

PUBLICATION

Anthem Loses Merger Appeal in a 2-1 Decision by the D.C. Circuit

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On March 24, the D.C. Circuit held oral argument on Anthem's appeal in *United States v. Anthem*, in which Anthem sought to have the appellate court overturn District Court Judge Amy Berman Jackson's ruling that barred the parties from consummating their proposed merger. The principal focus of Anthem's appeal was their argument that the merger would provide significant cost-saving efficiencies (which Anthem values at more than \$2 billion and would be created by a reduction in health care costs) was not given sufficient weight by the District Judge.

The appeal was conducted on an expedited basis (in recognition of an April 30 deadline for the merger in the parties' merger agreement), and on April 28, the D.C. Circuit Court issued its highly-anticipated decision in the matter. In a 2-1 decision, the Court denied Anthem's appeal, affirming the District Court decision. In reaching this decision, Judge Judith Rogers held that Anthem failed to show "the kind of extraordinary efficiencies necessary to offset the conceded anticompetitive effect of the merger in the fourteen Anthem states: the loss of Cigna, an innovative competitor in a highly concentrated market." The Court also held that the District Court's ruling was supported for the additional, independent reason that the merger would have anticompetitive effects in the Richmond, Virginia large group employer market (which was a local market that the parties focused on at trial).

Judge Brett Kavanaugh issued a dissenting opinion in the case, agreeing with Anthem that the efficiencies they claimed would occur – as a result of the merger – had not been given sufficient weight by the District Court. However, Judge Kavanaugh explained that this was not enough to resolve the issue – instead, he explained that he would remand the case for further proceedings by the District Court on the issue of whether the merger would likely have anticompetitive effects in the provider market, an issue that Judge Berman Jackson had not reached. Notably, however, as Judge Rogers stated in her decision, Judge Kavanaugh did not address whether the lower court's decision as to the Richmond market was incorrect, notwithstanding that it constituted an additional, independent reason for the lower court's decision.

The D.C. Circuit ruling is clearly a significant setback for Anthem, and it could be the development that finally brings Anthem's effort to consummate the merger to a close. Only time will tell. Stay tuned.