

Anthem/Cigna litigation underscores importance of antitrust planning in transactions

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On August 31, 2020, the Delaware Chancery Court issued an opinion in litigation between Anthem and Cigna related to the contract in their terminated merger.¹ In its sprawling 306-page opinion, the court detailed a “corporate soap opera” in which the parties’ “battle for power spanned multiple acts.”²

Ultimately resulting in a draw, with neither party receiving any compensation, the opinion exemplifies the importance of involving antitrust counsel in all aspects of a transaction that may raise regulatory scrutiny from antitrust authorities.

Behind the scenes, the relationship between Anthem and Cigna began to deteriorate when they were at odds about who would lead the merged entity and whether the transaction was an acquisition (as Anthem viewed it) rather than a merger of equals (as Cigna viewed it).

In complicated transactions such as the Anthem/Cigna merger, antitrust strategy must be accounted for from the very beginning, including during initial negotiations, board and management advisory meetings, the drafting of the merger agreement, public relations and communications efforts, and many other deal-related workstreams peripheral to interactions with antitrust regulators.

ANTHEM/CIGNA CONTRACT LITIGATION

Anthem and Cigna agreed to merge in July 2015, in a transaction valued at over \$54 billion. After a year-long investigation, the Department of Justice, joined by 11 states and the District of Columbia, sued to enjoin the merger in July 2016 (DOJ Litigation).³ The DOJ Litigation ultimately went to trial, and in February 2017 the District Court for the District of Columbia permanently enjoined the transaction.⁴

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By February 2016, Cigna secretly hired outside counsel and a communications firm to influence Anthem’s approach to post-merger organization and, if Cigna’s goals were not met, to work against the consummation of the merger.⁶

At this point, Cigna also refused to engage in integration planning and withheld information from Anthem’s consultants and economists.⁷ By March 2016, the Delaware Chancery Court found that Cigna had turned against the merger, and continued to stonewall integration planning attempts while criticizing Anthem’s regulatory strategy.⁸

The court found that Cigna’s hostility to the transaction came to a head during the DOJ Litigation trial, with Cigna witnesses ultimately giving testimony that was damaging to Anthem’s defense and supportive of the DOJ’s arguments against the merger.⁹

Shortly after Anthem appealed the District Court’s decision in early 2017, Cigna attempted to terminate the merger agreement and sued Anthem for breach of the agreement’s antitrust covenant, alleging \$13 billion in damages and demanding the \$1.85 billion termination fee delineated in the agreement.¹⁰

In turn, Anthem sued Cigna for breach of its obligations under the agreement and alleged \$20 billion in damages (together, the Contract Litigation).¹¹ In the DOJ Litigation, the Court of Appeals for the District of Columbia Circuit ultimately affirmed the District Court’s opinion blocking the merger in April 2017,¹² and Anthem formally terminated the merger agreement on May 12, 2017.

Five years after Anthem and Cigna announced their deal, and over a year after the merger agreement was formally terminated, the Delaware Chancery Court decided the breach of contract claims between the parties.

In their merger agreement, the parties agreed to several provisions that the Delaware Chancery Court found relevant to its opinion. The court went into extreme detail and analysis of the language of these provisions, the most pertinent of which are summarized below:

- **Reasonable Best Efforts Covenant:** The parties agreed to take “reasonable best efforts” to satisfy closing conditions and complete the merger. This included obligations to satisfy

a “No Injunction Condition,” which conditioned closing on no governmental entity imposing a “Legal Restraint” preventing consummation of the merger, including a permanent injunction due to antitrust issues.

- **Regulatory Efforts Covenant:** The parties agreed to take efforts beyond those in the Reasonable Best Efforts Covenant to secure antitrust approval, requiring “any and all actions necessary to avoid each and every impediment” under the antitrust laws. Specifically, this covenant required the parties to “(I) obtain all Necessary Consents; (II) resolve any objections that may be asserted by or on behalf of any Governmental Entity ... ; and (III) prevent the entry of, and have vacated, lifted, reversed or overturned, any order that would prevent, prohibit, restrict, or delay the consummation of the Mergers”
- **Burdensome Condition Exception:** The Reasonable Best Efforts Covenant and Regulatory Efforts Covenant were both subject to a “Burdensome Condition Exception,” which excused Anthem (but not Cigna) from taking any actions that would have a “material adverse effect” on the merged company.
- **Regulatory Cooperation Covenant:** The merger agreement gave Anthem authority to take the lead in communicating with regulators and developing regulatory strategy, including for any litigation with the DOJ.
- **Termination Provision:** The merger agreement allowed either party to terminate the agreement if a Legal Restraint rendered the No Injunction Condition impossible to satisfy, unless the party seeking to terminate “proximately caused or resulted in the imposition of” the Legal Restraint (Legal Restraint Termination Right). Additionally, either party could terminate if the merger did not consummate prior to the termination date and the party seeking to terminate did not proximately cause that failure (Temporal Termination Right). In the event that the only outstanding condition to closing was antitrust approval, the Termination Provision allowed the merger agreement’s termination date to be extended by either party to no later than April 30, 2017.
 - Anthem also had a “Termination Right for a Cigna Breach,” which allowed Anthem to terminate prior to closing due to failure of a condition (e.g., the No Injunction Condition) caused by Cigna not satisfying its obligations (including related to regulatory efforts). Such a failure must be incapable of being cured prior to closing or within 30 days.
- **RTF Provision:** The merger agreement’s reverse termination fee (RTF) provision stated that Anthem would be required to pay a \$1.85 billion RTF if either side terminated the agreement under its Legal Restraint

Termination Right or Temporal Termination Right, regardless of whether or not antitrust approval was secured. However, Anthem was not obligated to pay the RTF if other conditions to closing were not satisfied, including Cigna’s obligations under both Efforts Covenants.

- **Effect-of-Termination Provision:** In the merger agreement, Cigna and Anthem agreed to modify the circumstances under which they potentially could recover damages. This “Effect-of-Termination Provision” stated that upon termination of the agreement, no party will be held liable unless a party (i) committed fraud, (ii) committed a “Willful Breach” of any representation or warranty, or (iii) committed a Willful Breach of any covenant or agreement in the agreement.
 - Willful Breach was defined as “a material breach of this Agreement that is the consequence of an act or omission by a party with the actual knowledge that the taking of such act or failure to take such action would be a material breach of this Agreement.”

DELAWARE CHANCERY COURT OPINION

Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation by the defendant; and (3) a resulting damage to the plaintiffs.¹³

The merger agreement gave Anthem authority to take the lead in communicating with regulators and developing regulatory strategy, including for any litigation with the DOJ.

In the Contract Litigation, the court found that the “resulting damage” prong was the most complex issue for each party’s claims based around the Efforts Covenants due to the element of causation — namely, whether either party materially contributed to the DOJ’s blocking of the merger and the resultant failure of the No Injunction Condition.

The court stated that a party’s breach need not be the but for cause of the failure, but simply that its breach made satisfaction of the condition “less likely.”

However, if a breaching party can prove by a “preponderance of the evidence” that the condition would have failed regardless (i.e., the merger would have been enjoined even if the breaching party had fulfilled its contractual obligations), that party isn’t liable for damages.

CLAIMS AGAINST CIGNA

For Cigna, at issue in the Contract Litigation was whether Cigna breached the merger agreement through its concerted

attempts to interfere with approval of the transaction. Ultimately, the court found that Cigna breached the Reasonable Best Efforts Covenant through its covert communications campaign and by withdrawing from integration planning.

Refusing to decide whether the Regulatory Efforts Covenant was what is commonly referred to as a “hell-or-high-water” provision, the court found that Cigna was required to take “any and all actions necessary” to secure regulatory approval from the antitrust authorities.

The Chancery Court also held that “[a] necessary corollary” of the Regulatory Cooperation Covenant granting Anthem control over regulatory strategy “was that Cigna was obligated to follow Anthem’s lead and adhere to Anthem’s strategy.”

Accordingly, the court found that Cigna breached both the Regulatory Efforts Covenant and the Regulatory Cooperation Covenant by opposing a divestiture, resisting mediation with the DOJ and undermining Anthem’s defense in the DOJ Litigation.

For Cigna, at issue in the Contract Litigation was whether Cigna breached the merger agreement through its concerted attempts to interfere with approval of the transaction.

Although attacking the merger was the “exact opposite” of Cigna’s obligations outlined in the Efforts Covenants, the court ultimately did not require Cigna to pay damages to Anthem.

In evaluating whether Cigna’s breaches had material effects on the DOJ Litigation and the resultant failure of the No Injunction Condition, the court found that Cigna’s covert communications campaign did not have a significant effect on the DOJ or the courts and merely served to provide “powerful evidence” of Cigna’s intent to oppose the merger.

And, while Anthem proved that the rest of Cigna’s breaches contributed materially to failure of the No Injunction Condition, including by undermining Anthem’s local-markets-based arguments, Cigna successfully proved that it was “more likely than not” that the DOJ would have won a suit to block the merger using national-markets-based arguments even if Cigna had fulfilled its contractual obligations.

CLAIMS AGAINST ANTHEM

Regarding Anthem, at issue were Cigna’s claims that Anthem breached the Regulatory Efforts Covenant by (1) failing to change certain rules Anthem was subject to as a member of the Blue Cross Blue Shield Association (Blues Rules) and

(2) omitting \$704 million of potential merger-specific synergies from a white paper submitted to the DOJ.

The court found that Anthem “selected a viable strategy seeking to change [the Blues Rules]” and “pursued this strategy in a logical way,” including by avoiding actions that may have resolved issues raised by the DOJ but would have caused disastrous effects on Anthem’s business.

The court also found that Anthem chose a reasonable regulatory strategy and was only forced to exclude the efficiencies at issue because Cigna refused to provide the detailed support necessary to verify them.

Additionally, the court pointed to Cigna’s initial support of Anthem’s regulatory strategy before the parties’ relationship deteriorated, as well as Cigna’s contemporaneous conduct during the DOJ’s investigation, as evidence that Cigna did not disagree with Anthem’s regulatory approach other than for the purposes of the Contract Litigation.

The court went so far as to assume, *arguendo*, that Anthem did breach its obligations under the merger agreement, and found that under the Effect-of-Termination Provision negotiated by the parties, Anthem would still not be liable for any damages.

Because of the Effect-of-Termination Provision, Cigna had to demonstrate not only that Anthem’s breach of the Efforts Covenants was a material breach, but also that it was committed “with the actual knowledge that the taking of such act or failure to take such action would be a material breach.”

Reviewing the DOJ Litigation record, the court found that “Anthem acted at all times with the belief that it was complying with the merger agreement and using its utmost efforts to complete the Merger.”

The court specifically pointed to the approximately \$800 million Anthem expended, the aggressive positions it took on privilege and certain aggressive business decisions Anthem testified it would take post-merger.

The court noted that “Anthem was *not* contractually obligated to *achieve* regulatory approval,” but rather “adopted a reasonable strategy and pursued it, consistent with its obligations under the Regulatory Efforts Covenant.”

Finally, the court found that Cigna could not recover the \$1.85 billion RTF, because Anthem validly terminated the merger agreement using its Termination Right for a Cigna Breach.

Although Cigna argued that it terminated the merger agreement under its Temporal Termination Right, the court found Cigna’s arguments unavailing — Cigna first attempted to terminate after Anthem had effectively extended the termination date, and later attempted to terminate while subject to a temporary restraining order that prohibited Cigna from terminating the agreement.

Because Anthem sent notice that it was exercising its Termination Right for a Cigna Breach prior to the court lifting the restraining order on Cigna's ability to terminate, when Cigna did attempt to exercise its termination right "[t]here no longer was a Merger Agreement in effect for Cigna to terminate."

CREDIBILITY OF THE PARTIES

Throughout its opinion, the court noted that "the key witnesses suffered from serious credibility problems." For example, the court found that Cigna witnesses gave "less than credible testimony when attempting to justify" adopting stances damaging to the regulatory case that conflicted with their positions before succession planning became an issue.

Further, the court found that Cigna witnesses "worked to hide their efforts [to undermine the merger] and manufacture an alternative narrative" in which Anthem was incompetent. Anthem witnesses, on the other hand, were found to have a "desire to consummate the transaction [which] led them to make statements, advance arguments, and give testimony that were at times questionable, at other times unsupported, and on some occasions untrue."

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For example, Anthem executives spoke positively about cooperation between the parties that was belied by the evidentiary record. Testimony given by Anthem executives during the DOJ Litigation at times contradicted testimony during the Contract Litigation, and the court cited to credibility issues during the DOJ Litigation as further evidence that Anthem testimony was not credible.

Finally, the court found that both parties "anticipated [the contract] lawsuit, and they engaged in careful record-making to prepare for it," making it "difficult to accept at face value certain carefully crafted and heavily vetted documents" in light of the larger record.

CONCLUSION

While hindsight may be 20/20 when evaluating a party's actions after a transaction is unsuccessful, and no one wants to focus on the worst-case scenario, if parties plan ahead they can effectively structure efforts provisions in their merger agreements, including antitrust covenants, to avoid being penalized if their attempts to complete the deal are ultimately unsuccessful.

As evidenced by the Anthem/Cigna Contract Litigation, it is important to clearly define and understand the obligations

each party has to secure regulatory approval to avoid liability for a failed transaction.

Because of the importance antitrust covenants play in settling disputes resulting from terminated or enjoined transactions, clients should work closely with antitrust and corporate counsel to first assess the potential antitrust risks posed by the transaction and then to understand the implications of any antitrust-related provisions under the merger agreement.

However, the Anthem/Cigna Contract Litigation also makes clear that written agreements and sworn testimony are not the only evidence a court may consider. Public statements and actions taken behind the scenes may be cited as evidence of a party's intent to fulfill its obligations, and can serve to bolster or, in the case of Anthem/Cigna, undermine the credibility of witnesses during a dispute.

In order to understand the interplay between actions and communications seemingly unrelated to antitrust, regulatory approval and antitrust covenants, antitrust counsel should be retained early and consulted on an ongoing basis regarding diligence, integration and other workstreams concerning the merger.

Notes

- ¹ *In re Anthem-Cigna Merger Litigation*, No. 2017-0114-JTL, 2020 WL 5106556 (Del. Ch. Aug. 31, 2020).
- ² *Id.* at 310.
- ³ Complaint, *United States of America v. Anthem, Inc.*, No. 16-1493 (ABJ) (D.D.C. Feb. 21, 2017).
- ⁴ *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir.).
- ⁵ *In re Anthem-Cigna Merger Litigation*, No. 2017-0114-JTL, at 55 (Del. Ch. Aug. 31, 2020).
- ⁶ *Id.* at 70-71.
- ⁷ *Id.* at 74-75.
- ⁸ *Id.* at 77.
- ⁹ *Id.* at 142.
- ¹⁰ Complaint, *Cigna Corp. v. Anthem, Inc.*, No. 2017-0109-JTL (Del. Ch. Feb. 14, 2017).
- ¹¹ Complaint, *Anthem, Inc. v. Cigna Corp.*, No. 2017-0114-JTL (Del. Ch. Feb. 17, 2017).
- ¹² *United States v. Anthem, Inc.*, 855 F.3d 345 (D.C. Cir. 2017).
- ¹³ *In re Anthem-Cigna Merger Litigation*, No. 2017-0114-JTL, at 189 (Del. Ch. Aug. 31, 2020), quoting *WaveDivision Hldgs. v. Millennium Digital Media*, 2010 WL 3706624, *13 (Del. Ch. Sept. 17, 2010).

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