



The Pharmacist Activist

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Editorial

CVS-Aetna (continued)

Although the Department of Justice has approved the acquisition of Aetna by CVS-Caremark, this action also requires the review of District Court Judge Richard Leon. At the time I write this (February 12), Judge Leon has not yet completed his review. However, it is anticipated that he will provide his opinions soon, perhaps even before you receive this commentary. I have provided below the two letters I have sent to Judge Leon urging him to oppose this acquisition and also initiate action that would require CVS to divest Caremark because of their anticompetitive practices. Although many anticipate that the CVS-Aetna acquisition will be permitted to proceed, my additional purpose in now publishing these letters is the hope that the situations and egregious practices described will be of value in your continued activism in addressing these matters.

December 5, 2018

The Honorable Richard J. Leon
U.S. District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington, DC 20001

Dear Judge Leon:

I am encouraged to learn that you are continuing your evaluation of the potential consequences of the proposed CVS-Aetna acquisition/merger. It is my opinion that a merger of these two huge organizations would have highly negative consequences, most importantly for the quality and scope of health services for patients, as well as for independent community pharmacists. I urge you to rule against this acquisition, as well as the pending Cigna-Express Scripts acquisition. In addition, I urge

you to initiate or request an investigation of the CVS Caremark organization that I contend is engaged in highly anticompetitive practices and that CVS should be required to divest its Caremark component.

I am a pharmacist but do not own or practice in a community pharmacy. I have been a member of the faculty at the Philadelphia College of Pharmacy for 52 years. I recently retired from this position but continue to maintain a close awareness of the opportunities and challenges of community pharmacies in particular, and health care in general. I know that you will hear directly from many pharmacists regarding the financial difficulties they have personally experienced as a result of what I consider to be blatantly anticompetitive policies and practices of pharmacy benefit managers (PBMs) and health insurance companies. Accordingly, I will limit this letter to addressing some other concerns, although I have addressed many of the concerns of pharmacists in the materials I have enclosed.

Experience as a patient

As a *patient*, I and my family used an independent pharmacy in our community for several decades for our prescription medications and related services. We knew the pharmacists well and valued their services. The prescription benefit plan of my employer offered a financial incentive to use a mail-order pharmacy that was owned by or collaborating with the company administering the prescription benefit plan. However, we continued to use our local independent pharmacy even though we incurred higher out-of-pocket costs. Approximately three years ago, this pharmacy closed

because of increasing financial challenges and the fact that a new Rite Aid store was opening in the same block. We then started using another independent pharmacy located about 5 miles from our home, in which our experience has been very positive.

Several years ago, the consortium in which my employer is a participant switched to CVS Caremark as the administrator of its prescription plan. Although there was a financial incentive in this plan to use the Caremark mail-order pharmacy or a local CVS pharmacy, we were willing to pay the larger co-pays so that we could continue to use the independent pharmacy. However, in 2017 the prescription benefit plan was changed, in a manner that apparently was not clearly communicated to the employers in the consortium, and escaped the attention of our Human Resources Department. I and other employees were informed by CVS Caremark that the revised prescription plan would only permit two 30-day supplies of medications for chronic conditions to be obtained at a local pharmacy. Following that, 90-day supplies could be obtained from a Caremark mail-order pharmacy or a CVS local pharmacy, and that *there would no longer be any coverage for these medications at any local pharmacy other than CVS* (emphasis added). I use 5 medications daily for chronic conditions. In discussing this situation with my local independent pharmacist, I learned that I could obtain 90-day supplies of all 5 medications from this pharmacy at a cost that was lower than the copays I would have had to pay if I was to use the Caremark mail-order pharmacy or CVS local pharmacy. Needless to say, I do not use the prescription plan coverage for these medications, although CVS Caremark would presumably still be receiving the same compensation from my employer for my coverage.

Experience as an editor

My strong concerns regarding the need for more effective and appropriate, and safer use of medications by patients, as well as the increasing financial and other challenges experienced by pharmacists and other health professionals have resulted in my writing numerous editorials regarding these issues. In 2006, I began publishing a monthly newsletter, *The Pharmacist Activist*, and I have enclosed the following recent issues in which I voice concerns about the policies and practices of PBMs and health insurance companies:

- September, 2018 editorial: “Reducing Drug Costs –

PBMs are Not Needed and Should Not be Used!”

- August, 2018 editorial: “The Corporate Destruction of Health Care: Part 2”
- March, 2018 editorial: “Merger Mania – Bigger Isn’t Better!”
- January, 2018 editorial: “The FTC Must Prevent CVS from Acquiring Aetna, and Require CVS to Divest Caremark!”

Many of the concerns identified are not new ones, and I am also enclosing the May 2009 issue of *The Pharmacist Activist* with my editorial, “CVS Caremark – An Alliance that Must be BROKEN.” However, there is no question that the severity of the concerns and the threat to the survival of independent pharmacies have greatly increased over the last 10 years. Many independent pharmacies have had to close for financial reasons or are presently at risk of having to do so. The number of actual or potential closings of independent pharmacies because of these anticompetitive practices is not known but underestimated. To illustrate, I know of situations in which independent pharmacies have had to close because of current and worsening financial difficulties. It is common in these circumstances for a large chain pharmacy such as CVS to purchase some of the inventory of the closing independent pharmacy. In some of these situations, the chain pharmacy (e.g., CVS) may offer employment to the pharmacist(s) and other staff of the pharmacy that has closed, and there is also a non-compete agreement, the terms of which are usually confidential. Because continued criticism of the predatory practices of the PBMs such as CVS Caremark might place the future employment of the pharmacist(s) and staff in jeopardy, they are silent.

Hearing

It is my understanding that you will be conducting a hearing regarding the proposed CVS-Aetna merger/acquisition on December 18. If it is possible, I would welcome the opportunity to present comments. If that is not possible, will the hearing be open to the public so that I can attend and listen?

Thank you for your attention to these very important matters. If you have any questions regarding my comments, I would be pleased to respond.

Sincerely,
Daniel A. Hussar

January 24, 2019

The Honorable Richard J. Leon
U.S. District Court for the District of Columbia
333 Constitution Avenue N.W.
Washington, DC 20001

Dear Judge Leon:

I appreciate your continued evaluation of the potential consequences of the proposed CVS-Aetna acquisition/merger, and your concerns that have resulted in your further analysis of this plan. On December 5, 2018 I wrote to you to urge that you rule against this acquisition, and to initiate action that would require CVS to divest its Caremark component because of the anticompetitive practices in which they are engaged. I have attached a copy of my letter.

Since the time that I wrote you in December, additional pertinent information has become available, and I have summarized the most important information below.

1. Walmart announced that it would no longer participate in the CVS-Caremark prescription program because of the financial and other terms of the program in which it dispenses prescriptions to individuals covered by the CVS plans. Walmart's statement includes the following comments: "This issue underscores the problems that can arise when a PBM can exert their unregulated power to direct members on where to fill their scripts, disrupting patients' health care... Walmart is standing up to CVS's behaviors that are putting pressure on pharmacies and disrupting patient care."

Although Walmart and CVS quickly agreed on a new deal, the details of which have not been revealed, this experience, and the Walmart statement noted above, provide additional examples of how CVS-Caremark can use its size and influence to the disadvantage of patients and its competitors, even before its acquisition of Aetna is permitted to be implemented. One has to think that the fact that this confrontation between two giant companies was so quickly resolved is because CVS did not want a public debate of its anticompetitive practices to be prolonged at the time when you are evaluating the ramifications of it having an even more powerful influence on the provision of health care with a

priority of increasing its own profits.

If a company as large as Walmart has such concerns about the financial and other terms of CVS-Caremark prescription programs, independent pharmacies that do not have the leverage that Walmart has to force CVS to provide a better deal have little chance of surviving.

2. The January 5-6, 2019 issue of *The Wall Street Journal* has a front-page story (Joseph Walker and Christopher Weaver) titled: Medicare Overpaid Insurers Billions: CVS, Humana and others managing Part D drug plans pocketed \$9 billion in extra revenues." Excerpts from this article are noted below:

"Each June, health insurers send the government detailed cost forecasts for providing prescription-drug benefits to more than 40 million people on Medicare. . .

However, year after year, most of those estimates have turned out to be wrong in the particular way that, thanks to Medicare's arcane payment rules, results in more revenue for the health insurers, a *Wall Street Journal* investigation has found. As a consequence, the insurers kept \$9.1 billion more in taxpayer funds than they would have had their estimates been accurate from 2006 to 2015, according to Medicare data obtained by the Journal.

Those payments have largely been hidden from view since Medicare's prescription-drug program was launched more than a decade ago, and are an example of how the secrecy of the \$3.5 trillion U.S. health-care system promotes and obscures higher spending."

Even if what has occurred is somehow legal, it is wrong and a blatant abuse of taxpayer funds. Through deception and lack of transparency, CVS and others have outsmarted the government and taxpayers by exploiting prescription programs and the healthcare system to increase their profits, and this situation will only be exacerbated if CVS is permitted to acquire Aetna. I commend you for your insight and concerns in further investigating this plan.

3. The *Columbus Dispatch* has published a series of investigative reports regarding the anticompetitive

practices of CVS in its Medicaid prescription programs in Ohio. The January 20, 2019 issue includes an article (Marty Schladen and Cathy Candisky) titled: “CVS paid itself far more than some major competitors, report says.” This article includes the following statements:

“Critics say the state report is strong evidence that CVS was, in essence, using taxpayer money to give its own retail stores an unfair advantage in the marketplace.

At the same time this issue is being scrutinized in Ohio, CVS is attempting to convince a federal judge that its \$70 billion proposed merger with insurance giant Aetna doesn't pose a threat to competition in the pharmacy marketplace.”

In spite of the fact that the information that is available in heavily redacted disclosures is very limited and incomplete, there is sufficient evidence to demonstrate CVS's anticompetitive practices. In addition, in many CVS-Caremark prescription programs there are restrictions and/or incentives that result in patients having to obtain their prescriptions in CVS stores instead of the pharmacies they have used for many years.

4. Although it does not involve CVS or Aetna, another recent report is pertinent to the matter you are addressing. Optum, the PBM of UnitedHealth has sued a former executive who has joined the Amazon/J.P. Morgan/Berkshire Hathaway partnership to address healthcare issues, because it alleges that the former employee would violate a non-compete agreement and reveal trade secrets. I recognize the importance of trade secrets and that certain information would be of value to competitors. However, these explanations are being used to prevent the discovery of the deception and anticompetitive practices that are occurring.

The strength and extent of efforts on the part of CVS and others to prevent disclosure of secretive financial practices and policies invite suspicion that certain of their activities may be unethical, fraudulent, and even illegal, in addition to being anticompetitive. Should the provision and operation of programs that are funded by taxpayers and our government not be completely transparent? As a taxpayer and Medicare participant, I am outraged that my tax dollars have been used for the enrichment of executives of CVS and related companies. The potential for these abuses will become even worse if they are permitted to get even larger and I strongly urge you to rule against the acquisition of Aetna by CVS. We depend on our legislators, government agencies, and members of the judiciary to protect the interests of patients/consumers by preserving competition in the marketplace. It is very unfortunate that the Federal Trade Commission/Department of Justice had incomplete information and/or overlooked important considerations with regard to how the combination of CVS and Aetna would significantly harm competitors and consumers.

I know that there are conditions under which you have allowed the CVS acquisition of Aetna to proceed while you study this matter. However, CVS executives are stating that CVS and Aetna are one company, and that CVS is rolling out new services for Aetna members. These statements are extremely misleading, and arrogantly disrespectful to you and your authority for reviewing and approving the acquisition that is still pending.

Thank you for your recognition of the importance of these issues and your willingness to investigate them further.

Sincerely,
Daniel A. Hussar

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