

Delaware Court of Chancery Denies Damages After Collapse of Proposed \$54 Billion Merger

I. Overview

The Delaware Court of Chancery (“Chancery Court”) held that neither Cigna Corp. (“Cigna”) nor Anthem Inc. (“Anthem”) could recover billions of dollars in damages from one another after the 2017 abandonment of their proposed \$54 billion merger. On August 31, 2020, in a 311-page decision, the Court determined that a permanent injunction prohibiting the merger for violating antitrust law triggered a failure to satisfy the no-injunction provision in the merger agreement, eliminating obligations on either side to close the deal. The resulting decision leaves both parties managing the consequences and costly outcome of the failed merger.

II. Background and Procedural History

At the time of the proposed merger, Anthem and Cigna were the second and third largest private health insurance providers in the United States. *In re Anthem-Cigna Merger Litigation*, Del. Ch., C.A. No. 2017-0114-JTL, at *1 (Aug. 31, 2020).¹ On July 23, 2015, Anthem and Cigna entered into an agreement in which Anthem would pay over \$54 billion to merge with Cigna, which, if completed, would have resulted in the creation of the nation’s largest health care insurer. The agreement contained covenants that required the parties to use their best efforts to satisfy all of the conditions to closing the merger (the “Efforts Covenants”). Additionally, the transaction was subject to several conditions, including one that provided for the absence of any injunction that would prevent consummation of the merger (the “No Injunction Condition”).

Negotiations of the merger were contentious. While Cigna favored a deal in which its CEO would be the new company’s CEO, Anthem insisted on its own CEO. Additionally, after the agreement was signed, Cigna resisted integration planning. The merger was complicated by the fact that to satisfy its obligations as a member of the Blues Association, Anthem had to ensure that two-thirds of the combined company’s annual revenue was derived from Blue-branded plans. Thus, for the new company to remain a member of the Blues Association, the new company would have to divest business to achieve compliance. Perceiving Anthem to be launching a hostile takeover of Cigna and concerned about Anthem’s ability to complete the merger due to its obligations as a member of the Blues Association, Cigna ultimately withdrew from integration planning.

The parties notified the proposed transaction under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and the DOJ subsequently reviewed the transaction. On July 21, 2016, the DOJ sued Anthem and Cigna, challenging the transaction and arguing that the merger would substantially lessen competition in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Complaint at 30, *United States v. Anthem*, No 1:16-cv-01493 (D.C. Cir. Jul. 21, 2016). The DOJ proceeded under a theory that the merger would reduce the number of insurance providers and create unlawful levels of market concentration. In February 2017, the United States District Court for the District of Columbia (“D.C. District Court”) issued a permanent injunction to prevent the merger from closing, and in April 2017, the United States Court of Appeals for the District of Columbia (“D.C. Circuit Court”) affirmed.²

¹ Unless otherwise noted, all quotations in the memo are from the following case:
<https://courts.delaware.gov/Opinions/Download.aspx?id=310020>.

² See *United States v. Anthem*, 236 F. Supp. 3d 171 (D.D.C. 2017); *United States v. Anthem*, 855 F.3d 345 (D.C. Cir. 2017).

Cigna filed suit in the Delaware Chancery Court after the D.C. District Court's opinion, but before the D.C. Circuit Court issued its opinion. At the same time, Anthem filed a case in the Chancery Court to keep the merger agreement in place. The Chancery Court issued a temporary restraining order to enjoin Cigna from terminating the agreement. On May 12, 2017, Anthem issued a notice terminating the agreement. The Chancery Court subsequently consolidated both cases, and the litigation proceeded as a damages action, with both parties contending the other breached covenants in the merger agreement and Cigna separately seeking to recover a \$1.8 billion reverse termination fee.

III. The Delaware Court of Chancery Opinion

Vice Chancellor J. Travis Laster considered whether the parties breached the covenants of the merger agreement under Delaware law by determining whether there was (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages. Each party's claims arose from violations of the Efforts Covenants, with each side seeking damages based on the other side's failure to consummate the agreement and each party's obligations to consummate the agreement being subject to the No Injunction Condition. The Court concluded both parties failed to establish a claim for damages.

Although the Court determined Cigna materially breached the Efforts Covenants, the Court found Anthem failed to show Cigna's breaches led to damages, as Cigna proved the No Injunction Condition would not have been satisfied anyway because the federal courts enjoined the merger. Anthem proved that Cigna's breaches of the Efforts Covenants contributed materially to the failure of the No Injunction Condition by establishing Cigna's withdrawal from integration planning and its overall opposition to the merger. However, Cigna proved that even had it fulfilled its obligations under the Efforts Covenants, the DOJ still would have sought to block the merger based on its anticompetitive effects, the D.C. District Court would have enjoined the merger based on DOJ's charges, and the D.C. Circuit Court would have affirmed that decision. Thus, the No Injunction Condition would have failed regardless.

The Court also held Cigna failed to show that Anthem breached its obligations under the Efforts Covenants, as Anthem supported the merger throughout the entire period. Even if Cigna had proved Anthem violated the Efforts Covenants, the Court held Cigna still could not recover damages because under the language of the agreement, termination extinguished any liability for any party except for damages for willfully or knowingly committing a breach of the agreement. The Court held Cigna failed to prove Anthem knowingly committed a breach of the Efforts Covenants, as Anthem continuously acted under the belief it was complying with the agreement and using its best efforts to consummate the merger.

Finally, the Court held Cigna could not prove Anthem was liable for the Reverse Termination Fee because Anthem's termination preceded Cigna's termination, foreclosing Cigna's ability to recover the fee.

Both parties issued statements after the decision was released that they were pleased with the outcome. Cigna, however, is currently considering an appeal.

IV. Conclusion

This decision illustrates the difficulty in obtaining damages for a failed merger challenged by the DOJ, even when one party is found to have materially breached the covenants in a merger agreement. However, even had both parties in this case performed in accordance with the Efforts Covenants, the outcome would have been the same. Each party now must bear the losses it suffered from the abandoned merger and resulting litigation.

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Should you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email authors Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com; or Lauren Kosches at 212.701.3298 or lkosches@cahill.com; or email publications@cahill.com.

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