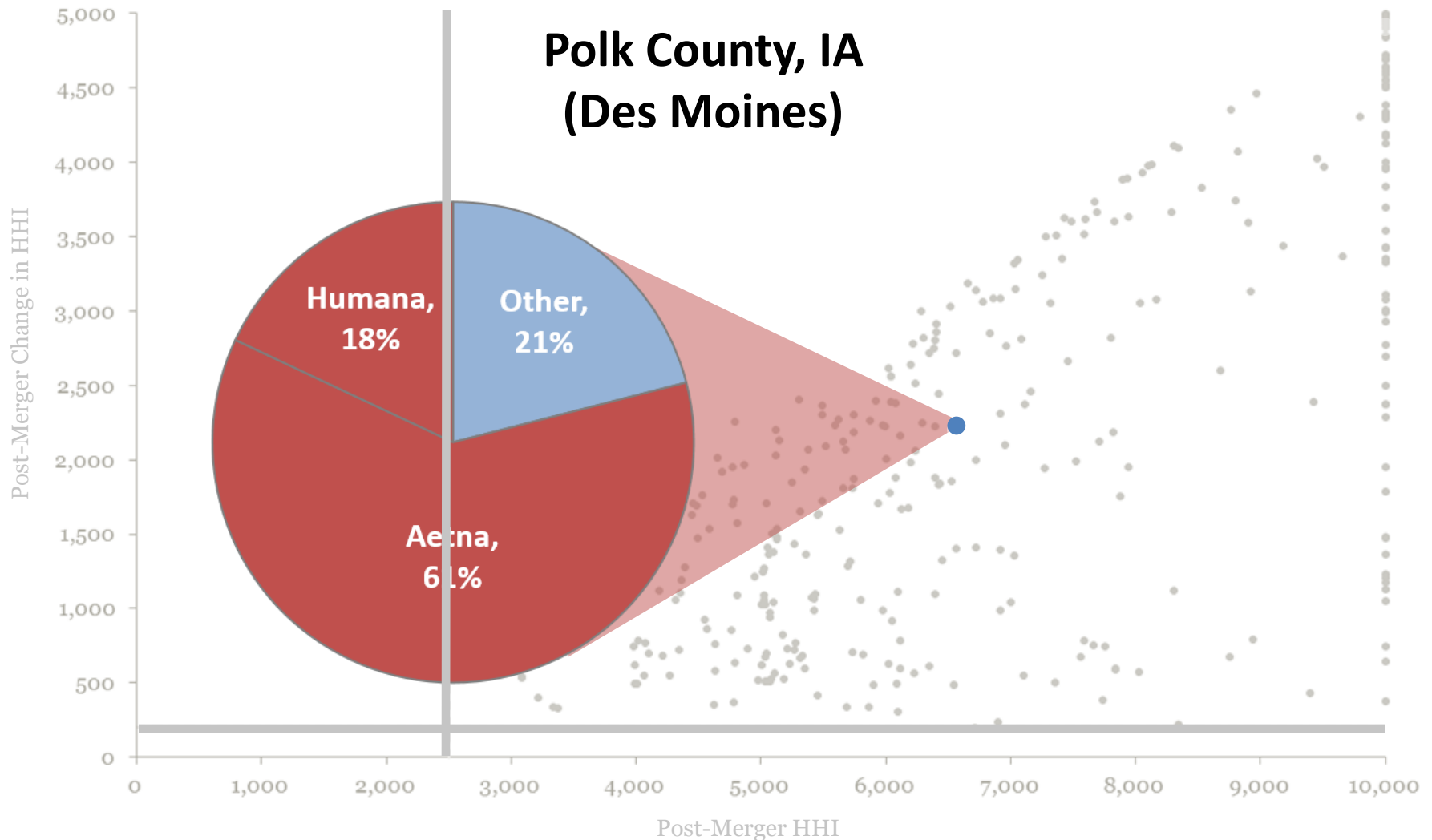
The merger is presumptively unlawful in all 364 counties



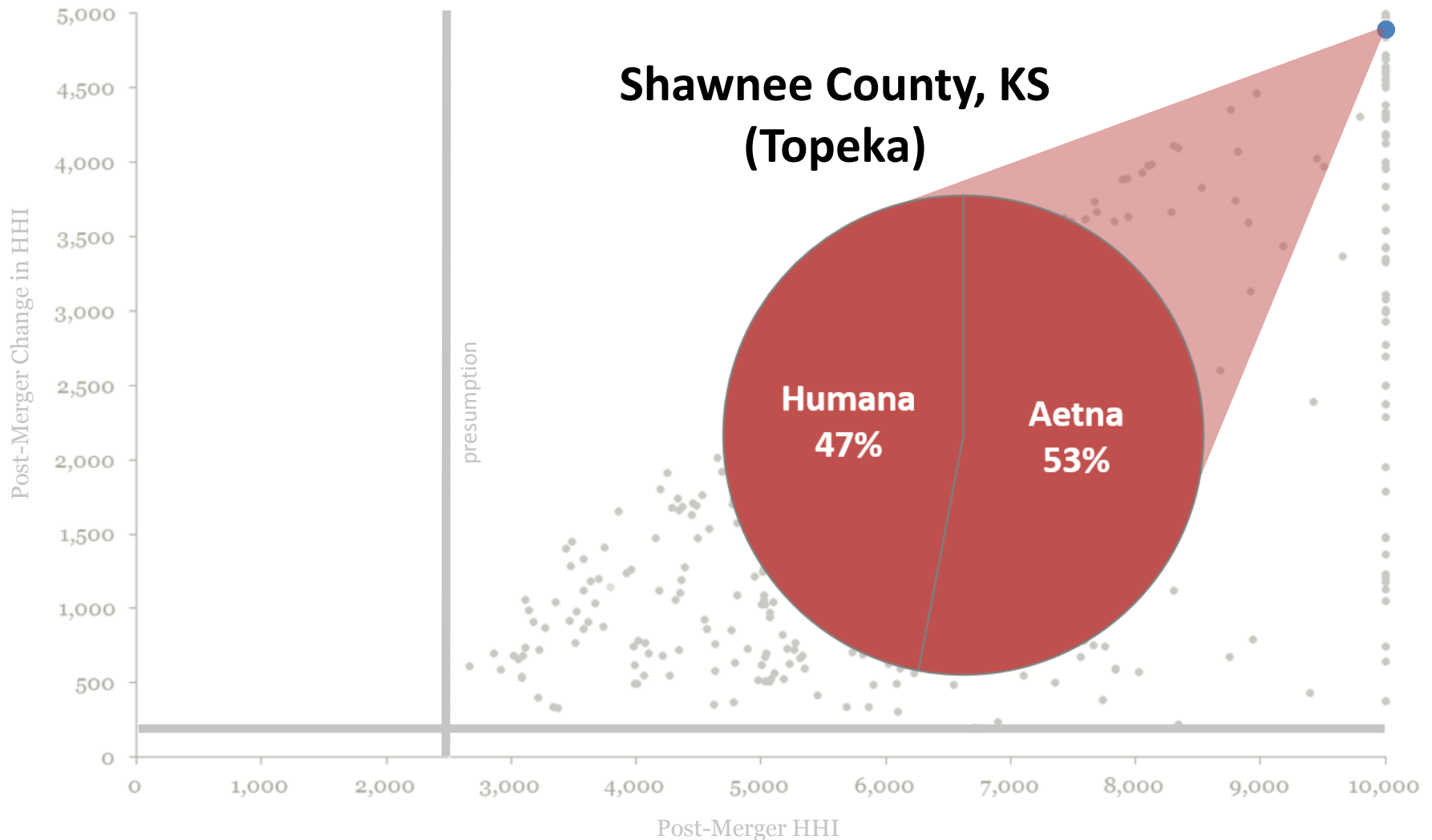
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The merger is presumptively unlawful in all 364 counties

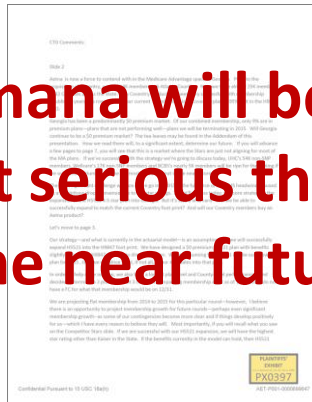


The merger is presumptively unlawful in all 364 counties



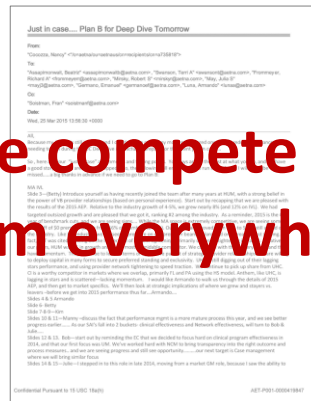
Aetna and Humana are close competitors

“Humana will be our most serious threat in the near future”



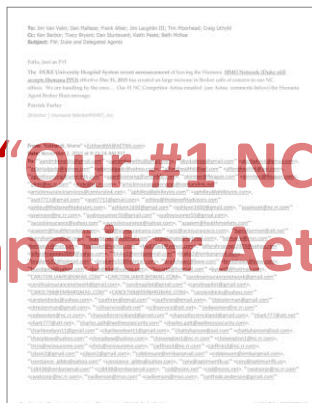
- Cindy Follmer,
Medicare General Manager at Aetna
PX0397, at 1 (Mar. 28, 2014)

“We compete with them everywhere”



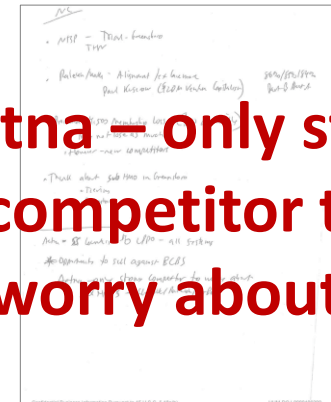
- Nancy Cocozza,
Head of Medicare Business at Aetna
PX0007, at 1 (Mar. 25, 2015)

“Our #1 NC Competitor Aetna”



- Patrick Farley,
Sales Director at Humana
PX0050, at 3 (Nov. 2, 2015)

“Aetna — only strong competitor to worry about”



- Kevin Meriwether
Southeast Division Leader at Humana
PX0512, at 9 (undated)

“Humana and Aetna dominate the Kansas City market”



- Humana “1st Look”
Competitor Analysis
PX0455, at 67 (Aug. 24, 2015)

The merger would create over \$500 million of annual harm to seniors and taxpayers

\$358 million in annual harm to seniors

Higher prices

**Lower benefits and
quality**

\$145 million in annual harm to taxpayers

**Higher CMS payments to
Medicare Advantage insurers**

The proposed divestiture is risky and would not remedy the harm



Aetna and Humana are not selling the assets that are necessary to compete effectively

Molina Would Not Receive:	
A business with tens of thousands of provider contracts	✗
The infrastructure of an ongoing business	✗
A recognized brand name	✗
An existing broker network	✗
Employees, including experienced Medicare actuaries and sales staff	✗
A business with value-based contracts with providers	✗
Physical locations, including sales office and Humana Guidance Centers	✗

Who is Molina?

“For the past 35 years, Molina has been focused on the Medicaid population.”

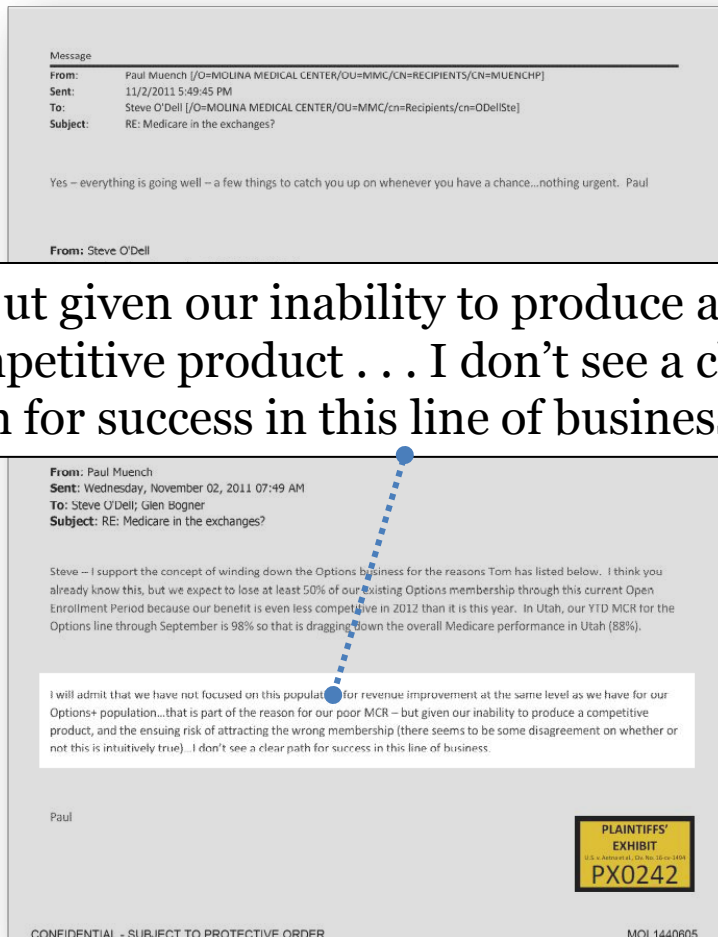
“You have probably received numerous inquiries for your Medicare and commercial business, but not Medicaid. This is where Molina can help.”

- John Molina

Chief Financial Officer at Molina Healthcare



Molina has a record of failure in Medicare Advantage



“[B]ut given our inability to produce a competitive product . . . I don’t see a clear path for success in this line of business.”

Molina is a trivial participant in individual Medicare Advantage

Humana

Over

2.5 million

members

Aetna

Over

700,000

members

Molina

424

members

The risk of the proposed divestiture will fall on seniors

Message

From: RICHARD SCHAPIRO [mailto:rmssch@me.com]
Sent: 7/1/2016 10:41:55 PM
To: J. Mario Molina M.D. [/O=MOLINA MEDICAL CENTER/OU=MMC/CN=Recipients/CN=MARIO]
Subject: Re: Divestitures

Will said grasshopper.

I don't think Dale and I had such different points of view. I agree that Medicare is the new growth engine. 10,000 people a day are turning 65. He was speaking more to the tactics of getting the inside track. I'm more focused on not owning it all because it's way too much money for us. I'd feel more comfortable with something bite sized that wouldn't require a huge financing. We both agree that we don't have the internal talent to run it.

Dick Schapiro

“The image that comes to my mind is the dog chasing the car and we are the dog. What happens if we catch it?”

>>> On Jul 1, 2016, at 1:22 PM, J. Mario Molina M.D. <Mario.Molina@MolinaHealthCare.com> wrote:

>>> I guess it depends on if it is a mini cooper or a subaru.

>>> -----Original Message-----

>>> From: RICHARD SCHAPIRO [mailto:rmssch@me.com]

>>> Sent: Friday, July 01, 2016 3:19 PM

>>> To: Julei Molina; J. Mario Molina M.D.; Runna Runna

>>> Subject: Divestitures

>>> The image that comes to my mind here is the dog chasing the car and we are the dog. What happens if we catch it?

>>> Dick Schapiro

>>>

>>>

>>>

>>> IMPORTANT NOTICE TO RECIPIENT: This email is meant only for the intended recipient of the transmission. In addition, this email may be a communication that is privileged by law. If you received this email in error, any review, use, disclosure, distribution, or copying of this email is strictly prohibited. Please notify us immediately of the error by return email, and please delete this email from your system. Thank you for your cooperation.

>>

PLAINTIFFS'
EXHIBIT
PX0086

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

MOL0085251

PX0086, at 1 (July 1, 2016)

Lots to do. Good luck.

Dick

Dick Schapiro

Sender: John Molina </O=MOLINA MEDICAL CENTER/OU=MMC/CN=RECIPIENTS/CN=MOLINAJ>
Sent: Thursday, June 30, 2016 11:25:54 AM
Recipient: Dale Wolf < >
Cc: J. Mario Molina M.D. <Mario@MolinaHealthCare.com>
Subject: RE: Aetna/Humana

“this is a very different business from what we do, including commercial marketing, pricing, contracting, etc.”

I can imagine the analysts also resetting the baseline.

Second, from a process view, I don't understand how Aetna can sign a definitive agreement to sell assets that it doesn't own, particularly since they don't have agreement from DOJ on their plan. Both Aetna and Humana will be signing the document and closing will be contingent on their transaction closing.

Third, this is a very different business from what we do, including commercial marketing, pricing, contracting, etc.. Unless we can acquire some talent as part of the deal, I think we are woefully under-resourced to be able to take this on. Agree wholeheartedly. Our medical management team (at Corporate) has a great deal of experience with MA-PD business, as many have worked at Health Care Partners and other MA plans in the past. I did reach out to Maria Fitzpatrick and she has responded. Ironically, she was a consultant for CUP, the plan we bought last year in Washington. I think our poor performance on our current SNP business provides ample evidence that we need to beef up Medicare resources.

Thanks for the update. Will wait to hear more.

Dale

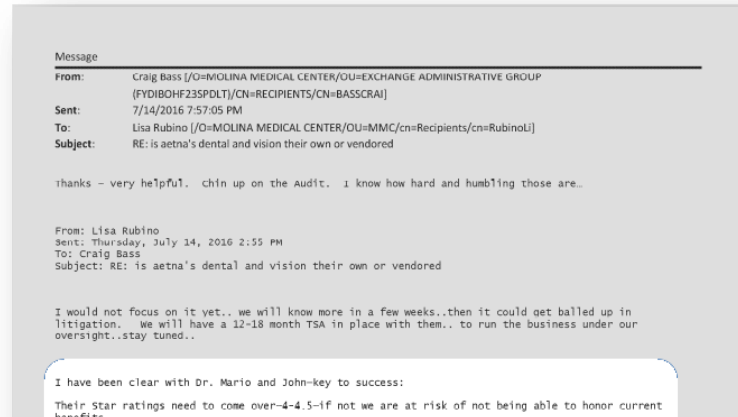
PLAINTIFFS'
EXHIBIT
PX0083

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

MOL0008373

PX0083, at 1 (June 30, 2016)

The risk of the proposed divestiture will fall on seniors



I have been clear with Dr. Mario and John-key to success:

Their Star ratings need to come over-4-4.5-if not we are at risk of not being able to honor current benefits

Their network needs to be replicated.. lose key providers and we will lose members in droves

Sales and market engine-8 week selling period

GA and broker network..

Then the basics in ops and CM.. big fricken lift..

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

MOL0322449

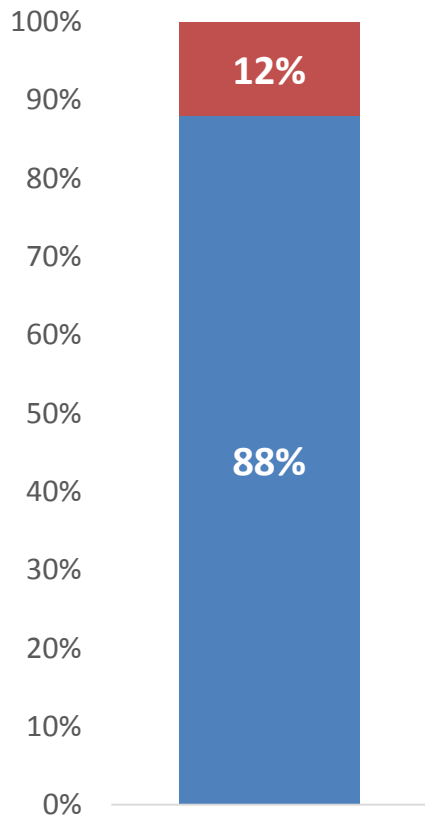
PX0102 (July 14, 2016)

The sale of insurance on the public exchanges is a relevant product market



Market definition is not seriously disputed

Percentage of public exchange enrollees in the
Complaint counties that qualify for a subsidy



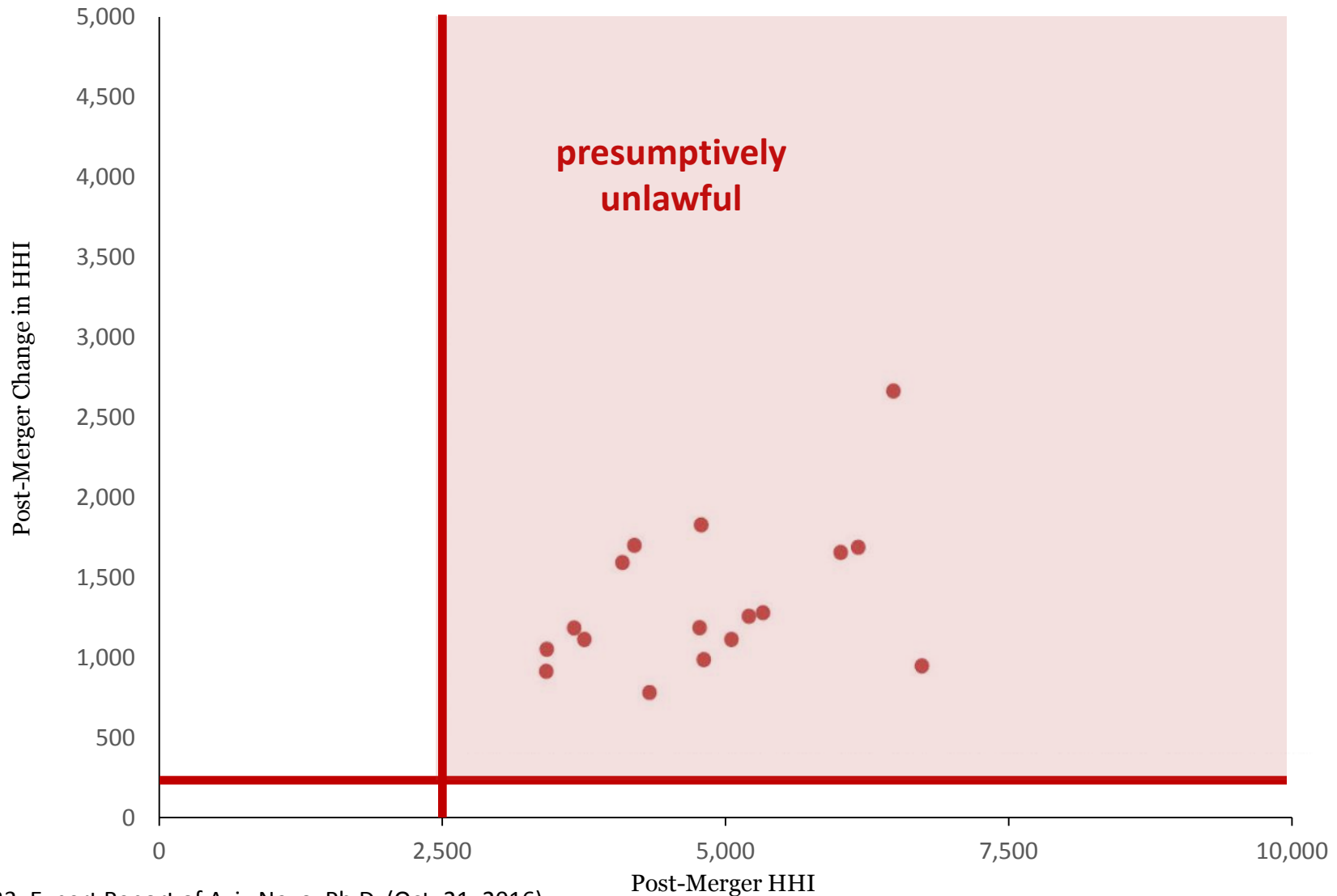
Qualifying Enrollees =
88%

Average Subsidy =
77% of premiums

Aetna and Humana are close competitors on the public exchanges



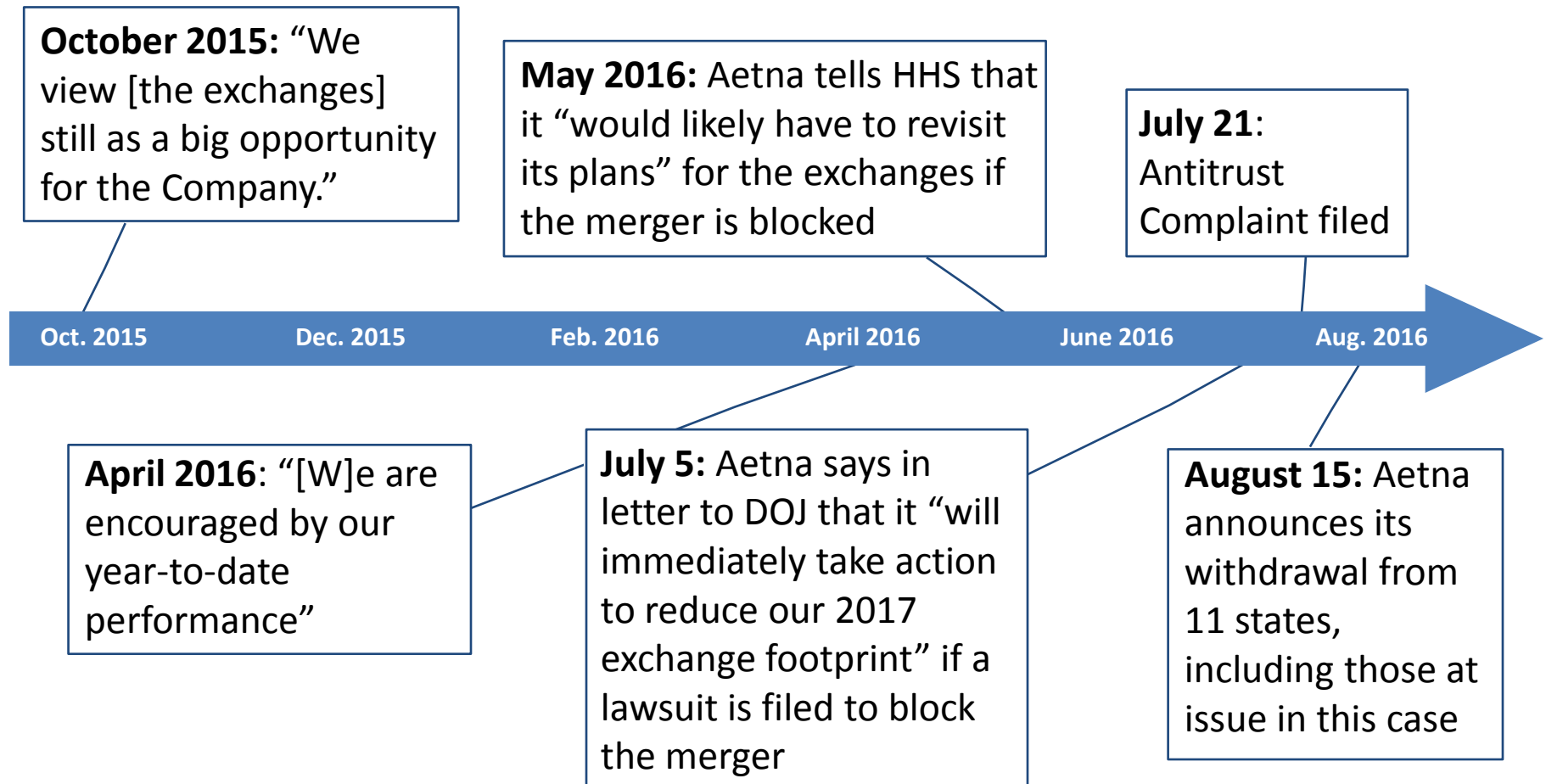
The merger is presumptively unlawful in all 17 counties



Aetna's withdrawal from the exchanges should not be credited



Aetna's withdrawal from the exchanges should not be credited



This merger is not about providing better insurance products to consumers

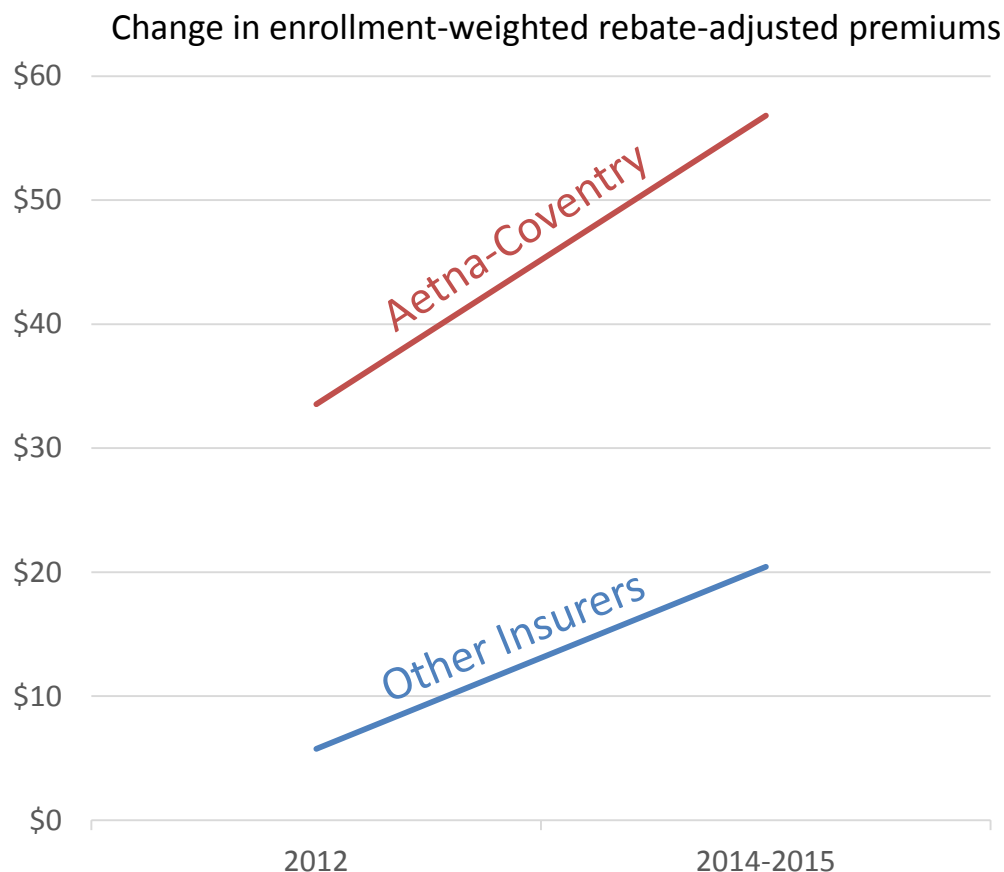
“[A]nticompetitive effects in one market [cannot] be justified by procompetitive consequences in another.”

U.S. v. Philadelphia Nat’l Bank,
374 U.S. 321, 370 (1963)

“The court is not aware of any case, and Defendants have cited none, where the merging parties have successfully rebutted the government's *prima facie* case on the strength of the efficiencies.”

FTC v. Sysco Co.,
113 F. Supp. 3d 1, 82 (D.D.C. 2015)

This merger is not about providing better insurance products to consumers



Despite efficiency claims before Aetna's merger with Coventry, prices **went up** relative to other insurers.



U.S. & Plaintiff States v. Aetna Inc. & Humana Inc.