

Litigators of the Week: The White & Case Duo Who Beat Back Cigna's Bid for a \$1.85B Breakup Fee in Ill-Fated Anthem Merger

By Ross Todd
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Last year the star-crossed tie-up between Anthem and Cigna spawned a Shakespearean [300-plus page opinion](#) from Vice Chancellor J. Travis Laster of the Delaware Court of Chancery who was overseeing litigation between the two health insurance giants.

Although Laster found that evidence showed that Cigna had sought to undermine the deal before the Justice Department took action in July 2016 to block it, he declined to award any of the billions in damages each side was seeking, finding the deal likely would have been blocked regardless.

On appeal, Cigna was still in pursuit of a \$1.85 billion breakup fee. That was until this week when Anthem's lawyers at **White & Case** secured a [two-paragraph](#) ruling from the Delaware Supreme Court adopting Laster's reasoning. **Glenn Kurtz**, the [global head of commercial litigation](#) at the firm, and partner **Claudine Columbres** land "Litigator of the Week" honors this week for fending off the breakup fee and navigating Anthem through the four-year litigation tempest.

Litigation Daily: Who was your client and what was at stake?

Glenn Kurtz: We represented Anthem, one of the largest health insurers in the United States, and at stake was \$1.85 billion. In 2015, White & Case's M&A team, led by **Daniel Dufner** and **Michael Deyong**, represented Anthem in its \$54 billion proposed acquisition of Cigna Corporation, which would have created the largest insurer in this country. The merger agreement contained covenants to use best efforts to close the deal. White & Case's antitrust team, led by **Chris Curran**, **Mark Gidley** and **George Paul**, handled the merger's regulatory



Courtesy Photos

Glenn Kurtz and Claudine Columbres of White & Case

defense. It became a difficult road to regulatory approval, and that difficulty was compounded when Cigna began working against approval. After the D.C. District Court blocked the merger as anticompetitive, Cigna purported to terminate the merger agreement and sued Anthem for breach, seeking the \$1.85 billion break-up fee, plus \$14 billion in damages. That same day, we sought, and the next day obtained, a TRO to prevent Cigna from terminating. We also sued Cigna for violating its best efforts covenants. After the D.C. Circuit affirmed the district court's decision, Anthem terminated the merger agreement based on Cigna's breaches.

Following two years of intense and contentious discovery, a two-week trial was held in the Delaware Court of Chancery before Vice Chancellor J. Travis Laster. The trial amassed a record of more than 4,600 trial exhibits, 111 lodged depositions, and the entire record from the antitrust case. The result was a \$1.85 billion victory for Anthem. The trial court found that Cigna willfully breached the contract in a "strikingly egregious" fashion and used the "exact opposite" of its best efforts. The trial

court also found that Anthem was not obligated to pay the \$1.85 billion break-up fee. In addition, we defeated each of Cigna's claims. As the trial court found, Anthem did not breach, but rather was dedicated to the merger and used best efforts to close it.

Cigna appealed only the denial of the break-up fee, claiming that it was automatically entitled to the fee if the merger failed to obtain regulatory approval, unless Cigna caused the failure. The Delaware Supreme Court affirmed our victory that Anthem was not obligated to pay the \$1.85 billion break-up fee because Anthem terminated based on Cigna's breaches, and did not have to prove causation—though the trial court found that Cigna materially contributed to the failure of the merger.

Who was on your team and how did you divvy up the work?

Claudine Columbres: The trial team was composed of a cross-office, cross-practice team and included the two of us and partners **Andrew Hammond** and **Greg Starner** from the New York office, **Heather Burke** from the Silicon Valley office, and **Dana Foster** from the Washington D.C. office, counsel **Jesse Green** from the Miami office, and associates **Camille Shepherd**, **Elizabeth Stainton**, **Vatsala Sahay**, **Alexander Sculthorpe**, **Taylor Allen**, and **Nicholas Grace** from the New York office. On appeal, the team consisted of the two of us, Jesse Green, Camille Shepherd, and Elizabeth Stainton. M&A partners **Daniel Dufner** and **Michael Deyong** from the New York office were also on the team.

We divided up the team in a way that sought to take advantage of the strengths of the talented attorneys with whom we work. Glenn shaped the strategy and led our case through a successful TRO, directed Anthem's CEO and General Counsel at trial, among others, and completely dismantled Cigna's false narrative through cross-examinations, particularly of Cigna's CEO and General Counsel. Glenn also argued the appeal. Andy led a team focused on coordinating all of the expert testimony. Greg put on an effective direct examination of one of White & Case's antitrust partners, **George Paul**, who was involved in the deal and efforts to clear the merger.

Heather brought expertise from her time on the antitrust case and methodically crossed Cigna's counsel from that case, among other cross-examinations. Dana ensured that witnesses were properly prepared for both

trials and depositions, breaking down complex concepts and a vast record. And Jesse is an impeccable writer with unparalleled research skills that proved invaluable from the TRO and complaint through the submission of our appellate briefing.

Finally, I would be remiss if I did not mention our associates. One thing that was unique about this case is that the associates were relatively junior for a case of this magnitude. The lead associate, **Camille Shepherd**, managed the team with me starting from when she was a second year during the preliminary injunction phase and managed a massive amount of discovery, drafted briefs, second chaired trial examinations, and was integral to the preparation of key witnesses at trial. She was assisted by **Liz Stainton**, an associate who was involved in the matter since the antitrust case and who also skillfully prepared key witnesses and managed a team of associates and support staff to make sure everything ran smoothly. Rounding out the core team were **Alex Sculthorpe**, **Vatsala Sahay**, **Taylor Allen** and **Nick Grace**, and who were all involved from a very junior stage and jumped right in to work on fact discovery and handled important witnesses from the beginning.

At all levels, there was great collaboration and teamwork, but the team chemistry of the associates and their positive attitudes throughout a very demanding and complex case was very important to our success. I think this case shows the importance of giving associates substantive work and client contact irrespective of seniority level. The associates were given a substantial amount of responsibility because they are smart, hard-working, professional, collaborative, and highly motivated.

This case also shows the significance of diversity, which is important to us as a firm, and our execution before, during, and after trial goes to show how diversity is more than a talking point—it generates better results. We were a team of lawyers that was diverse in many ways, which was unquestionably important to this victory. The diversity of the team fostered the creativity, innovative thinking and problem solving necessary for our success.

Glenn Kurtz: And obviously we cannot forget Claudine, who put this team together, managed the case day-to-day, handled countless depositions, drafted briefs, committed the voluminous record to memory and always

kept focused on our trial themes, which translated into highly-effective briefing and advocacy at trial and on appeal.

Glenn, you called this case “one of the most remarkable corporate litigations in history.” What makes it so remarkable?

Glenn Kurtz: This case was remarkable because I am not aware of another case that involved such an elaborate campaign by a merger partner to avoid a deal. Cigna secretly employed advisors and paid them millions of dollars to help it escape a merger that it was contractually required to support with best efforts.

It was also remarkable that the most damaging evidence was withheld under claims of privilege. At the start of this four-year litigation, we made common sense arguments given Cigna’s obvious opposition to the merger, but the case really came together when we moved to compel the production of the withheld documents, which resulted in our uncovering a large and colorful volume of very damaging evidence that Cigna was undermining Anthem’s defense of the merger.

With both sides in the underlying trial asking for billions, make your best case that Vice Chancellor Laster’s initial 300-plus page decision in the case was a win for Anthem?

Claudine Colombes: This case was about who breached, and we proved that it was Cigna, not Anthem. Cigna sued first, and we defeated all of Cigna’s claims. As to the economics, the case was primarily about the \$1.85 billion termination fee. In fact, Cigna appealed only the denial of the termination fee. And as is the case with all litigations, you can always tell who won by who appeals. Here, Cigna appealed the trial verdict. Anthem defended it. Additionally, the court’s findings were consistent with our positions and based on the record we developed. The findings against Cigna are very problematic for its executives.

What were oral arguments like in front of the Delaware Supreme Court? Did you get any feeling that this would be the outcome?

Glenn Kurtz: The Delaware Supreme Court is a pre-eminent appeals court, and appearing there is always a

privilege. I would not be presumptuous enough to predict the Delaware Supreme Court, but given Vice Chancellor’s Laster’s well-reasoned decision that Anthem did not owe the break-up fee, I felt confident that Anthem would win the appeal, especially given the willfulness of Cigna’s breaches.

What can lawyers in the M&A world and litigators who handle cases over “star-crossed” mergers like this take away from this case?

Glenn Kurtz: One takeaway from this case is that best efforts means just that. Even if a party is considering termination of a merger agreement, until termination, the party needs to continue to work towards closing. The second takeaway is that termination and termination fee provisions are important and should be written clearly. Here, we prevailed on appeal because our contract provided that Anthem had a right to terminate if Cigna breached, without regard to causation. Lastly, as I noted, Cigna concealed its true intent as to the merger. Lawyers should know, and should advise their clients, that the truth generally will emerge in litigation, and you will be judged on your actions, even if they are not yet known to your merger partner.

What will you remember most about handling this matter?

Claudine Colombes: I will remember the team camaraderie and collaboration. Although the case was a lot of hard work, we also had a lot of fun litigating it. And I will also remember the early stages of the case when we successfully obtained the TRO to prevent Cigna from terminating, a very important step in this case. Our strategic thinking to enjoin Cigna after it tried to terminate was an unconventional move that allowed us to gain an advantage that would form the basis for our trial and appeal success. I will also never forget how rewarding it was to uncover the crucial, damaging evidence in this case after our efforts to overcome Cigna’s privilege assertions. Given Cigna’s overt behavior, we had long suspected there was an intentional plan to sabotage the deal, but those documents really undermined the testimony from Cigna witnesses and the documentary record Cigna had created for use in litigation.