"Hell Or High Water" Clauses in Merger & Acquisition Agreements

In the M&A context, "hell or high water" clauses are often negotiated where obtaining antitrust or regulatory approval is a condition precedent to closing the deal. Such provisions may require one or both parties to take "all necessary steps" to obtain approvals. In this way, M&A "hell or high water" provisions mandate effort and require actions in furtherance of obtaining regulatory approvals, such as compliance with government demands for information, support for a particular strategy , or participation in litigation over regulatory challenges. But ***effort*** does not guarantee a desired ***outcome***—either regulatory approval or a closing.

In disputes arising from the failure to obtain regulatory or other approvals, courts do not automatically conclude that a party failed to take "all necessary" steps. Rather, courts analogize to other "efforts" covenants that govern the parties' pre-closing obligations. These disputes generally require a fact-intensive analysis, which means that they can be difficult to resolve without a trial.

As a result, disputes will continue to arise over antitrust and regulatory efforts clauses and affect the parties' rights and remedies, including their ability to close or to seek damages for failed deals. As federal antitrust regulators engage in more stringent review, participants may see an uptick in lawsuits over these provisions.

But recent decisions, particularly from Delaware, have signaled that, even if a party breaches a pre-closing hell-or-high-water obligation, it may not be held liable because its conduct may be found to have been immaterial to or not the "but for" cause of a merger's failure. Even when courts find a breach, a remedy will not necessarily follow due to the difficulty of proving causation, contractual provisions limiting recovery to acts of willful misconduct or a judicial reluctance to impose huge damage awards.

I. Breaches That May Not Bite

Efforts clauses that obligate parties to take "any and all actions necessary" have been characterized as hell-or-high-water clauses.[1] Although disputes arising under these provisions rarely

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[1] See, e.g., Akorn, Inc. v. Fresenius Kabi AG, 2018 WL 4719347, at *46 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018) (characterizing as a "Hell-or-High-Water Covenant" a provision requiring defendant to "take all actions necessary" to secure antitrust clearance and requiring efforts that "shall be unconditional and shall not be qualified in any manner"); Hexion Specialty Chems., Inc. v. Huntsman Corp., 965 A.2d 716, 756 (Del. Ch. 2008) (awarding $325 million for breach of multiple covenants including a "come hell or high water" obligation to "take any and all action necessary" to obtain antitrust approval where Hexion "dragg[ed] its feet on obtaining that clearance" including by failing to respond to interrogatories from the FTC). As the Delaware Court of Chancery has recognized, parties may dispute whether a given "efforts" obligation should be characterized as a "hell or high water" provision at all. As that court put it, "[t]he label does not matter. What counts is the plain language of the provision." In re Anthem-Cigna Merger Litig., 2020 WL 5106556, at *96 (Del. Ch. Aug. 31, 2020), judgment entered, (Del. Ch. 2020), aff'd sub nom. Cigna Corp. v. Anthem, Inc., 251 A.3d 1015 (Del. 2021); see also Vintage Rodeo Parent, LLC v. Rent-A-Center, Inc., 2019 WL 1223026, at *6 (Del. Ch. Mar. 14, 2019) (characterizing as a hell-or-high-water provision one requiring "commercially reasonably efforts to … promptly undertake … any and all action necessary or advisable to avoid, prevent, eliminate or remove the actual or threatened commencement of any action by … any Government Entity … that would … prevent the consummation of the Merger or the other transactions contemplated").

have been litigated to resolution,[2] courts analyzing them recently have found that a breach of a hell-or-high-water provision does not necessarily establish a remedy, such as damages or a right to terminate.

One factor is that, in some M&A agreements, hell-or-high-water efforts clauses subject ***both*** parties to the same unconditional obligations.[3] For example, after the $54 billion merger between Anthem and Cigna failed on antitrust grounds, each party asserted that the other had breached its respective obligations under a hell-or-high-water antitrust efforts clause.

Despite the "all necessary" steps language, courts have still interpreted hell-or-high-water provisions in the M&A context as mandating ***effort***—i.e., by requiring parties to take all actions necessary to obtain regulatory approvals—but not ***outcome***—i.e., requiring parties to obtain those approvals or to close the transaction no matter what.[4] .

Delaware's Court of Chancery has made clear in recent decisions that disputes over such heightened efforts-obligations are still subject to proof of all elements, including causation and materiality. This opens the door to scenarios where a party can breach its hell-or-high-water obligation but not bear the cost of a failed merger. Such analyses are case-specific and fact-intensive.

By way of example, after the failed Anthem-Cigna merger, the court analyzed the parties' mutual obligations to use "commercially reasonable efforts" to take "any and all action necessary or advisable" to obtain regulatory approvals using standard rules of contract interpretation and the parties' conduct.[5] Anthem accused Cigna of failing to take "any and all action necessary" to support Anthem's efforts to obtain antitrust approval. Anthem argued also alleged that Cigna had intentionally sabotaged that approval by failing to provide necessary information to the DOJ, refusing to support mediation with the DOJ, denying Anthem access to witnesses for the trial over DOJ's merger approval, and actively undermining Anthem's defense of the merger at trial through adverse witness testimony, cross-examination of Anthem's witnesses, refusal to participate in

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[2] For example, the parties involved in the Nidec/Whirlpool merger litigated—though not to conclusion—the hell-or- high-water provision in the merger agreement. That agreement, which provided that Nidec would purchase Whirlpool's refrigeration compressor business, allocated antitrust risk to Nidec through a hell-or-high-water clause obligating Nidec to take all means necessary to secure antitrust approval. Whirlpool sued to enforce that obligation, rather than to terminate the transaction, arguing that Nidec had not taken every possible action to persuade multiple country's regulators. See Dkt. No. 1 (Complaint), 19-cv-02155 (S.D.N.Y. Mar. 8, 2019). The suit was dismissed because Nidec's time to perform its antitrust effort obligations had not yet lapsed.

[3] See, e.g., Anthem-Cigna, 2020 WL 5106556, at *93 (describing a provision obligating both parties to "take any and all actions necessary to avoid each and every impediment" under multiple sets of applicable law including antitrust).

[4] Of course, litigation also can arise over antitrust efforts clauses absent a higher "hell or high water" threshold. In the failed merger between Tribune and Sinclair, the merger agreement contained a "reasonable best efforts" antitrust provision. After the Federal Communications Commission rejected the merger, Tribune terminated the agreement and sued for breach, asserting that Sinclair had failed to use "reasonable best efforts" and alleging that Sinclair had refused to sell stations in specified markets, proposed divestitures that risked rejection or delay, and engaged in "unnecessarily protected negotiations" with regulators. See Tribune Kills $3.9B Sinclair Deal, Files Lawsuit - Law360 (Aug. 9. 2018). The case settled. See Sinclair Paying $60M To End Fight Over Failed Tribune Merger - Law360 (Jan. 28, 2020).

[5] See Anthem-Cigna, 2020 WL 5106556, at *111-13, *115, *117-20, *130-31.

opening or closing remarks or to join Anthem's post-trial briefing in support of the merger, and refusal to join an appeal of the adverse district court decision, triggering Anthem's claims of breach of the efforts clause.[6]

The Delaware court agreed that Cigna had breached its obligations. It held that, although "Anthem had the right to determine the regulatory strategy," "Cigna was obligated to accept Anthem's judgment and follow Anthem's lead"; and that "once Anthem opted to pursue a divestiture" strategy, "Cigna was required to support Anthem's divestiture efforts by identifying potential buyers, assisting with the development of a divestiture plan, entering into NDAs, providing due diligence, and advocating for the buyers and the divestiture proposal to the DOJ."[7] The court held that Cigna did "none of those things," instead "undermin[ing] Anthem's defense" in the litigation against the DOJ and breaching "its contractual commitments by a wide margin."[8]

Despite these rulings—and the court agreeing that these actions "contributed materially to the DOJ's failure to approve the Merger" in breach of Cigna's regulatory efforts obligations—the court concluded that Anthem was not entitled to any damages because Cigna demonstrated that the merger would have not have been approved even if it had not breached its efforts obligations. The court reasoned that "the DOJ would have sued" to block the merger even absent Cigna's actions and the court overseeing antitrust litigation "would have ruled against the Merger on the [antitrust] issue even if Cigna had complied with its obligations under the Efforts Covenants."[9]

As to Cigna's parallel challenge to Anthem's compliance to the same hell-or-high- water provision, the court rejected Cigna's contention that Anthem's conduct also amounted to a breach. It held that Anthem's conduct was sufficient to satisfy its obligations because the provision did not entitle Cigna to Monday-morning-quarterback Anthem's strategic choices in its pursuit of regulatory approval. The court was unpersuaded by Cigna's attempt to identify other actions Anthem could have taken, ruling that Cigna's argument that Anthem failed to pursue strategies that could have succeeded in obtaining antitrust approval amounted merely to "ways to criticize Anthem's strategy with the benefit of hindsight" while "[i]n real time, Anthem adopted a reasonable strategy and pursued it, consistent with its obligations under the Regulatory Efforts Covenant." [10]

Another example of an efforts clause breach—albeit a more technical one—that was not outcome-determinative arose in the lawsuit Akorn filed against Fresnius for specific performance, seeking to prevent Fresenius from exercising its termination rights under the parties' merger agreement. Akorn claimed that Fresenius had breached a clause obligating it to "take all actions necessary" to secure antitrust clearance—an obligation expressly deemed "unconditional" and "not … qualified in any manner." The court agreed that Fresenius had breached that obligation: after a lengthy period during which Fresenius pursued regulatory approval in compliance with its obligations

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6 See Anthem's Pre-Trial Brief, 2019 WL 2019 WL 859364 (Feb. 18, 2019); Anthem's Combined Answering and Reply Post-Trial Brief, 2019 WL 2904853 (June 28, 2019).

7 See Anthem-Cigna, 2020 WL 5106556, at *113.

8 See Anthem-Cigna, 2020 WL 5106556, at *113, 119.

9 Anthem-Cigna, 2020 WL 5106556, at *127.

10 Anthem-Cigna, 2020 WL 5106556, at *132.

until the FTC proposed divestiture by Fresenius rather than Akorn, as their agreement provided, and Fresenius for a period of only a week adopted a strategy that would have delayed the approval process by two months.[11] But because Fresenius "changed course in approximately a week and returned to" a strategy that put the regulatory approval timeline back on course, the court held the breach was not material.[12] The court concluded that Fresenius was allowed to exercise its termination rights.[13]

II. Remedies

Even when courts find that a party has breached an M&A efforts clause, a remedy does not necessarily follow.

Expectation Damages

Following the failed Anthem-Cigna merger, a Delaware court ruled that the target, Cigna, had breached its contractual obligation to take "any and all action necessary" to obtain regulatory approvals.[14] But the prospective purchaser, Anthem, was not entitled to damages. Cigna proved that even if it had complied with its obligations, the merger would not have obtained antitrust approval.[15] As the court explained, although "Anthem proved that Cigna breached the Efforts Covenants," Anthem did not demonstrate "that Cigna's breaches led to causally related damages" because Cigna's full performance would not have changed the outcome of the DOJ's denial of antitrust approval or the district court's review, which caused the merger to fail."[16]

The problem of obtaining damages is further complicated because many M&A agreements include language limiting the availability of damages to circumstances where the injured party can demonstrate that its counterparty's breach was willful—a high standard to meet.[17] As such, damages

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11 Akorn, 2018 WL 4719347, at *96–100.

12 Akorn, 2018 WL 4719347, at *100.

13 Akorn, 2018 WL 4719347, at *46.

14 The parties' "Regulatory Efforts Covenant" not only required Cigna take "any and all action necessary," but imposed a specific obligation to oppose government efforts to block antitrust clearance "fully and vigorously" including "by defending through litigation … and vigorously pursuing all available avenues of administrative and judicial appeal." Anthem-Cigna, 2020 WL 5106556, at *117-18. The court found that Cigna breached these obligations. See id. ("Cigna undermined Anthem's defense by litigating against its merger partner."); id. at *120 (explaining that the "Litigation Requirement obligated Cigna to 'vigorously pursu[e] all available avenues of administrative and judicial appeal'" and describing the "clear pattern" by which "Cigna engaged in a knowing and intentional effort to undermine Anthem's position in the Antitrust Litigation"); id. at *117 ("Anthem proved that Cigna breached its obligations under the Efforts Covenants" and "Cigna's conduct contributed materially to … making it less likely that the District Court would deny the DOJ's application for a permanent injunction or that the DC Circuit Court would take a different view on appeal").

15 Specifically, the court concluded that the DOJ "would have sued" to block the merger even absent Cigna's actions and the court overseeing antitrust litigation "would have ruled against the Merger on the [antitrust] issue even if Cigna had complied with its obligations under the Efforts Covenants." Anthem-Cigna, 2020 WL 5106556, at *127.

16 Anthem-Cigna, 2020 WL 5106556, at *5.

17 See Theresa Arnold, Amanda Dixon, Madison Whalen Sherrill, Hadar Tanne & Mitu Gulati, The Cost Of Guilty Breach: Willful Breach In M&A Contracts, 62 B.C. L. Rev. E.Supp. I.-32 (2021),

are unlikely to be available as a remedy in most contexts, and even then may be limited by judicial restraint and distaste for damages of the scale needed to make a party to a broken merger whole.[18]

Termination Fees

A contractual termination fee may be available. In many M&A agreements, a seller will be required to pay a "fiduciary termination fee" where a seller board's fiduciary duty to obtain the best deal for the company's shareholders mandate that it terminate the transaction in favor of another bid. In addition, a buyer may be required to pay a "reverse termination fee" where the merger cannot be completed because of the failure of a condition precedent for which the buyer has responsibility, such as financing—or, as relevant to M&A "hell or high water" disputes, for obtaining regulatory approval.[19] In either case, however, a termination fee is not a remedy for breach per se, but rather limited liquidated damages for specifically negotiated terminations.

Anthem-Cigna shows some of the limitations of this remedy. Both parties had termination rights. After the merger failed, Cigna pursued a reverse termination fee against Anthem. Notably, the contract's $1.85 billion reverse termination fee represented only a fraction of the merger value ($54 billion) and of the damages sought by both sides ($14.7 billion by Cigna, and $21.1 billion by Anthem). But the court concluded that Anthem was entitled to and did terminate the merger agreement first, meaning that Cigna no longer had a termination right that would trigger Anthem's payment of the fee.[20] A key predicate to the court's determination was its ruling that Cigna had breached the hell-or-high-water provision, giving rise to Anthem's termination right.[21]

Specific Performance

Where damages or a termination fee are unavailable or provide unsatisfactory relief, parties often have another powerful equitable remedy at their disposal. Specific performance is often the remedy of choice in M&A transactions, especially for sellers and targets. M&A agreements routinely provide for specific performance —such as mandating closing, with or without a financing condition—and courts routinely enforce them.[22]

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https://lawdigitalcommons.bc.edu/
cgi/viewcontent.cgi?article=3971&context=bclr.

[18] See also In re IBP, Inc. S'holders Litig., 789 A.2d 14, 83 (Del. Ch. 2001) (explaining that "the determination of a cash damages award" would be "very difficult" and "could be staggeringly large," require consideration of valuation questions, and would ultimately "lack any pretense to precision").

[19] See Arnold et al., at I-3; Drafting and Negotiating Reverse Break-Up Fee and Specific Performance Provisions, THOMSON REUTERS: PRACTICAL L. (comparing reverse break-up fee clauses).

[20] Anthem-Cigna, 2020 WL 5106556, at *139–40.

[21] Anthem-Cigna, 2020 WL 5106556, at *140.

[22] See, e.g., Snow Phipps Grp., LLC v. Kcake Acquisition, Inc., 2021 WL 1714202, at *51 (Del. Ch. Apr. 30, 2021) ("This court has not hesitated to order specific performance in cases of this nature, particularly where sophisticated parties represented by sophisticated counsel stipulate that specific performance would be an appropriate remedy in the event of breach."); Channel Medsystems, Inc. v. Bos. Sci. Corp., 2019 WL 6896462, at *39 (Del. Ch. Dec. 18, 2019) (granting specific performance to close a merger, where provided for by the parties' agreement, as such a provision "does not tie the court's hands in fashioning appropriate equitable relief," but does "reflect[] the parties' understanding that specific performance would be available in this

Courts adjudicating M&A disputes have awarded specific performance of contractual obligations short of closing, including enforcement of "efforts" obligations. These have included orders requiring a party to obtain alternative financing and to take any other steps required to enable the transaction to close.[23]

How would courts treat a claim seeking specific performance of a hell-or-high-water obligation? Imagine that in *Anthem-Cigna*, Anthem had sought specific performance of Cigna's "hell-or-high-water" obligation before regulatory approval had been denied, rather than suing for damages after the deal was scuttled. Might Anthem have obtained an order directing Cigna to participate in defending the litigation against the DOJ, testing the court's counterfactual conclusion that such support would not have changed the course of obtaining regulatory approval?

A prospective purchaser like Anthem, faced with a uncooperative target or seller, should consider pursuing specific performance rather than risk being zeroed out on damages despite the target's breach of a hell-or-high-water provision. Such a purchaser, however, will need to work through important practical and strategic issues. For example, most M&A agreements give either party the right to terminate if the closing does not occur by a certain date. In light of this timing constraint, a purchaser will need to decide whether and when to seek judicial intervention versus continuing to negotiate with its counterparty and regulators. The window may be small, particularly if a significant portion of the closing period has been expended in good faith (or less than good faith) negotiations and required efforts.

A purchaser seeking specific performance of a hell-or-high-water provision will also need to consider the specific remedy that a court might award. Asking a court to enforce an obligation to participate in defending litigation (as Anthem might have) does not ask the court to direct strategic business decisions. But would a court, for example, be willing to direct a party to propose a specific remedy to a regulator to relieve antitrust concerns?[24] Would a court construe "all steps necessary" to include proposing to regulators the sale of part of the target business to limit competition or remove the business from certain markets?

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circumstance … entirely consistent with past Delaware cases granting specific performance for failure to perform under a merger agreement"); Gildor v. Optical Sols., Inc., 2006 WL 4782348, at *11 (Del. Ch. June 5, 2006) ("If the Stockholder Agreement was silent as to the availability of specific performance, Gildor would bear the burden of showing that a legal remedy would be inadequate…. But, given Delaware's public policy of favoring freedom of contract, there is no need to make that inquiry. . . .").

[23] See, e.g., Snow Phipps Grp., LLC v. Kcake Acquisition, Inc., 2021 WL 1714202, at *55 (Del. Ch. Apr. 30, 2021) (holding plaintiffs were "entitled to specific performance of Kohlberg's obligation to use reasonable best efforts to obtain alternative financing," as well as on its obligation to close); Hexion Specialty Chemicals, Inc. v. Huntsman Corp., 965 A.2d 715, 762 (Del. Ch. 2008) (ordering Hexion to "specifically perform its obligations under the merger agreement, other than the obligation to close," including obligation to use reasonable best efforts to consummate the financing, where the agreement provided that in the event of any breach, the non-breaching party would be entitled to obtain an order of specific performance "to enforce the observance and performance of such covenant or obligation," other than the obligation to close).

[24] For example, in Anthem-Cigna, the court rejected Cigna's argument that Anthem failed to pursue strategies that could have succeeded in obtaining antitrust approval because the claim amounted to "ways to criticize Anthem's strategy with the benefit of hindsight" while "[i]n real time, Anthem adopted a reasonable strategy and pursued it, consistent with its obligations under the Regulatory Efforts Covenant." Anthem-Cigna, 2020 WL 5106556, at *132.

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This survey of hell-or-high-water clauses also provides practical lessons for deal lawyers. Parties commit to such heightened obligations for various reasons, including increased antitrust or regulatory risk associated with a transaction. However, a contractual obligation to comply with regulators can also provide the government with its own heightened leverage, increasing the cost of compliance. Recent decisions can guide the drafting of such provisions:

- Heightened efforts clauses do not mandate outcomes. The breach of a hell-or-high-water provision—whether a technical breach or a willful campaign contrary to regulatory approval— may not determine the outcome of a dispute over a terminated or failed merger. Parties that want to shift costs from a failure to obtain regulatory approval should express such expectations clearly and should negotiate specific obligations and consequences. Parties should describe the desired specific required conduct; parties could state that a given party must take actions "including but not limited to" obligatory actions, and specify the consequences for failing to do so.
- Hell-or-high-water clauses are not a stand-in for termination rights. Courts have not second-guessed strategic decisions regarding regulatory compliance efforts.

In summary, since hell-or-high-water "efforts" provisions have not resulted in the bright-line outcomes, the risks and rewards of these provisions factor in the costs of increased government leverage in transactions with antitrust ramifications.

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If you have questions or would like a copy of any of the cited materials, please contact:

Andrew J. Rossman
Email: andrewrossmann@quinnemanuel.com Phone: +1 212-849-7282

Nicholas Hoy
Email: nicholashoy@quinnemanuel.com Phone: +1 212-849-7042

Kathryn Bonacorsi
Email: kathrynbonacorsi@quinnemanuel.com Phone: +1 212-849-7312

Anna Deknatel
Email: annadeknatel@quinnemanuel.com Phone: +1 212-849-7551

August 17, 2022

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