

MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30-4:55 pm
Dale Collins
dale.collins@shearman.com
www.appliedantitrust.com

Class 20 (November 6): Anthem/Cigna (Unit 13)¹

The reading for the class consists of materials in connection with the proposed Anthem/Cigna merger. The full set of case materials is very large—over 350 pages not counting a 140-page district court opinion—and obviously too much to assign. I have identified a much more limited set of materials for the required reading, although I have included the full set of materials as supplemental reading. But read the table of contents of the full set to see what you are missing.

Anthem/Cigna was a proposed \$52.2 billion deal that would have combined the second and third largest medical insurance companies. Start with the Anthem/Cigna joint press release announcing the deal and the DOJ press release announcing the action to block the transaction. Judge Jackson's February 8, 2017, order entering the preliminary injunction nicely summarizes her detailed opinion and is worth a careful read.

The bulk of the reading is the D.C. Circuit's opinions on the appeal. Judge Rogers wrote the majority opinion and Judge Kavanaugh wrote a dissent. The issue on appeal was whether the district court erred in its analysis of Anthem's efficiency defense. Judge Rogers' opinion is a masterful evisceration of the defendants' efficiency defense and provides courts and the agencies with a roadmap of how to deal with the defense in the future.

Something you will not see in the required reading but is one of the most interesting aspects of the transaction is that the merging parties had a falling out as the case was going to trial. One source of tension was the role of Cigna CEO David Cordani, who had obtained a commitment from Anthem CEO Joseph R. Swedish that Cordani would have oversight of the combined company's business segments. Reports suggest that Swedish quickly came to regret giving Cordani such a large role and soon began to pull back on his commitment. By the time of trial the companies were in semi-open warfare with each other. Swedish testified at trial that after the DOJ filed its complaint to block the deal Cigna stopped cooperating on planning for what would happen after the deal closed. For its part, Cigna accused Anthem of pursuing a strategy, both in court and in the integration planning, that was designed to harm Cigna. Cigna declined to sign onto several Anthem court filings and even cross-examined some of the Anthem witnesses. Cigna witnesses also were not helpful to Anthem in supporting Anthem's efficiency defense.

On February 14, 2017, less than a week after Judge Jackson entered her order enjoining the transaction, Cigna announced that it was terminating the merger agreement and seeking payment of the \$1.85 billion antitrust reverse termination fee. In its press release, Cigna said it "believes that the transaction cannot and will not achieve regulatory approval and that terminating the agreement is in the best interest of Cigna's shareholders." Cigna also filed suit in the Delaware Court of Chancery seeking a declaratory judgment that Cigna has lawfully terminated the merger

¹ A reasonably complete set of the most important filings in the litigation may be found [here](http://www.appliedantitrust.com) on AppliedAntitrust.com.

agreement and that Anthem is not permitted to extend the termination date under the terms of the agreement. Cigna's complaint also sought payment by Anthem of the reverse termination fee as well as additional damages in an amount exceeding \$13 billion, which included the amount of premium that Cigna shareholders did not realize as a result of the failed merger process.

Anthem, which had filed a notice of appeal from Judge Jackson's order (in which Cigna had not joined), did not take this well. Among other things, if Cigna's termination of the agreement was effective it would moot Anthem's appeal. So Anthem immediately sued Cigna in Delaware Chancery Court for a TRO enjoining Cigna from terminating the merger agreement and seeking specific performance of Cigna's obligations under the merger agreement (including the antitrust cooperation provisions) and damages for Cigna's prior breach of its obligations under the merger agreement. In its press release, Anthem asserted that Cigna had conducted an "ongoing campaign to sabotage the merger and deflect attention from its repeated willful breaches of the merger agreement." Anthem also noted that on January 18, 2017, Anthem exercised its right to extend the merger agreement through April 30, 2017, and that in any event Cigna did not have a right to terminate the agreement because it has failed to perform fully its obligations in a manner that has proximately caused or resulted in the failure of the merger to have been consummated. On February 15, the Delaware Chancery Court entered the TRO enjoining Cigna from terminating the merger agreement, which allowed the appeal of Judge Jackson's order to go forward.

The D.C. Circuit affirmed Judge Jackson's order on April 28. On May 5, Anthem filed a petition for a writ of certiorari with the Supreme Court. On May 11, however, the Delaware Chancery Court denied Anthem's motion for a preliminary injunction to extend its order enjoining Cigna from terminating the merger agreement and Anthem terminated the agreement the next day. The Anthem and Cigna actions continue in Delaware court on the payment of the antitrust reverse breakup fee and the opposing claims for damages for breach of contract.

Enjoy the reading! Email me if you have any questions.

Dale