

JUDGE REJECTS JOINT DEFENSE PRIVILEGE CLAIM; ORDERS WOULD-BE MERGER PARTNERS TO PRODUCE SENSITIVE EMAILS TO DOJ

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On October 14, 2016, a federal judge in Washington, D.C., ruled that two companies could not claim a joint defense privilege for certain sensitive emails they had exchanged in connection with their proposed merger. Specifically, the court found that documents expressing disagreements between the two companies about how the merged entities would operate were not privileged because they did not relate to the parties' common interest or made in furtherance of that interest. The ruling came in response to a demand from the Antitrust Division of the Department of Justice ("DOJ"), which has sued the two companies, health insurers Anthem, Inc. ("Anthem") and Cigna, seeking to stop the companies from merging.

The court's decision highlights the need for parties to have joint defense agreements—whether in the merger or any other context—to understand the limits of the protection from disclosure provided by such agreements. The privilege not to disclose shared information between parties to a joint defense agreement is limited to communications: (1) on subjects about which the parties have a common interest; (2) relating to an actual or potential litigation; (3) related to the parties' common interest; and (4) made in furtherance of that common interest. Shared communications that don't meet these criteria are potentially subject to disclosure despite the existence of a joint defense agreement.

BACKGROUND

In July of 2015, Anthem reached an agreement to buy Cigna in a \$54 billion deal expected to impact 54 million members for both insurers. As part of their agreement, the parties entered a joint defense agreement designed to allow them to communicate with each other confidentially during the required regulatory review. That process included review by the DOJ to determine whether it thought the proposed merger would harm competition and violate the antitrust laws. As a result of its review, in July 2016, the DOJ sued in federal court to block the merger.

On August 16, 2016, during pretrial discussions, counsel for Cigna told Richard Levie, the court's Special Master, that Anthem and Cigna had exchanged letters accusing each other of breaching the merger agreement. It appears the accusations stemmed from disagreements between the insurers about a variety of issues, including the eventual leadership structure of the combined entity, as well as unrelated litigation commenced by Anthem in March 2016.

Shortly after learning of the emails' existence, the DOJ demanded that Anthem and Cigna turn them over. The insurers refused, citing privilege. The DOJ then moved the court to order the documents' disclosure. The DOJ

conceded that the emails were related to the merger; however, the DOJ argued that the communications were not in furtherance of the parties' joint defense agreement. Rather, the DOJ argued that the emails were adversarial in nature, and actually were at odds with the joint defense that Anthem and Cigna contemplated, as the emails undermined the parties' joint defense. The DOJ also argued the emails were relevant because they called into question whether or not the companies could work together effectively and achieve significant cost-saving synergies, as Anthem and Cigna had argued.

The companies responded that the privilege should apply to shield the emails from disclosure because they were related to the parties' ongoing merger negotiations and were covered by their joint defense agreement. Like typical joint defense agreements, theirs was based on the premise that two parties with an actual or potential shared interest in litigation against a common adversary may, without waiving their privilege, communicate and share privileged information related to that litigation to facilitate the preparation of a defense.

THE COURT RULES FOR THE DOJ AND ORDERS DISCLOSURE

Judge Jackson asked Special Master Levie to look into the dispute and make a recommendation to the court. After considering all arguments and viewing the emails, the Special Master recommended that 12 whole emails and parts of 13 other emails be handed over to the DOJ.

The Special Master agreed with the DOJ that the selected emails were relevant because they called into question the alleged post-merger efficiencies and synergies which Anthem and Cigna had pled in their Answer to the Complaint. Special Master Levie opined that the insurers' argument that the documents weren't relevant because they intended to work past this dispute and proceed to merge successfully went not to the applicability of the joint defense privilege or the admissibility of the communication, but to the weight the fact-finder should give the evidence.

The Special Master also agreed with DOJ that the joint defense privilege and the joint defense agreement did not protect the selected emails. He found that the emails were not created or sent with the intent of furthering both parties' common interest in defending against the DOJ suit. He reasoned that extending the joint defense privilege to this situation would undermine the justification for the privilege. In his view, protecting the communications would do nothing to promote a vigorous defense of the merits of the underlying DOJ suit, and would do nothing to inhibit the feared chilling that would follow if companies risked waiving privilege when engaging with co-parties in a joint defense.

In a one page order on October 14, 2016, Judge Jackson agreed and ordered that Special Master Levie's recommendation be made final and binding.

DANGERS OF JOINT DEFENSE PRIVILEGE AND JOINT DEFENSE AGREEMENTS

The court's decision highlights the risks involved with any written communication, even when parties believe their communications are protected by privilege. It highlights the limitations of the joint defense privilege and the risks of assuming that it will protect all communications between parties to joint defense agreements. It also specifically shows that adversarial communications between parties to such agreements risk falling outside of joint defense privilege protection.

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