

MERGER ANTITRUST LAW

LAW 1469
Georgetown University Law Center
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Tuesdays and Thursdays, 3:30 pm – 5:30 pm

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CLASS 9 WRITTEN ASSIGNMENT—INSTRUCTOR’S ANSWER

Instructions

Submit by email by 3:30 pm on Tuesday, September 22
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 9

Assignment

Time: Early 2014
Calls for a memorandum to the client

John Taylor, the general counsel of Albertsons (not really), called to tell you that the Albertsons CEO has had a quiet conversation with the Safeway CEO about a possible cash acquisition of Safeway. Although Safeway’s CEO expressed interest in proceeding with discussions, he told the Albertsons CEO that two things need to be agreed upon first in the negotiations: (1) the purchase price, and (2) the steps Albertsons will take to ensure deal certainty (that is, certainty that the deal will close and that the Safeway shareholders will get their money). Safeway’s CEO told the Albertsons CEO there would be no give on this. Unless and until there is an agreement on the purchase price and the steps Albertsons will take to ensure deal certainty, nothing else will be discussed.

Albertsons has the funds to do the deal and will not ask for a financing condition precedent (a “financing contingency”) in the acquisition agreement, so there will be no risk of not closing because Albertsons cannot obtain financing.¹ But Albertsons recognizes that in some geographic areas, Albertsons and Safeway are two of only a few competitors. Indeed, in some small towns, they are the only two competitors, so the deal carries meaningful antitrust risk.

Taylor has asked you to prepare a short memorandum on the types of provisions that Albertsons could propose—or Safeway could demand—to be in the acquisition agreement to give comfort to Safeway that the deal will close (or at least that the residual risk of the deal not closing will be sufficiently small that, given the purchase price, Safeway is willing to take the risk).

¹ A financing contingency is a condition precedent in the contract that the buyer can borrow the necessary funds to make the acquisition. If the buyer cannot borrow the funds, then the condition is not satisfied and the buyer is not required to close the deal. If the condition remains unsatisfied until the drop-dead date, the buyer can unilaterally terminate the contract without cause. When a financing condition precedent is included in the purchase agreement, the seller may insist on a reverse termination fee in the event that the condition is not satisfied and the buyer terminates the purchase agreement. Financing reverse termination fees are even more common than antitrust reverse termination fees.

Taylor understands that you have not yet performed any substantive analysis of the transaction and therefore cannot, for example, tell him which geographic areas may present serious antitrust concerns or how many Albertsons and Safeway stores may be implicated in those concerns. He is only asking you to describe, at a general level, the types of provisions that could be included in an acquisition agreement to assure the seller that the deal is sufficiently likely to close so Taylor can discuss the concepts intelligently with his management team. To that end, Taylor would also like you to include any particular downsides for the buyer for each type of provision.

This matter is very confidential. To minimize the risk of disclosure, code names are used. Never include the actual name of the counterparty in a confidential transaction in a memorandum or email. Whenever possible, use the same code names the client uses. If the client has not given you one, you can either ask or make up your own. In this matter, the client's code name for the transaction is Project Ceres, and the code names for Albertsons and Safeway are Jupiter and Juno, respectively.

Notes

1. Smart sellers will want the purchase price and the antitrust risk-shifting provisions to be the gating items in the negotiations. The idea is that the buyers are usually anxious to move forward with the negotiations and get the deal signed, and therefore will be marginally more amenable to giving away more in terms of the risk-shifting provisions at the beginning of the negotiations than at the end when it is much more certain that the deal is going to sign. Conversely, savvy buyers, while they recognize they will have to give at least an “indication of interest” in what they are willing to pay at the beginning, will want to wait to address the antitrust risk-shifting provisions until the very end of negotiations. The idea is that after sellers “have tasted the money”—that is, come to expect that they will do a deal with a premium in the purchase price they really like—the seller will be less ready to walk away and refuse to sign the acquisition agreement if the buyer will not give them all they want in the antitrust risk-shifting provisions. Here, the Safeway CEO, who surely talked to counsel before the meeting, has been well advised. Who succeeds in this game of chicken largely depends on which side wants the deal more (they lose).

2. One thing the Safeway CEO could have raised in the initial discussion—which often happens in a one-on-one meeting of the CEOs over dinner—is what are colloquially called “social issues.” This is the question of what roles the target's senior management, beginning with the CEO, will have in the merged company. Giving the CEO and a few key managers in the target company important roles in the merged company can greatly increase the key management decision-makers' enthusiasm for doing a deal. Conversely, refusing to commit to giving the key managers important roles can materially and sometimes fatally decrease this enthusiasm.

The 2015 Anthem/Cigna deal, a \$48.4 billion transaction, provides a great object lesson. Anthem had committed, albeit informally, during negotiations to give the Cigna CEO a significant role in the merged company's management. Later, after the deal was signed and approved by the shareholders of both companies, but while the Antitrust Division was still challenging the deal in court, Anthem backed away from its commitment. That turned Cigna against the deal, although in the absence of a breach of a contractual commitment, Cigna could not terminate the acquisition agreement. What it did, however, was refuse to cooperate with Anthem in defending

the antitrust litigation the DOJ had brought to block the deal. Cigna went so far as to elicit testimony from its own CEO and Anthem witnesses that aided the DOJ's case. It also proposed trial exhibits that undermined Anthem's claimed efficiencies, and its counsel even cross-examined Anthem's CEO and its economic expert. Cigna also refused to comment on Anthem's proposed findings of fact and conclusions of law and instructed Anthem's counsel to remove Cigna's name from the signature block. Judge Amy Berman Jackson, the trial judge in the case, was incredulous:

What am I supposed to make of that? I wasn't going to ask you that question in open court because they're just drafts to this point, but since you brought it up, your name isn't on them; Cigna's name isn't on them.

What am I supposed to think that tells me? What does that mean?²

After the district court permanently enjoined the transaction (which was affirmed on appeal³), the parties terminated the acquisition agreement. Cigna then sued Anthem in Delaware state court for breach of the acquisition agreement for refusing to pay the \$1.85 billion antitrust reverse termination fee set forth in the agreement and to recover \$14.7 billion in damages as a result of Anthem's alleged breach of the agreement's regulatory efforts covenant.⁴ Anthem countersued, seeking \$21.1 billion in expectation damages for Cigna's alleged breach of the acquisition agreement for failing to abide by its covenants to cooperate in litigation to defeat the entry of the injunction and its alleged breach of the covenant to use its reasonable best efforts to consummate the merger.⁵

On August 31, 2020, in a 306-page unpublished memorandum opinion summarily affirmed by the Delaware Supreme Court, Vice Chancellor J. Travis Laster rejected the claims of both parties.⁶

In assessing Anthem's claims, Vice Chancellor Laster found that Cigna willfully breached its efforts covenants by engaging "in a knowing and intentional effort to undermine Anthem's position in the Antitrust Litigation."⁷ However, Laster accepted Cigna's proof that even if Cigna had fulfilled its contractual obligations, the DOJ still would have succeeded in proving its Section 7 claim and the district court would have enjoined the merger. Hence, Laster refused to award Anthem damages because Anthem failed to prove that Cigna's breaches caused it any injury.⁸

² *In re Anthem-Cigna Merger Litig.*, No. CV 2017-0114-JTL, 2020 WL 5106556, at *73 (Del. Ch. Aug. 31, 2020) (unpublished) (quoting antitrust trial transcript), *aff'd sub nom.* Cigna Corp. v. Anthem, Inc., 251 A.3d 1015 (Del. 2021) (unpublished).

³ *United States v. Anthem, Inc.*, No. CV 16-1493 (ABJ), 2017 WL 527923 (D.D.C. Feb. 8, 2017), *redacted opinion issued*, 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017).

⁴ News Release, Cigna Corporation, *Cigna Terminates Merger Agreement with Anthem* (Feb. 14, 2017).

⁵ News Release, Anthem, Inc., *Anthem Files Suit Against Cigna Seeking a Temporary Restraining Order to Enjoin Cigna from Terminating the Merger Agreement, Specific Performance Compelling Cigna to Comply with the Merger Agreement and Damages* (Feb. 15, 2017).

⁶ *Anthem-Cigna Merger Litig.*, 2020 WL 5106556. *See generally* Robert S. Reder & Connor J. Breed, *Chancery Court Determines that Merger Partner Breached "Efforts Covenants" in Connection with "[S]tar-[C]rossed" Combination of Health Insurance Giants*, 74 VAND. L. REV. EN BANC 383 (2021).

⁷ *Anthem-Cigna Merger Litig.*, 2020 WL 5106556, at *120.

⁸ *Id.* at *4-*5, *126.

In assessing Cigna's claims, Laster found that Cigna had failed to prove that Anthem's strategy for defending the deal breached its regulatory efforts covenant.⁹ Moreover, the merger agreement provided for damages only if the breach was "willful." Laster found that even if Cigna had proved that Anthem breached its covenant, the breach was not willful.¹⁰

With respect to Cigna's claim for the reverse termination fee, Laster found that Anthem had validly terminated the Merger Agreement on May 13, 2017, under a termination right that did not trigger the fee before Cigna invoked its termination right.¹¹ Cigna sent Anthem three termination notices, none of which the court found effective. The court found the February 14, 2017, notice ineffective because Cigna sent it before Cigna had a unilateral contractual right to terminate the agreement. Cigna sent its second notice on May 12, 2017, in violation of a temporary restraining order entered by the Chancery Court in this action enjoining Cigna from terminating the merger agreement to permit Anthem to appeal the district court's antitrust decision. By the time Cigna sent Anthem a third notice of termination on May 13, hours after Anthem had sent its termination notice, no agreement remained for Cigna to terminate.¹²

Anthem/Cigna also illustrates two provisions discussed in the memorandum below: the general efforts clause, which was the subject of one of the rare litigated disputes over its meaning, and the question whether an antitrust reverse termination fee is the seller's exclusive remedy, since Cigna sought both the fee and damages for Anthem's alleged willful breach.

If you have any questions, please let me know.

⁹ *Id.* at *4.

¹⁰ *Id.* at *4.

¹¹ *Id.* at *7, *135-*138.

¹² For a good, short analysis of the case and its implications, see, for example, Wilson Sonsini, [The Anthem-Cigna Merger Litigation Saga: Key Insights for Future Deals](#) (May 5, 2021), Skadden, Arps, Slate, Meagher & Flom LLP, [Anthem/Cigna Litigation Underscores Importance of Antitrust Planning in Transactions](#) (Sept. 16, 2020), Mark Metts, Katy Lukaszewski & Stephen Chang, [No Damages in Dispute Over Failed Anthem/Cigna Merger](#), HARV. L. SCH. FORUM CORP. GOVERNANCE (Sept. 29, 2020), and Robert S. Reder & Connor J. Breed, [Chancery Court Determines that Merger Partner Breached "Efforts Covenants" in Connection with "\[S\]tar-Crossed" Combination of Health Insurance Giants](#), 74 VAND. L. REV. EN BANC 383 (2021). See generally Karen Kazmerzak, James W. Lowe & Joseph V. Coniglio, [Antitrust Covenants in the Spotlight following Recent Failed Mergers](#), ANTITRUST, Fall 2019, at 68; Scott Sher, Brendan Coffman & Alexandra Keck, [Risk Allocation in Merger Agreements in an Era of Increased Enforcement](#) (Oct. 23, 2020).