EFiled: Dec 30 2020 03:04PM EST
Filing ID 66217531
Case Number 364,2020

IN THE

Supreme Court of the State of Delaware

CIGNA CORPORATION, Appellant, v. ANTHEM, INC. and ANTHEM MERGER SUB CORP., Appellees.	**No. 364, 2020** COURT BELOW: COURT OF CHANCERY OF THE STATE OF DELAWARE, CONSOLIDATED C.A. No. 2017-0114-JTL

APPELLANT'S OPENING BRIEF

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December 15, 2020

PUBLIC VERSION FILED:
December 30, 2020

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NATURE OF PROCEEDINGS

In July 2015, Cigna and Anthem entered into a merger agreement. Both companies recognized the substantial risk that antitrust regulators would block the merger. Specifically allocating that risk, their agreement provided that Anthem would pay Cigna a reverse termination fee of $1.85 billion if regulatory approval was not obtained, unless Cigna's breach of contract caused the regulatory failure.

In February 2017, Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia issued an order permanently enjoining the merger as a violation of federal antitrust law. In her decision, Judge Jackson observed that Anthem's defense of the merger, based on supposed post-merger "efficiencies," had never been sustained by any court, and that Anthem's witnesses further undermined the defense by presenting "incredible" testimony inconsistent with Anthem's own ordinary-course documents. The D.C. Circuit affirmed, holding that "this is not a close case."

These rulings led Cigna and Anthem to each terminate the merger agreement and to lengthy litigation in the Court of Chancery. Both parties claimed damages based on the other's alleged breach of its regulatory efforts obligation. Cigna also sought the reverse termination fee.

After trial, the court issued a 306-page decision. *See* Memorandum Opinion, Exhibit A hereto ("Op."); *see also* Order, Exhibit B hereto. The court found that

Anthem had not breached the agreement. Crediting the same witnesses the federal courts had discredited and overlooking substantial countervailing evidence, the court found that Cigna had breached the agreement. But the court concluded that Cigna's breaches did not cause the merger's regulatory failure. Accordingly, neither party owed damages.

The court then ruled that Cigna was not entitled to the reverse termination fee. This ruling was irreconcilable with its finding that Cigna did not cause the regulatory failure. This appeal thus presents a single question of law: Given the finding, supported by overwhelming evidence, that Cigna did not cause the regulatory failure, is Anthem obligated to pay Cigna the regulatory reverse termination fee?

Under the terms of the merger agreement, the answer must be yes.

SUMMARY OF ARGUMENT

1. Anthem is obligated to pay Cigna the reverse termination fee because the contractual conditions to the obligation have all been met.

The merger agreement between Anthem and Cigna contained a reverse termination fee allocating to Anthem, as the acquirer, the risk that the proposed merger would fail to secure regulatory approval. That provision, § 7.3(e), required Anthem to pay Cigna $1.85 billion if either party terminated the agreement under § 7.1(b) based on a failure to secure regulatory approval of the merger and the failure was not caused by Cigna's breach of its regulatory efforts obligations.

The merger ultimately failed to secure regulatory approval, and—as the trial court found—that failure was not caused by Cigna's breach of its regulatory efforts obligations. The court's ruling that Cigna was nevertheless not entitled to the reverse termination fee is incorrect, as a matter of law.

a. The trial court held that Anthem terminated the merger agreement before Cigna—under § 7.1(i)—and that once Anthem did so, "[t]here no longer was a Merger Agreement in effect for Cigna to terminate." Op. 303. The court then concluded that Anthem need not pay the fee under § 7.3(e) because Cigna had never validly terminated the agreement under § 7.1(b) and thus never triggered § 7.3(e).

Nothing in the agreement, however, supports the conclusion that one party's exercise of its termination rights extinguishes the other party's termination rights. Section 7.1 provides that the agreement "may be terminated … at any time" before the merger closes. Section 7.2, entitled "Effect of Termination," provides that a termination under § 7.1 terminates only specified obligations—not any rights. Section 7.2 further specifies that the obligations of § 7.3—which includes § 7.3(e), the reverse termination fee provision—survive a termination under § 7.1.

Although Cigna emphasized these provisions below, the trial court ignored them to reach a result that thwarts the risk-allocation purpose of § 7.3(e). (The decision below does not even mention these provisions in its analysis of the reverse termination fee.) The court's interpretation of the merger agreement to create a commercially irrational "race to termination" is inconsistent with the plain language and evident purpose of the agreement.

b. Even if the contract is interpreted to create a race to termination, Anthem remains obligated to pay the reverse termination fee because Cigna won the race, or tied it, on three independent grounds:

(i) Cigna sent its first notice of termination under § 7.1(b) on February 14, 2017. Under § 7.1(b), Cigna was entitled to terminate the merger agreement as of May 1, 2017 because, as the trial court held, it did not cause the failure of the merger to close by May 1, 2017. Well-settled authority teaches that a notice of

premature termination, such as Cigna's February 14 notice, is effective as of the earliest contractually permissible termination date—here, May 1, 2017. That is eleven days before Anthem issued its notice of termination on May 12, 2017. The court's ruling that Cigna's February 14 notice was never effective, rather than effective when timely, contradicts longstanding case law and is supported by no authority.

(ii) Cigna's second notice of termination, served hours after Anthem served its only notice of termination on May 12, 2017, should also be treated as invoking Cigna's right to terminate as of May 1, 2017. Cigna was unable to send a notice of termination on May 1 because the court had issued a temporary order restraining it from doing so. The court's post-trial decision confirms, however, that Cigna did not commit a breach of its regulatory efforts obligations that caused the regulatory failure. Op. 264, 273. Accordingly, under § 7.1(b), Cigna should have been permitted to terminate the merger agreement as of May 1 and was improvidently restrained from doing so.

The trial court reasoned that the TRO nevertheless properly impeded Cigna's ability to invoke its termination rights until the TRO was lifted because Cigna had breached the agreement—albeit not in a way that caused the regulatory failure. Thus, having interpreted the contract to create a race to termination, the court interpreted its own TRO to guarantee that Anthem won the race. This was

error. TROs are designed to maintain the status quo pending a preliminary injunction hearing—not to finally determine the parties' rights. As retroactively applied by the trial court, however, the TRO conclusively and erroneously determined the parties' rights and defeated the contract's central risk-allocation function.

(iii) Section 8.2 of the merger agreement provides that notice delivered by fax is "deemed duly given" on the "date of delivery," not at the time of delivery. The parties' May 12 notices of termination—faxed within hours of each other—were thus simultaneously delivered and mutually effective under the contract. The trial court rejected this conclusion but supplied no support for its decision.

c. In the trial court, Anthem argued that any material breach by Cigna relieves Anthem of its obligation to pay the reverse termination fee under § 7.3(e). The court did not reach this issue but this Court may address it as a matter of law. Section 7.3(e) contains a proviso specifying that Anthem must pay the reverse termination fee unless Cigna's "Willful Breach" of its regulatory efforts obligations caused the regulatory failure. Anthem's interpretation renders this proviso superfluous. The only reasonable interpretation of § 7.3(e) is that Cigna is entitled to the reverse termination fee upon a termination for failure to secure regulatory approval, unless Cigna's "Willful Breach" of its regulatory efforts obligations caused that failure. Because the trial court found that Cigna did not

commit a breach of its regulatory efforts obligations that caused the failure to secure regulatory approval, Cigna is entitled to the reverse termination fee under § 7.3(e).

STATEMENT OF FACTS

A. Cigna and Anthem agree to merge

In 2014, the five largest health-insurance carriers in the country were UnitedHealth Group, Anthem, Cigna, Aetna, and Humana. Op. 14.

Anthem was a member of the Blue Cross Blue Shield Association (the "Blues Association"), a group of carriers licensed to sell insurance under the "Blue" brands. Op. 15. The licensing terms imposed by the Blues Association (the "Blues Rules") divide the country into exclusive geographic service areas and limit the amount of non-Blue insurance each Blue carrier is permitted to sell. Op. 15; A2729.

Since 2012, private employers and healthcare providers have prosecuted national class actions against the Blues Association and its members claiming that the Blues Rules violate the federal antitrust laws. Those class actions are consolidated in a federal district court in Alabama (the "MDL Court"). Op. 9-10. On April 5, 2018, the MDL Court held that the Blues Rules constituted a "*per se*" violation of the Sherman Act. A2892-93.

In 2014, Anthem and Cigna discussed a potential merger. Op. 19-24. In internal analyses, both companies recognized that any deal carried substantial regulatory risk, exacerbated by the likelihood that a merger between any two of the

five largest carriers would likely provoke a second merger between two of the three remaining carriers. Op. 19 (citing A1850; A1896).

In February 2015, Anthem broke off the talks. Three months later, Humana announced it was for sale. Op. 24. Worried it would be "left out of the remaining consolidation," Anthem "aggressively reengage[d]" in discussions with Cigna. Op. 24-25.

In late June, Cigna's board discussed the "virtual certainty that antitrust agencies will conduct a lengthy, in-depth review of any transaction in this space, even if there is only one transaction." Op. 33-34 (citing A1993). Cigna management explained that "if [an Aetna/Humana transaction] is announced before or roughly at the same time as a [Cigna/Anthem] or a [Cigna/UnitedHealth] transaction, the antitrust risk associated with either of the [Cigna] transactions generally increases." A1993. That increase in risk reflected "the optics and resulting pressure on regulators from a perceived reduction in nationally significant health insurers from 5 to 3." *Id.*

Three days later, on July 3, 2015, Aetna announced that it was acquiring Humana. Op. 43. Shortly thereafter, Cigna sent its first mark-up of Anthem's draft merger agreement. A2248. Cigna proposed a reverse termination fee, payable if regulators blocked the merger, equal to 8% of the transaction's equity value. *Id.* Anthem rejected the fee proposal as a "non-starter[]," but ultimately

agreed to a fee of $1.85 billion, equal to 3.8% of the transaction's equity value. A2007 (cited in Op. 37); A2248-49. Cigna and Anthem signed the merger agreement on July 23, 2015. Op. 41.

B. The merger agreement

The merger agreement included provisions addressing the parties' obligations in the regulatory review process, termination rights, the effect of invoking termination rights, and termination fees:

Regulatory efforts obligations. Section 5.3 requires both parties to use "reasonable best efforts" to obtain regulatory approval. A2073 § 5.3.

Termination rights. Section 7.1 provides that the agreement "may be terminated" on thirteen different grounds "at any time prior to the Effective Time" —*i.e.*, the closing of the merger. A2087 § 7.1; A2019 § 1.3.

Section 7.1(b) permits either party to terminate if the merger had not closed by the "Termination Date," unless that party's breach "caused … the failure of the Merger to have been consummated by the Termination Date." A2087 § 7.1(b). Section 7.1(b) defined January 31, 2017 as the "Termination Date" but allowed either party to extend that date to April 30, 2017 if all conditions other than regulatory approval were satisfied. *Id*.

Effect of termination. Section 7.2, titled "Effect of Termination," governs the effect of a termination under § 7.1. A2089 § 7.2. Section 7.2 provides: "In the

event of the termination of this Agreement pursuant to Section 7.1, the obligations of the parties under this Agreement shall terminate, except for the obligations in the confidentiality provisions of Section 5.2, and all of the provisions of this Section 7.2 and Section 7.3." *Id.*

Termination fees. Section 7.3, titled "Fees and Expenses," provides for payments triggered by termination. *See* A2089-91 §§ 7.3(a)-(e). Section 7.3(e) governs the reverse termination fee. It provides that in the event of a termination based on a regulatory injunction barring the merger—either under § 7.1(b) because the injunction had prevented the closing of the merger by the Termination Date, or under § 7.1(g) because the injunction was non-appealable—"Anthem shall pay to Cigna a fee … in the amount of $1,850,000,000 (the 'Reverse Termination Fee')." A2091 § 7.3(e). This obligation is qualified by a proviso "that no Reverse Termination Fee shall be payable … in the event that" the regulatory injunction "is caused by Cigna's Willful Breach of Section 5.3," the regulatory efforts provision. *Id.*

C. Anthem leads the regulatory defense; the Blues oppose the deal; and DOJ sues to enjoin the merger as a violation of federal antitrust law

The parties announced the merger on July 24, 2015. Op. 42. That evening, the *Wall Street Journal* reported, "In a sign that investors have doubts that the deal—and the parallel tie-up between Aetna and Humana—will clear regulatory

and other hurdles, Cigna shares closed at a nearly 20% discount to the current value of the Anthem offer. Humana, meanwhile, was trading at a 16% discount to the Aetna offer." A2114.

Five days later, DOJ opened an investigation into the Anthem/Cigna merger. Anthem insisted on leading the regulatory response. Op. 201; A2075 § 5.3(e). DOJ sent Anthem broad information requests concerning, among other topics, the Blues Rules. Op. 50-51 & n.73. DOJ staff identified "Anthem's relationship/discussions with the [Blues Association]" and "how the Blues Rules impact the transaction" as immediate areas of interest. Op. 50. DOJ focused on these issues throughout its investigation. Op. 89-90, 116-17.

Anthem recognized that the Blues Rules were anticompetitive and the principal obstacle to antitrust clearance—the "biggest worry inside the DOJ." Op. 51, 282. Pressed by DOJ to explain how the merger could pass regulatory muster given the Rules, Anthem assured the regulators (and Cigna) that they would soon be modified or eliminated in a settlement of the MDL. But as the trial court found (given overwhelming evidence), Anthem had no basis for those assurances. Op. 12, 116-17.

Anthem knew, in fact, that its fellow Blue carriers were considering strengthening rather than relaxing the Rules. After the Cigna deal was announced, the Blues Association formed a Special Task Force to undermine the merger.

Op. 278. Meeting in early 2016, the Task Force developed a series of proposals "designed to restrict and eliminate [the merged company's] ability to compete" and remained "positioned to act quickly" against the transaction if it received regulatory approval. Op. 285 (quoting A2630); A758 at 334:10-336:22; A2634. Recognizing that the transaction was in jeopardy, Anthem began creating a record to avoid paying the reverse termination fee. A1062-70. Anthem sought to conceal the Task Force from DOJ and Cigna in discovery, knowing that its mandate contradicted Anthem's assurances that the Blues Rules might soon be tempered. Op. 13, 72 n.128.

While Anthem concealed from Cigna the opposition of the Blues Association and its lack of progress in modifying the Rules, Cigna nevertheless perceived that the merger was in regulatory trouble. Nicole Jones, Cigna's general counsel, "was concerned, both about the level of the DOJ's interest and the extent of Anthem's preparation." Op. 52 n.76. Jones "attempted to prod" Anthem "to be more proactive, but [Anthem] resisted." *Id.* Between January and June of 2016, Jones repeatedly pressed Anthem's top executives and its general counsel to develop a divestiture strategy and to proactively address DOJ's core concerns about the Blues Rules. A2490; A2498, 501-04. As the trial court observed in a footnote, "[w]ith the benefit of hindsight, Jones's assessment proved correct, and

she championed what could have been a better approach" to the regulatory approval effort. Op. 52 n.76.[1]

DOJ's nearly year-long investigation culminated in meetings with the parties in June 2016. Op. 110. DOJ disclosed its conclusion that the merger was "presumptively unlawful" because it would reduce competition in the national insurance market. Op. 111. DOJ also concluded that the "efficiencies" Anthem touted were "anti-competitive." A2509. DOJ added that it could see no path to a divestiture resolution. Op. 118; A2507; A2519-20; A2525-26. The government's top enforcement officer again pressed the point that the Blues Rules would render the post-merger company "growth constrained." Op. 117 (citing A2523). As Anthem's advisors admitted, DOJ "hate[d] the merger." Op. 112.

Days later, DOJ sued to enjoin both the Anthem/Cigna merger and the Aetna/Humana merger. Op. 124. Both complaints alleged that the mergers "would reshape the industry" by reducing "the big five" to "the big three."

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[1] The trial court harshly criticized Ms. Jones in its decision, even though it was compelled to recognize that on the issue that mattered most—how to achieve regulatory approval—Ms. Jones forcefully advocated a better strategy than Anthem. The trial court did not acknowledge that Ms. Jones is a distinguished and highly-credentialed attorney or that Anthem's top executives repeatedly dismissed her by, for example, calling her a "shrew" and her advice "ridiculous." A2510; A2486. Nor, more fundamentally, did the trial court reconcile its conclusion that Cigna sought to torpedo regulatory approval with its finding that Cigna's lawyers—and only Cigna's lawyers—were "championing" a regulatory strategy that might have appealed to DOJ.

A2549-50 at ¶ 4. DOJ's complaint against the Anthem/Cigna merger also alleged that, as a result of the Blue Rules, the merger would "eliminate Cigna as a competitor for national accounts" "[i]n the 14 Anthem states" where Anthem was licensed to sell Blue insurance and that "Anthem has … been unable to explain how the combined company would address problems created by Anthem's membership in the [Blues Association]." A2553 at ¶ 15; A2559 at ¶ 33.

At the press conference announcing the suits, DOJ was asked if there was "something that [the] companies could do … to get a settlement?" Op. 124. The answer: "We have seen nothing that suggests that. Absolutely nothing." *Id.*

D. The District Court permanently enjoins the merger as a violation of federal antitrust law

Judge Amy Berman Jackson of the U.S. District Court for the District of Columbia presided over a bench trial on DOJ's suit to enjoin the merger. Op. 9, 155. The court took the case under advisement on January 4, 2017. Op. 9.

On January 18, before the District Court ruled, Anthem sent Cigna a notice stating that, under § 7.1(b) of the merger agreement, Anthem was extending the termination date from January 31, 2017 to April 30, 2017. Op. 154.

On January 23, another federal judge permanently enjoined the Aetna/Humana merger. *United States* v. *Aetna, Inc.*, 240 F. Supp. 3d 1 (D.D.C. 2017).

On February 8, 2017, Judge Jackson issued a decision permanently enjoining the Anthem/Cigna merger. *See United States* v. *Anthem, Inc.*, 236 F. Supp. 3d 171 (D.D.C. 2017) (A2711). The court held that the merger was likely to have a substantial anticompetitive effect on the sale of health insurance to national employers and to large regional employers within Anthem's exclusive Blue license area. Op. 155; *see* A2718-19.

Emphasizing the novelty of Anthem's "efficiencies" defense, Judge Jackson observed that Anthem had "not pointed the Court to a single litigated case in which the merging parties were successful in overcoming the government's case by presenting evidence of efficiencies." A2777. The defense was further undermined, in Judge Jackson's view, by Anthem's "insulting" refusal to be "straightforward" in its presentation of evidence. A2633 at 2671:2-6. Judge Jackson thus found that Anthem witnesses testified "somewhat incredibly and contrary to their ordinary course records"; that "Anthem's ordinary course documents tell a consistent story that contravenes the firm's litigation position"; and that Anthem tried to sell the court "a well-rehearsed Anthem motif" about the insurance market that "was not credible, as it was contradicted by numerous Anthem documents." A2759, 98. Throughout the trial, Anthem executives "ma[d]e statements, advance[d] arguments, and g[a]ve testimony that were at times questionable, at other times unsupported, and on some occasions untrue." Op. 12.

E. Cigna issues a notice of termination and seeks a declaratory judgment that its termination is effective no later than May 1, 2017

On February 14, Anthem sent Cigna a letter asserting that "Cigna has no right to terminate the Merger Agreement [under § 7.1(b)] even if final [regulatory] approvals have not been received by April 30." A2800. Anthem's position was thus that Cigna could never terminate the merger agreement under § 7.1(b) because Cigna had caused the failure of the merger to close by the Termination Date.

That day, Cigna responded by sending Anthem a notice of termination stating that Cigna was terminating the merger agreement under § 7.1(b) based on the merger's failure to close by January 31, 2017. Cigna's notice further stated that Anthem's extension of the Termination Date from January 31 to April 30, 2017 was invalid because the conditions for an extension under § 7.1(b) were not satisfied. A2801-02.

Shortly after noticing termination, Cigna brought suit in the Court of Chancery, seeking a declaratory judgment that its February 14 termination was valid. A412. In the alternative, Cigna sought a declaration that its termination was effective on the date the District Court's injunction became non-appealable or the outside Termination Date of April 30, 2017, whichever was earlier. *Id.* Cigna also asserted claims for the reverse termination fee and for damages for breach of § 5.3, the regulatory efforts provision. A413-15.

Later that day, Anthem filed its own suit in the Court of Chancery, also claiming breach of § 5.3. A291. At the same time, Anthem sought a temporary restraining order to "preserv[e] the status quo by restraining Cigna from terminating the Merger Agreement." A436. Anthem argued that it would "suffer imminent and irreparable harm if the merger agreement is terminated," A460, while "the risk of harm to Cigna" from the entry of a TRO "is non-existent," A476.

F. The Court of Chancery issues a TRO "to preserve the status quo" that enjoins Cigna from terminating the merger agreement

The next day, February 15, the Court of Chancery granted Anthem's TRO application. A528. The court observed that "preliminary injunctive relief including a TRO is quite common, particularly in this Court … where it is necessary to preserve the status quo." A521. Noting that the proposed "TRO is designed to preserve the status quo pending April 30, 2017," the court concluded that Anthem had "cleared the relatively lenient standard for a TRO." A519, 29.

As issued, the order provided, "[P]ending further order of this court, [Cigna] is subject to a temporary restraining order and is enjoined from terminating" the merger agreement. A533. The parties thereafter stipulated to a preliminary injunction schedule culminating in a hearing on May 8. A534.

G. The D.C. Circuit affirms the District Court's permanent injunction blocking the merger

On April 28, the D.C. Circuit affirmed the District Court's injunction order. *See United States* v. *Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017) (A2804, 08).

In the opening of its opinion, the D.C. Circuit noted the District Court's references to the apparent discord between the parties and observed: "That [the companies'] relationship may have deteriorated has little to do with the anticompetitive effects of the proposed merger." A2807 n.1. The appeals court instead focused on Anthem's "tactical choice to present an efficiencies defense based on best-of-breed discounts"—that is, savings derived by cutting payments to doctors, nurses, and other healthcare providers—rather than advancing "a defense based on [the] new products" that might be created by the merger. Op. 220-21; A2812, 14-26. After expressing skepticism that economic efficiencies could ever "offer a viable legal defense," the court concluded that Anthem's evidence had failed to demonstrate them. A2812, 14-15. "The savings [Anthem] projected … were without a doubt enormous," the court observed. "The problem is, those projections fall to pieces in a stiff breeze." A2823. The court concluded: "[T]his is not a close case." *Id.*

H. After Anthem's motion for a preliminary injunction is denied and while Cigna is still temporarily restrained from terminating the merger agreement, Anthem sends Cigna a notice of termination

Anthem's board met five days later, on May 3, 2017. A2841. The board approved the company's continued prosecution of its preliminary injunction motion. A2842. It also "authorize[d] Company management to send Cigna a termination notice under Section 7.1(i) of the Merger Agreement if the Company loses its motion for a preliminary injunction in the Delaware Court case, with discretion granted to Company management to determine when such termination notice should be provided." *Id.*

On May 11, the Court of Chancery denied Anthem's preliminary injunction motion in an oral ruling. A738-39. The court then *sua sponte* offered to extend the TRO for twenty-four hours to allow Anthem to decide whether to appeal the denial. A739-44. Anthem asked the court if it would instead extend the TRO for four days, until May 15. The court agreed. A740-43.[2]

That evening, Anthem's board reconvened. Anthem's general counsel "reported that Cigna attempted to terminate the Merger Agreement, but that the termination was not valid due to the Delaware Court's stay of its ruling." A2844.

[2] After the court stated that the motion was denied, a Cigna employee who had been instructed to fax a termination notice to Anthem upon denial of the motion began faxing the notice. A749; A2846. When the court then stated it was extending the TRO, the Cigna employee terminated the fax. *Id.*

The directors then "concurred with management's recommendation to terminate the Merger Agreement pursuant to Section 7.1(i) (as previously authorized by the Board), and not appeal the Delaware Court ruling." A2844-45.

The next day, May 12, at 11:32 a.m., Anthem faxed Cigna a notice of termination pursuant to § 7.1(i). A2855. Anthem simultaneously filed a letter informing the Court of Chancery that its "Board of Directors has decided not to pursue a motion to certify an interlocutory appeal." A746.

At 2:20 p.m., Cigna faxed Anthem a notice of termination stating that Cigna "hereby notifies Anthem … that Cigna has terminated the Merger Agreement pursuant to Section 7.1(b)." A2850-52. The notice added: "This termination is effective as of Cigna's original notice of termination on February 14, 2017. In the event that such prior notice of termination is held to be invalid, the termination is effective, as may be held by the Court, as of (i) April 30, 2017, the purportedly extended Termination Date, or (ii) today." A2852.

Later that afternoon, the court issued an order denying Anthem's motion for preliminary injunction. A754.

I. The Court of Chancery's post-trial decision

The parties then engaged in nearly two years of plenary litigation. Trial ended on March 8, 2019, and the court issued its opinion on August 31, 2020.

The trial court devoted most of its 306-page decision to addressing each party's claim that the other had breached its regulatory efforts obligations under § 5.3. Op. 189-293. The court found that Anthem did not breach § 5.3 and that Cigna did. *Id.* That ruling was largely based on factual findings that credited the same Anthem executives that Judge Jackson had found to be untruthful, as well as the same Anthem antitrust lawyers who Judge Jackson had criticized for not being "straightforward" and who had an interest in blaming Cigna for the loss at trial. *Compare* Op. 189-293 *with* A2759, 98; A2633 at 2671:2-6.

The trial court thus found, for example, that Cigna breached the merger agreement because its CEO David Cordani "provided exaggerated and unsupported testimony [at the DOJ trial] that bolstered the DOJ's case." Op. 5. But Judge Jackson, the judge who heard and weighed the testimony, made no such finding. To the contrary, Judge Jackson credited Cordani's testimony as truthful and consistent with "the entire record, including the testimony of consultants, customers, providers, and even Anthem's own experts." A2789.

In light of the overwhelming evidence of DOJ's hostility to the deal and the weaknesses in Anthem's efficiencies defense, the court below concluded that any breach by Cigna did not cause the regulatory failure. Op. 263-73. Accordingly, the court ruled that neither party was entitled to any damages.

The court confined its analysis of Cigna's claim for the reverse termination fee to twelve pages at the end of the opinion. *See* Op. 294-305. It ruled that Anthem need not pay the fee because Cigna had never validly terminated the agreement under § 7.1(b) and thus never triggered Anthem's obligation to pay the fee under § 7.3(e). Op. 300-05. Cigna's February 14 notice "was ineffective," the court ruled, because "Anthem [had] validly extended the Termination Date" from January 31 to April 30, 2017, so "Cigna could not exercise the [§ 7.1(b)] Termination Right until after April 30, 2017"—that is, until after the TRO had gone into effect. *Id*. And Cigna's May 12 notice, the court ruled, "was ineffective" because "[b]y that point, Anthem already had terminated the Merger Agreement" while the TRO was pending, so "[t]here no longer was a Merger Agreement in effect for Cigna to terminate." Op. 303.

In the trial court's view, the merger agreement set the parties on a "race to exercise a termination right," in which only the winner could validly terminate the agreement. Op. 304. The court cited no provision of the merger agreement in support of that conclusion. The court went on to find that Cigna lost the race to terminate because it was at all times restrained by the TRO from effectively terminating, until after the race was over and Anthem had won it. Op. 301-05. The court rejected Cigna's contention that, under § 8.2 of the merger agreement,

which governed "Notices," its May 12 notice and Anthem's May 12 notice should be deemed to have been delivered simultaneously. Op. 303.

The court also rejected Cigna's argument that the TRO could not properly determine the parties' rights under the merger agreement. In the court's view, "the TRO was put in place because Cigna previously breached its contractual obligations by attempting to terminate the Merger Agreement on February 12 and moot Anthem's appeal," so "Cigna cannot now complain about the effects of a TRO that its own conduct made necessary." Op. 304.

ARGUMENT

ANTHEM IS OBLIGATED TO PAY THE REVERSE TERMINATION FEE

A. Question Presented

Did the Court of Chancery err in ruling that Anthem was not obligated to pay Cigna the reverse termination fee under the terms of the merger agreement? This question was raised below (A1073-1110; A1194-1226; A1732-57) and considered by the Court of Chancery (Op. 294-305).

B. Scope of Review

This Court reviews *de novo* the Court of Chancery's legal conclusions in interpreting the terms of the merger agreement. *See Alta Berkeley VI C.V.* v. *Omneon, Inc.*, 41 A.3d 381, 385 (Del. 2012).

C. Merits of Argument

"[I]t is [the court's] role to enforce the parties' bargained for allocation of risks and opportunities." *CompoSecure, LLC* v. *CardUX LLC*, 206 A.3d 807, 811 n.6 (Del. 2018). Here, "[a]s with any highly negotiated transaction, the parties allocated risks in the Merger Agreement." *Williams Cos., Inc.* v. *Energy Transfer LP*, 2020 WL 3581095, at *11 (Del. Ch. July 2, 2020). Chief among those risks was the risk that regulators would block the merger as anticompetitive. *See* Op. 33-35.

After extensive negotiations, the parties allocated that risk by requiring that Anthem, as the acquirer, agree to a reverse termination fee in the event of

regulatory failure. A2248-49. Section 7.3(e) of the merger agreement provides that Anthem owes Cigna a fee of $1.85 billion upon a termination under § 7.1(b)—that is, a termination on the ground that the merger did not close by the Termination Date—if a lack of regulatory approval prevented the closing. A2091 § 7.3(e). Section 7.3(e) further provides that Anthem is not obligated to pay the fee if the failure to secure regulatory approval was caused by Cigna's willful breach of its regulatory efforts obligations under § 5.3. *Id.*

The parties thus expressly allocated to Anthem the risk of a failure to secure regulatory approval that was not caused by Cigna's willful breach of § 5.3. That very risk came to pass. The merger was permanently enjoined as an antitrust violation. And, as the trial court found, that injunction was not caused by Cigna's willful breach of § 5.3. Cigna twice invoked its right to terminate the agreement under § 7.1(b) to claim the reverse termination fee due under § 7.3(e) in exactly these circumstances.

Yet the trial court held that Anthem was not obligated to pay Cigna the fee. That conclusion was premised on the court's view that the merger agreement set the parties on a race to termination, in which one party's exercise of its termination rights extinguished the other party's termination rights. Op. 300-05. Cigna never triggered Anthem's payment obligation under § 7.3(e), the court concluded,

because Anthem managed to terminate the agreement under § 7.1(i), which does not trigger § 7.3(e), before Cigna terminated the agreement under § 7.1(b). *Id.*

The trial court's interpretation of the merger agreement defeats the risk-allocation purpose of § 7.3(e), ignores the context in which the agreement was negotiated, and conflicts with the plain language of the agreement. The contract cannot be reasonably read to provide that one party's exercise of its termination rights extinguishes the other party's termination rights. And even assuming the agreement set the parties on a race to termination, Cigna won that race, or at least tied it. Cigna thus validly terminated the agreement under § 7.1(b) and is entitled to the reverse termination fee under § 7.3(e).

1. The merger agreement provides that Anthem's exercise of its termination rights did not relieve Anthem of its obligation to pay Cigna the reverse termination fee

Article VII of the merger agreement governs termination. The sections of that article provide that either party may terminate the agreement any time before the merger closes; that one party's termination does not affect the other's termination rights; and that all obligations to pay fees and expenses survive termination. Those terms make clear that Anthem's termination neither extinguished Cigna's termination rights nor relieved Anthem of its obligation to pay Cigna the reverse termination fee.

The first section in Article VII, § 7.1, is titled "Termination." It provides that "[t]his Agreement may be terminated and the Mergers contemplated hereby may be abandoned at any time prior to the Effective Time" under thirteen distinct provisions, set forth in § 7.1(a)-(m). A2087-89 § 7.1. The "Effective Time" is the time "the Merger becomes effective." A2019 § 1.3. Section 7.1 thus gives either party the right to terminate the agreement "at any time" before the merger closes.

Section 7.2, titled "Effect of Termination," provides:

> In the event of the termination of this Agreement pursuant to Section 7.1, the obligations of the parties under this Agreement shall terminate, except for the obligations in the confidentiality provisions of Section 5.2, and all of the provisions of this Section 7.2 and Section 7.3, and there shall be no liability on the part of any party hereto; provided, however, that no party hereto shall be relieved or released from any liabilities or damages arising out of … fraud … [or] Willful Breach by any party….

A2089 § 7.2.

As set forth in § 7.2, the "Effect of Termination" under § 7.1 is to "terminate" only specified "obligations of the parties under this Agreement." According to § 7.2, a termination under § 7.1 has no effect on a party's rights under the agreement—and the parties here distinguished carefully between "rights" and "obligations" in the agreement. *See, e.g.*, A2096 § 8.10. Termination under § 7.1 thus extinguishes some of the parties' obligations under the agreement, but none of their rights. Those surviving rights include a party's termination rights.

See A2087 § 7.1(b) (addressing "the *right to terminate* this Agreement pursuant to this Section 7.1(b)" (emphasis added)).

Under § 7.2, the obligations that survive a termination under § 7.1 expressly include "the obligations in … all of the provisions of … Section 7.3." A2089 § 7.2. Section 7.3, titled "Fees and Expenses," contains five provisions, each setting forth a different post-termination fee or expense payment obligation. *See* A2089-91 §§ 7.3(a)-(e). Each of these post-termination payment obligations, including the reverse termination fee, is triggered by the exercise of a termination right under specified provisions of § 7.1. *Id.*

Read together, §§ 7.1, 7.2, and 7.3 establish that Anthem's exercise of its termination rights under § 7.1(i) extinguished neither Cigna's termination rights under § 7.1 nor Anthem's obligation under § 7.3(e) to pay the reverse termination fee.

The trial court nevertheless concluded that Anthem's termination meant "[t]here no longer was a Merger Agreement in effect for Cigna to terminate," and thus no way for Cigna to trigger Anthem's obligation under § 7.3(e) to pay the reverse termination fee. Op. 303. The court interpreted the contract to create "a race to exercise a termination right" because it did not "provid[e] … that a Reverse Termination Fee would remain due even if the Merger Agreement is terminated on other grounds." Op. 304-05.

This interpretation is irreconcilable with § 7.2. Under § 7.2, the effect of termination is to terminate only specified contractual obligations, not render the entire agreement ineffective.[3] And § 7.2 specifically provides that the reverse termination fee *does* "remain due even if the Merger Agreement is terminated" under a provision of § 7.1 that does not trigger § 7.3(e)—because "the obligations in … *all* of the provisions of … Section 7.3" survive any termination under § 7.1. A2089 § 7.2 (emphasis added).

The decision never explains how Anthem's termination under § 7.1 can extinguish Cigna's right to collect, and Anthem's obligation to pay, the reverse termination fee under § 7.3 when § 7.2—which controls the "Effect of Termination"—specifically preserves "the obligations in … all of the provisions of … Section 7.3" upon a termination under § 7.1. Instead, the trial court just ignored § 7.2.

This was error, as recent case law confirms. In *Williams*, the acquiring party, like Anthem here, argued that its termination of the agreement meant that "all its obligations fell away" and "[t]hus, there is nothing left to trigger the … Termination Fee." 2020 WL 3581095 at *13. The court found that interpretation unreasonable because, just like the agreement between Anthem and Cigna, the

[3] The parties would have used different language to provide that termination under § 7.1 voided the agreement—as language elsewhere in the agreement shows. *Compare* § 7.2 *with* A2108 § 7.

agreement expressly provided that the section containing the fee provision survived termination. *Id.* at *13-14. The court thus "reject[ed] ETE's argument" that its termination "'extinguished' all its obligations, including those referenced in [the termination fee provision]." *Id.*

As *Williams* recognized, a merger agreement—like any other contract—should be "read in full and situated in the commercial context between the parties." *Chicago Bridge & Iron Co.* v. *Westinghouse Elec. Co.*, 166 A.3d 912, 926-27 (Del. 2017). The trial court here did neither. It disregarded not only the words of the agreement but also the commercial context. The court offered no reason why sophisticated parties would structure their contractual relations so that their ability to collect substantial termination fees and expenses depends on the happenstance of which party wins a race to termination.

The merger agreement evinces no such intent. Rather, the contract makes the obligation to pay each of these fees, which range from $600 million to $1.85 billion, contingent on satisfaction of carefully articulated conditions relating to matters such as alternative transactions, failure to secure shareholder approval, and failure to secure regulatory approval. *See* A2089-91 §§ 7.3(a)-(e). The agreement adds that "[i]n no event shall either party be obligated to pay more than one Cigna Termination Fee, Anthem Termination Fee or Reverse Termination Fee, as applicable, pursuant to this Section 7.3." A2092 § 7.3(h).

Yet, under the trial court's reading, the satisfaction of all those carefully drawn conditions can come to nothing if the party who would otherwise owe the fee is the first to deliver a notice of termination. Nor would there be any need to protect a party against having to pay multiple termination fees under § 7.3 if only the first termination can be valid. The court's reading of the agreement is therefore not sensible.

The merger agreement specifically preserved Cigna's ability to claim the fee under § 7.3(e), without regard to any earlier termination of the agreement by Anthem. Accordingly, Anthem's termination did not extinguish its obligation to pay the reverse termination fee.

2. Even assuming that the merger agreement set the parties on a race to termination, Anthem is still obligated to pay Cigna the reverse termination fee

Even if the merger agreement created a race to termination, Cigna won or tied the race, and thus triggered Anthem's obligation to pay the reverse termination fee.

a. Cigna's February 14 termination notice validly invoked Cigna's right to terminate as of May 1, 2017

Cigna was indisputably the first party to invoke its termination rights. Cigna sent Anthem a notice of termination on February 14, 2017. Op. 169. Anthem did not send a notice of termination until May 12, 2017. Op. 187. The trial court ruled

that Cigna nevertheless lost the supposed race to termination because its February 14 notice was never effective. Op. 300-01.

Cigna's February 14 notice invoked Cigna's right under § 7.1(b) to terminate the agreement. A2802. That provision permits a party to terminate the agreement if the merger has not closed by the "Termination Date," unless that party caused the failure to close by that date. A2087 § 7.1(b). When Cigna sent its February 14 notice, it disputed the validity of Anthem's extension of the Termination Date from January 31, 2017 to April 30, 2017. For its part, Anthem disputed Cigna's right to terminate under § 7.1(b) before or after April 30.

Those disputes were resolved at trial. The trial court ruled that Anthem's extension of the Termination Date was valid and that Cigna had not caused the failure to secure regulatory approval of the merger. Op. 7, 273. From these holdings, it necessarily follows that Cigna was entitled under § 7.1(b) to terminate the merger agreement as of May 1, 2017. But instead of treating Cigna's February 14 notice as effective on May 1, the court assumed the notice could be valid only if Cigna had the power to terminate the agreement when the notice was issued. *See* Op. 301.

This was error, as the authorities Cigna pressed below demonstrate. The merger agreement nowhere provides that a termination notice is invalid if sent before the first contractually permissible termination date. Nor is that a default

rule of contract law. To the contrary: the long-settled "erroneous date rule" holds that "a termination notice which erroneously identifies the termination date is nonetheless sufficient to effect a termination as of the first proper termination date." *G.B. Kent & Sons* v. *Helena Rubinstein, Inc.*, 393 N.E.2d 460, 461 (N.Y. 1979).[4]

The trial court held that the erroneous date rule did not apply to Cigna's February 14 notice because the cases Cigna cited applying the rule "address[ed] contracts where a party had the power to terminate, but only after giving a certain amount of notice." Op. 301. That was an unsound basis to reject the rule. Notably, the trial court did not identify any authority that had found the rule inapplicable on the basis of that distinction.

That is unsurprising because neither the rule nor its rationale suggest it should not apply in the case of contracts, like the merger agreement here, that do not require advance notice of termination. As its name indicates, the "erroneous date rule" applies to a notice that seeks to effect termination before the date termination is contractually permitted. *G.B. Kent & Sons*, 393 N.E.2d at 461. Cigna's February 14 notice is such a notice. The rationale of the rule is that the

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[4] *See also, e.g.*, *Lyon* v. *Pollard*, 87 U.S. 403, 407 (1874); *All States Serv. Station* v. *Standard Oil Co. of N.J.*, 120 F.2d 714, 715 (D.C. Cir. 1941); *Hepner* v. *Am. Fid. Life Ins. Co.*, 258 S.E.2d 508, 512 (Va. 1979); *Richards* v. *Allianz Life Ins. Co. of N. Am.*, 62 P.3d 320, 325 (N.M. Ct. App. 2002); *Rockland Exposition, Inc.* v. *All. of Auto. Serv. Providers of N.J.*, 706 F. Supp. 2d 350, 357 (S.D.N.Y. 2009).

non-terminating party "receive[s] fully the protection to which it agreed, the period of notice … determined by the appropriate contract provision." *All States Serv.*, 120 F.2d at 715. That rationale applies equally whether the incorrect termination date is too soon because the termination date must follow a certain period of notice or because the fixed termination date has not yet arrived, as in this case. In both scenarios, the non-terminating party gets what it bargained for—termination no sooner than contractually permitted, with no less notice than contractually required.

There is no reason Cigna's February 14 notice of termination should be treated as permanently ineffective when it gave Anthem a *longer* notice period than was contractually required. The merger agreement permitted Cigna to terminate under § 7.1(b) on May 1, 2017 without any advance notice. Contract law generally seeks to put parties in the positions they would be in were the contract performed. But here, the trial court's ruling that Cigna's February 14 notice was permanently invalid instead of effective as of May 1 put Anthem in a better position than the contract anticipated. What's more, the trial court then relied on that ruling to hold that Cigna lost the race to termination and thus its right to claim the reverse termination fee. The trial court cited no case where a party was deprived of valuable rights because it noticed termination prematurely. That result cannot be justified by the objectives of contract law or the words of the contract.

b. Cigna's May 12 termination notice validly invoked Cigna's right to terminate as of May 1, 2017

Cigna's second notice of termination was sent on May 12, 2017, hours after the February 15, 2017 TRO enjoining it from terminating the merger agreement was lifted. Op. 303. That notice is also properly treated as invoking Cigna's right to terminate under § 7.1(b) as of May 1, 2017. The trial court, however, ruled that Cigna's May 12 notice was ineffective because Anthem had delivered a notice of termination earlier that day, when the TRO was still in effect. Op. 303.

The court acknowledged that the TRO gave Anthem "a timing advantage over Cigna" because the TRO lifted only upon Anthem's notification to the court that it was not appealing the denial of its preliminary injunction motion. Op. 187, 304. "Anthem (rather than Cigna) had control over when the TRO would end," the court explained, and "Anthem could therefore deliver its notice of termination first." Op. 304. The trial court thus recognized that, under its analysis, the TRO determined the outcome of the race to termination. The improper effect of this analysis was to allow a TRO, a mere provisional remedy, to operate as an order of final relief denying Cigna the reverse termination fee.

When Anthem sought the TRO on February 14, it alleged that Cigna's breach of § 5.3 was the reason that the merger had not received regulatory approval and that Cigna therefore had no right to terminate the agreement under § 7.1(b). A458. Anthem argued it needed a TRO pending adjudication of Cigna's right to

terminate under § 7.1(b) merely "to preserve the status quo." A460. At the TRO hearing, the trial court repeatedly emphasized that the TRO was just "a status quo order." A519; *see also id.* at A518, 21, 25, 28-29.

As the court's post-trial findings demonstrate, the TRO improvidently restrained Cigna from terminating as of May 1 2017. After weighing the evidence, the court concluded that Cigna did not cause the failure to secure regulatory approval. By the terms of § 7.1(b), Cigna therefore had the right to terminate the agreement as of May 1, 2017. Op. 7; A2087 § 7.1(b). It necessarily follows that the imposition of the TRO from May 1 to May 12, 2017 was wrongful. *See Emerald Partners* v. *Berlin*, 726 A.2d 1215, 1226 (Del. 1999); *see also id.* (citing *Blumenthal* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 910 F.2d 1049, 1054-55 (2d Cir. 1990) ("a temporary injunction" is "wrongfully issued" if "in hindsight in light of the ultimate decision on the merits after a full hearing, the injunction should not have issued in the first instance")). But for the TRO's wrongful pendency during that period, Cigna would have terminated the agreement on May 1, 2017. Yet the trial court held that Cigna's May 12 notice could not be effective until May 12, after the TRO lifted. Op. 303; *see also id.* 301.

As the trial court ultimately resolved the case, the TRO proved conclusive of Cigna's termination rights under § 7.1(b), and thus the parties' reverse termination fee dispute. Because the court ruled that Cigna's February 14 termination should

never be deemed effective, Cigna's pre-TRO efforts to invoke its rights were invalidated. Because the court entered a TRO that improvidently restrained Cigna from terminating until a time of Anthem's choosing, the court ensured that Anthem would win any race to termination. And because the court decided that the parties' obligations turned on such a race, the TRO operated to definitively resolve the fee dispute in Anthem's favor.

That was error. The unwavering rule is that TROs "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing." *Granny Goose Foods, Inc.* v. *Bhd. of Teamsters*, 415 U.S 423, 439 (1974); *see also Hall* v. *Kalinowski*, 1992 WL 296861, at *1 (Del. Ch. Oct. 9, 1992) (TROs are properly issued "only to maintain the true status quo"). The only legitimate purpose of the TRO was to preserve the trial court's ability to enforce a final order of specific performance. The trial court, however, retroactively interpreted the TRO to override the words of § 7.1(b) and thus effectively deprive Cigna of the reverse termination fee.

Tellingly, neither the trial court nor Anthem cited any decision by any court in which a provisional remedy similarly determined the parties' valuable contractual rights. The outcome-determinative effect of the TRO cannot be squared with Anthem's representations to the trial court in its TRO application that a TRO posed

a "non-existent" "risk of harm to Cigna." A476. By according the TRO that effect, the trial court also rewarded Anthem for being yet again less than straightforward with a court and Cigna—by using the TRO extension not for the stated purpose of maintaining the status quo as it decided whether to appeal, but instead to seize an ultimate advantage in the supposed race to termination.

The court believed its use of the TRO to deprive Cigna of the reverse termination fee worked "no injustice" since "the TRO was put in place because Cigna [had] previously breached" § 5.3 by attempting to terminate the merger agreement on February 14. Op. 304-05. But as the court itself held, no Cigna breach caused the regulatory failure. Sections 7.1(b) and 7.3(e) make clear that a breach by Cigna does not relieve Anthem's obligation to pay the reverse termination fee—unless that breach caused the failure to secure regulatory approval. *That* is the risk-allocation deal the parties struck. The court was not empowered to rewrite the bargain to accord with its own view of the equities. "Under Delaware law, which is more contractarian than that of many other states, parties' contractual choices are respected." *GRT, Inc.* v. *Marathon GTF Tech., Ltd.*, 2011 WL 2682898, at *12 (Del. Ch. July 11, 2011).

c. Under § 8.2, the parties' May 12 termination notices were simultaneous

Even assuming Cigna's May 12 notice could be effective no earlier than May 12, it is properly treated as simultaneous with Anthem's May 12 notice.

Section 8.2 of the merger agreement provides:

> All notices and other communications hereunder shall be in writing and shall be deemed duly given
> (a) on the date of delivery if delivered personally, or by facsimile upon confirmation of receipt;
> (b) on the first Business Day following the date of dispatch if delivered by a recognized next-day courier service; or
> (c) on the third Business Day following the date of mailing if delivered by registered or certified mail, return receipt requested, postage prepaid.

A2092 § 8.2.

Section 8.2(a) provides that faxed notices are "deemed duly given" on the "date of delivery," not at the specific time of delivery. Accordingly, under § 8.2(a), the parties' May 12 faxed notices of termination are both "deemed duly given" on the "date" of May 12 and so were simultaneous. Cigna's May 12 notice thus effectively invoked Cigna's right to terminate under § 7.1(b), triggering Anthem's obligation under § 7.3(e) to pay the reverse termination fee. And while Anthem's termination under § 7.1(i) did not trigger § 7.3(e), neither did it relieve Anthem of any obligation under § 7.3(e).

The trial court asserted that "[t]he plain language of the provision does not say that" the May 12 notices "must be treated as having been delivered simultaneously." Op. 303. What the plain language does say is that all notices are deemed given on the "date" or "Day" of delivery—not at the time of delivery. The

contract attaches no significance to the time of delivery.[5] The trial court's contrary decision to accord Anthem's May 12 notice priority based on the time of delivery has no footing in the text of the agreement.

To justify this outcome, the trial court surmised that § 8.2 was "designed to establish a set of timing rules for the effectiveness of notices that would eliminate uncertainty by displacing comparable common law doctrines such as the mailbox rule." Op. 303. This speculation was raised by neither party, is supported by no evidence, and is not relevant. The "mailbox rule" provides that "a letter properly directed … is presumed" to have "reached its destination" and "applies only if the fact of receipt is disputed." 29 Am. Jur. 2d *Evidence* § 266 (cited in Op. 303). Section 8.2, however, provides that notices "shall be deemed duly given" only if actually "delivered," not if merely "sent," and neither party disputes its receipt of the other's May 12 notice.

3. Anthem cannot avoid its obligation to pay the reverse termination fee by writing a key part of § 7.3(e) out of the merger agreement

Anthem disputed below that Cigna was entitled to the reverse termination fee under § 7.3(e) even if Cigna had validly terminated the merger agreement. The trial court did not decide the issue. Because the parties' dispute over the proper

[5] This is yet another clue that the agreement does not contemplate a race to termination in which the parties' rights and obligations can be arbitrarily determined by the delivery times of dueling termination notices.

reading of § 7.3(e) presents a question of law, this Court may choose to resolve it in the first instance.

As relevant here, § 7.3(e) provides:

> In the event that this Agreement is terminated by either Anthem or Cigna … (ii) pursuant to Section 7.1(b) and at the time of such termination, *all of the conditions set forth in Section 6.1 and Section 6.2 have been satisfied (other than (x) Section 6.1(a) (but only if the applicable Legal Restraint constitutes a Regulatory Restraint) or Section 6.1(b) and (y) conditions that by their nature are to be satisfied at the Closing, but that are capable of being satisfied if the Closing were to occur on the date of such termination)*, then Anthem shall pay to Cigna a fee … in the amount of $1,850,000,000 (the "Reverse Termination Fee"); provided, however, that no Reverse Termination Fee shall be payable pursuant to this Section 7.3(e) in the event that (A) the failure of the condition set forth in Section 6.1(a) … or Section 6.1(b) to be satisfied is caused by Cigna's Willful Breach of Section 5.3 or (B) ….

A2091 § 7.3(e) (emphasis added).

The italicized language identifies circumstances in which Anthem is obligated to pay the reverse termination fee upon a termination under § 7.1(b)—that is, a termination on the ground that the merger has failed to close by the Termination Date. In those circumstances, the conditions of § 6.1 and § 6.2 have been satisfied, except for the conditions of § 6.1(a), § 6.1(b), and any conditions to be satisfied at closing. Sections 6.1 and 6.2 set forth all of the conditions to Anthem's obligation to close, and §§ 6.1(a) and (b) identify two in particular: the absence of an injunction blocking the merger and the acquisition of the required governmental consents.

The italicized language thus ensures that Anthem is obligated to pay the fee only where the failure to close the merger by the Termination Date is attributable to the failure to obtain regulatory clearance. The proviso following the italicized language ensures that Anthem is not obligated to pay the reverse termination fee where (but only where) the failure to obtain regulatory clearance was caused by Cigna's Willful Breach of § 5.3. Section 7.3(e) thus institutes a sensible risk-allocation arrangement: the acquirer agrees to pay a reverse termination fee if the merger is blocked by regulators, unless the target's breach of its regulatory efforts obligations caused the block.

Anthem argues, however, that it need not pay the fee if Cigna committed any material breach of the merger agreement, not just a Willful Breach of § 5.3 that caused the regulatory failure. According to Anthem, § 6.2(b) establishes as a condition that "Cigna shall have performed or complied in all material respects with all agreements and covenants required to be performed by it under this Agreement at or prior to the Closing Date." Because Cigna materially breached § 5.3, Anthem says, the conditions of § 6.2 have not been satisfied, and so Anthem is not obligated to pay the fee upon a termination under § 7.1(b)—even though Cigna's breach did not cause the regulatory failure.

Anthem's reading would render the key proviso of § 7.3(e) superfluous. If any material breach by Cigna relieved Anthem of its obligation to pay the fee, then

the proviso would serve no independent function in limiting the circumstances in which Anthem owes the fee. Anthem's interpretation would nullify the proviso's language that the fee is not payable where Cigna's "Willful Breach" of § 5.3 "caused" the regulatory failure.

That interpretation is untenable. In a contract, "each word should be given meaning and effect." *NAMA Holdings* v. *World Market Center Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007). Delaware courts "will not read a contract to render a provision or term 'meaningless or illusory.'" *Osborn ex rel. Osborn* v. *Kemp*, 991 A.2d 1153, 1159 (Del. 2010). And in interpreting contracts, "a specific provision"—here, the proviso setting out the specific exceptions to Anthem's obligations to pay the fee—"controls a general one"—here, the provision setting out the general condition to Anthem's obligation. *DCV Holdings, Inc.* v. *ConAgra, Inc.*, 889 A.2d 954, 961 (Del. 2005); Farnsworth, *Contracts*, § 7.13 (4th ed. 2019); Restatement (Second) of Contracts § 203(c).

The contract's structure and words, and commercial common sense, all indicate that § 7.3(e) was designed to assign to Anthem the risk of regulatory failure unless Cigna's breach caused the failure. Nowhere does Anthem or the decision below explain why the parties would excuse Anthem from bearing that risk where, as here, Cigna's actions were *not* the reason the deal was blocked. *See*

Chicago Bridge & Iron Co., 166 A.3d at 926-27 & n.61. Only Cigna's reading is consistent with the risk-allocation purpose of the provision.

CONCLUSION

The judgment for Anthem on Cigna's claim for the reverse termination fee should be reversed and the case remanded with instructions to enter judgment for Cigna.

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December 15, 2020

PUBLIC VERSION FILED:
December 30, 2020

CERTIFICATE OF SERVICE

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