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3 Lessons From The Failed $54B Cigna-Anthem Merger, Law360, ft. Patrick Kennell

Patrick Kennell, Partner, was quoted in *Law360's article written by Benjamin Horney, published on September 1, 2020.*

When it comes down to it, the decision in this case was relatively simple: A federal antitrust injunction in 2017 triggered the failure of a no-injunction provision in the deal, eliminating obligations to close on either side. Thus, while both sides made solid cases for breaches of provisions and covenants, neither is entitled to damages.

"When you boil it down, it's a rather straightforward legal analysis," said Patrick Kennell, a partner at Kaufman Dolowich Voluck LLP. "It's breach and causation in the simplest terms."

Still, the yearslong drama of the situation — which includes multiple lawsuits that were consolidated into one and a Cigna executive who seemingly went rogue to try to dampen the deal's prospects during the antitrust trial — inspired Vice Chancellor Laster to pen a remarkable opinion that's so long and filled with detail that it could be repackaged and sold in bookstores.

"It's a tour de force," said Lawrence A. Hamermesh, professor emeritus at Widener University Delaware Law School.

Steve Levitsky, an antitrust lawyer based in New York, compared the vice chancellor's opinion to Homer's epic poem "The Iliad" in its expansiveness.

"This is a very Homeric opinion," Levitsky said. "It's an extraordinary decision. The amount of detail he analyzed is incredible. He wanted to explain the characterization and plot development."

Not only that, but the vice chancellor seemingly sought to signal to other companies and legal counsel that they should take care to learn from the mistakes of Cigna and Anthem.

"I think he had many purposes in this decision," Levitsky said. "One is to rule on the claims, which he did, all in the last 30 pages or so. But he also wanted to make this a public example of how people have essentially squandered court time and resources arguing about a transaction they knew would never go through."
This outcome leaves the parties where they stand. Neither side can recover from the other. Each must deal independently with the consequences of their costly and ill-fated attempt to merge.
Potential Issues Should Be Solved in Advance

Every M&A agreement sets out the terms and conditions and makes clear which party bears what risks, but the Cigna-Anthem situation underscores the importance of thinking through every potential issue before a deal is signed. It's imperative that lawyers help clients address even the most outlandish of possible scenarios, according to Levitsky.

"I've been involved in a number of deals where there were definitely potential problems, and when you'd ask, 'Don't you think we should put in a provision to protect against these things?' people didn't want to do it," Levitsky said. "Corporate attorneys are often optimists in the sense that they don't want to face working out the details of what could go wrong and provide for them in the agreement."

In this case, the companies failed to adequately address obvious antitrust concerns that would result from a tie-up of two of the largest health insurance providers in the nation, which resulted in the U.S. Department of Justice enjoinment that ultimately made it so neither side could collect damages.

According to Hamermesh, the DOJ's decision to enjoin the deal in 2017 actually wound up helping Cigna, because without it the company could have been on the hook for damages related to multiple contract breaches.

"Cigna really dodged a bullet," Hamermesh said. "[Vice Chancellor Laster] made it seem plausible that they violated a number of the covenants in the merger agreement. The only reason he didn't stick it to them, as far as I can tell, is that the antitrust case was going to end up the way it did anyhow."

Meanwhile, there wasn't consensus from the two companies on who would lead the merged entity. An initial succession plan unraveled and resulted in a battle for executive control between Cigna CEO David Cordani and then-Anthem CEO Joseph Swedish, and the bad blood steadily increased as Cordani sought to displace Swedish as leader of the combined company.

"There's a really important human factor in all these transactions," said Byron Egan, a corporate partner at Jackson Walker LLP.

By the time the matter was being addressed in court with the DOJ, Cordani was being accused of an effort to sabotage the deal, complete with a campaign of unflattering information leaks to the public.

"When you're dealing with a human being and their livelihood, people can do funky things," Kaufman Dolowich's Kennell said. "This is an absolute lesson to, as much as you can, quantify things like management succession in the deal documents."

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