
CLASS 9 SLIDES

For October 1, 2019

Unit 7: Hertz/Avis Budget/Dollar Thrifty

Merger Antitrust Law

Georgetown University Law Center

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Hertz/Avis Budget/Dollar Thrifty



Antitrust Risk Allocation

What do the parties want?

■ The seller

- Wants the deal to close before the termination date so that the seller can get the purchase price
 - In an all cash deal, does not care about any divestiture the buyer will have to make to settle the investigation or litigation
 - Does not want any purchase price adjustment for divestitures

■ The buyer

- After taking into account any restructuring that would be required by a consent settlement and any reverse termination fee—
 - If the transaction remains a good deal, wants the deal to close before the termination date
 - If the transaction becomes a bad deal, does not want the deal to close before the termination date, at which time the buyer will terminate the contract

What is the antitrust risk in a transaction?

- For the seller:
 - That the transaction will not close, and so the seller will not receive the purchase price
 - The seller also must take into account for any loss of going concern value during the pendency of the deal
- For the buyer:
 - That the buyer will be forced by the affirmative covenants in the purchase agreement to close the transaction with divestitures that make the deal undesirable, and/or
 - That the buyer will have to pay a reverse termination fee if the deal does not close

Look to both the probability and the magnitude of the loss of these possible events

What was the antitrust risk in this deal?

- The competitive landscape—U.S. rental car market 2011

Company	Cars	Locations	%Cars
Enterprise Holdings (Alamo, Enterprise, National)	920,861	6,187	52.3%
Hertz (includes Advantage)	320,000	2,500	18.2%
Avis Budget Group	285,000	2,300	16.2%
Dollar Thrifty Automotive Group	118,000	445	6.7%
U-Save Auto Rental System	11,500	325	0.7%
Fox Rent A Car	11,000	13	0.6%
Payless Car Rental System	10,000	32	0.6%
ACE Rent A Car	9,000	90	0.5%
Zipcar	7,400	128	0.4%
Rent-A-Wreck of America	5,500	181	0.3%
Triangle Rent-A-Car	4,200	28	0.2%
Affordable/Sensible	3,300	179	0.2%
Independents	55,000	5,350	3.1%
	1,760,761		100.0%

Combined share
= 24.9%

What was the antitrust risk in this deal?

- The competitive landscape—U.S. rental car market 2011

Overall

Company	Cars	Locations	%Cars	Airport
Enterprise Holdings (Alamo, Enterprise, National)	920,861	6,187	52.3%	34.0%
Hertz (includes Advantage)	320,000	2,500	18.2%	25.0%
Avis Budget Group	285,000	2,300	16.2%	26.0%
Dollar Thrifty Automotive Group	118,000	445	6.7%	12.0%
U-Save Auto Rental System	11,500	325	0.7%	
Fox Rent A Car	11,000	13	0.6%	
Payless Car Rental System	10,000	32	0.6%	
ACE Rent A Car	9,000	90	0.5%	
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Triangle Rent-A-Car	4,200	28	0.2%	
Affordable/Sensible	3,300	179	0.2%	
Independents	55,000	5,350	3.1%	
	1,760,761		100.0%	

Combined airport share = 37.0%

FTC could demand the divestiture of specific store locations in order to settle the investigation or any subsequent litigation

The risk for the parties

- For the seller:
 - The deal will not close because the FTC demands the divestiture of more store locations than the buyer is required or adequately incentivized by the merger agreement to accept
- For the buyer
 - The buyer will be forced to close even though the FTC's demand for the divestiture of stores will make the transaction inadequately profitable or perhaps even unprofitable, either because the merger agreement—
 - Contains *affirmative covenants* requiring the buyer to accept a consent decree requiring the divestiture of these stores, or
 - Incentivizes the buyer to accept the divestiture to avoid paying the seller a sufficiently high *antitrust reverse termination fee*
 - The buyer will be able to terminate the deal but will have to pay the seller a reverse termination fee

Antitrust risk allocation

- The bargaining game
 1. How can affirmative covenants in the merger agreement change the probability that the conditions precedent will be satisfied before the termination date?
 2. Given the antitrust risk, what affirmative covenants will result from the parties' bargaining?
 3. How will these affirmative covenants change the probability of the closing conditions being satisfied?

The relevant contract provisions

- Closing conditions (conditions precedent)
 - Deal does not close unless and until all conditions are satisfied
 - *Closing date* usually with 5 business days of satisfaction
- Termination date
 - Date on which either party can terminate agreement without cause (often called the “drop-dead date”)
 - Can provide for extensions in certain contingencies
- Affirmative covenants
 - Requires the parties to do—or refrain from doing—certain acts
 - Can be used to increase the probability that the conditions precedent will be satisfied
- Antitrust reverse termination fee (ARTF)
 - Payable by the buyer to the seller if the antitrust closing conditions are not satisfied when the deal is terminated

Conditions precedent

- Standard antitrust-related provisions
 1. Regulatory authorizations
 2. No injunction or legal restraint
 3. No threatened or pending litigation by an antitrust authority

Conditions precedent

1. Regulatory authorizations

- Example: 2010 Hertz/Dollar Thrifty § 7.01(d)—Applies to both parties

Regulatory Authorizations. **Each of the HSR Approval and the CBC Approval shall have been obtained and shall remain in full force and effect.** All other actions or nonactions, waivers, clearances, consents and approvals of (or filings or registrations with) any Governmental Authority identified on Section 7.01(d) of the Company Disclosure Schedule shall have been obtained or made or have occurred prior to the Effective Time.

Note: The CBC is the Canadian Competition Bureau

Conditions precedent

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Conditions precedent

2. No injunction or legal restraint

- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.01(f)—Applies to both parties

No Injunctions or Restraints. **No temporary restraining order, preliminary or permanent injunction or other judgment, order or decree issued by any court of competent jurisdiction or other statute, law, rule, legal restraint or prohibition (collectively, “Restraints”)** shall be in effect restraining, enjoining, prohibiting or otherwise making illegal the consummation of the Merger and the other transactions contemplated hereby; *provided*, that a party shall not be relieved of its obligation to effect the Merger and the other transactions contemplated hereby if it has not used its reasonable best efforts to contest, appeal and remove any such Restraint.

Conditions precedent

2. No injunction or legal restraint

- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.01(f)—Applies to both parties

No Injunctions or Restraints. No temporary restraining order, preliminary or permanent injunction or other judgment, order or decree issued by any court of competent jurisdiction or other statute, law, rule, legal restraint or prohibition (collectively, “Restraints”) **shall be in effect restraining, enjoining, prohibiting or otherwise making illegal the consummation of the Merger and the other transactions contemplated hereby; provided**, that a party shall not be relieved of its obligation to effect the Merger and the other transactions contemplated hereby if it has not used its reasonable best efforts to contest, appeal and remove any such Restraint.

Conditions precedent

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- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.01(f)—Applies to both parties

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Conditions precedent

3. No threatened or pending litigation by an antitrust authority

- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.02(d)—Applies to both parties

No Litigation. **There shall not be instituted or pending any suit**, action or proceeding by the **United States Federal Trade Commission** or the **Antitrust Division** of the United States Department of Justice under any U.S. Antitrust Law or the **Commissioner of Competition** appointed pursuant to Section 7 of the Competition Act (Canada) under the Competition Act (Canada) (the “Commissioner”) . . .

Conditions precedent

3. No threatened or pending litigation by an antitrust authority

- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.02(d)—Applies to both parties

No Litigation. There shall not be instituted or pending any suit, action or proceeding by the United States Federal Trade Commission or the Antitrust Division of the United States Department of Justice under any U.S. Antitrust Law or the Commissioner of Competition appointed pursuant to Section 7 of the Competition Act (Canada) under the Competition Act (Canada) (the “Commissioner”)

(i) challenging or seeking **to make illegal**, to **delay materially** or otherwise **directly or indirectly to prohibit the consummation of the Merger** or any of the other transactions contemplated hereby,

Conditions precedent

3. No threatened or pending litigation by an antitrust authority

- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.02(d)—Applies to both parties (con't)

No Litigation. There shall not be instituted or pending any suit, action or proceeding by the United States Federal Trade Commission or the Antitrust Division of the United States Department of Justice under any U.S. Antitrust Law or the Commissioner of Competition appointed pursuant to Section 7 of the Competition Act (Canada) under the Competition Act (Canada) (the “Commissioner”)

...

(ii) seeking to **prohibit Parent’s ability** to vote, transfer, receive dividends or otherwise **exercise full rights of ownership** with respect to the stock of the Surviving Entity or

Conditions precedent

3. No threatened or pending litigation by an antitrust authority

- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.02(d)—Applies to both parties (con't)

No Litigation. There shall not be instituted or pending any suit, action or proceeding by the United States Federal Trade Commission or the Antitrust Division of the United States Department of Justice under any U.S. Antitrust Law or the Commissioner of Competition appointed pursuant to Section 7 of the Competition Act (Canada) under the Competition Act (Canada) (the “Commissioner”)

...

(iii) seeking to **prohibit, limit, restrain or impair Parent’s ability** to **own, control, direct, manage, or operate** or to retain or change any portion of the assets, licenses, operations, rights, product lines, **businesses or interests therein of the Company** or its Subsidiaries from and after the Effective Time or any of the assets, licenses, operations, rights, product lines, businesses or interests therein of Parent or its Subsidiaries,

Conditions precedent

3. No threatened or pending litigation by an antitrust authority

- ❑ Example: 2010 Hertz/Dollar Thrifty § 7.02(d)—Applies to both parties (con't)

except, in each case, where the remedy sought by such Governmental Authority is one that Parent would be required to accept consistent with its obligations under Section 6.03(a) [the affirmative risk-shifting covenants].

Termination provisions

- Standard provisions

1. At any time by mutual consent
2. By either party after the Termination Date (the “drop-dead date”)
3. By either party if a law or court order (having exhausted all appeals) makes the closing unlawful

Termination provisions

1. At any time by mutual consent
 - Example: 2010 Hertz/Dollar Thrifty § 8.01(a)

SECTION 8.01 Termination. This Agreement **may be terminated at any time prior to the Effective Time**, except to the extent otherwise set forth below, whether before or after receipt of the Company Stockholder Approval, with any termination by Parent also being an effective termination by Merger Sub:

(a) by **mutual written consent** of Parent and the Company;

Termination provisions

2. By either party after the Termination Date (“drop-dead date”)

- Example: 2010 Hertz/Dollar Thrifty § 8.01(b)(i)

(b) by either Parent or the Company:

(i) if the Merger shall not have been consummated on or before 12 months after the date hereof (the “Termination Date”); provided, however, that the right to terminate this Agreement under this Section 8.01(b)(i) shall not be available to any party whose breach of any provision of this Agreement resulted in the failure of the Merger to be consummated on or before such date;

- May be extended for additional time in specified circumstances
 - Example: To permit litigation

Termination provisions

2. By either party after the Termination Date (“drop-dead date”)

- Example: 2010 Hertz/Dollar Thrifty § 8.01(b)(i)

(b) by either Parent or the Company:

(i) if the Merger shall not have been consummated on or before 12 months after the date hereof (the “Termination Date”); **provided, however, that the right to terminate this Agreement under this Section 8.01(b)(i) shall not be available to any party whose breach of any provision of this Agreement resulted in the failure of the Merger to be consummated on or before such date;**

- Typically written so that it may not be invoked by a party whose breach of its contractual obligations resulted in the failure of the deal to close
 - *Most common claim:* The party invoking the termination right failed to discharge its affirmative obligations to defend the transaction in the investigation

Termination provisions

3. By either party if a law or court order (having exhausted all appeals) makes the closing unlawful
 - Example: 2010 Hertz/Dollar Thrifty § 8.01(b)(ii)

(b) by either Parent or the Company:

...

(ii) if **any Restraint** having the effect of **permanently restraining, enjoining, or otherwise prohibiting the Merger** and the transactions contemplated by this Agreement **shall be in effect** and **shall have become final and nonappealable**; provided that the right to terminate this Agreement under this Section 8.01(b)(ii) shall not be available to any party that has not used its reasonable best efforts to contest, appeal and remove such Restraint;

Covenants

■ Basic idea

- Impose obligations on the merging parties to work to satisfy the conditions precedent

■ Antitrust-related covenants

1. General “efforts” clause
2. Obligations to satisfy conditions precedent
3. Obligations to make HSR and other premerger notification filings
4. Obligations to obtain government consents and clearances
5. Obligations to respond to government requests
6. Obligations to consult in prosecuting defense
7. Obligations to “fix” the agency's concerns
8. Obligations to litigate
9. Limitations on the obligation to “fix” the antitrust concerns
10. Obligations not to make acquisitions that could impede the closing

Covenants

1. General “efforts” clause

- ❑ “Best efforts”
- ❑ “Reasonable best efforts”
- ❑ “Reasonable efforts”/“Commercially reasonable efforts”

- ❑ Example: 2010 Hertz/Dollar Thrifty § 6.03(a)

Subject to the terms and conditions of this Agreement, each of the Company and Parent shall use its **reasonable best efforts** to take, or cause to be taken, **all actions**, and to do, or cause to be done, and to assist and cooperate with each other in doing, all things **necessary, proper or advisable to consummate and make effective, the Merger** and the other transactions contemplated by this Agreement **prior to the Termination Date**.

Covenants

2. Obligations to satisfy conditions precedent

- Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Without limiting the foregoing, each of the Company and Parent shall

(i) use their respective **reasonable best efforts** to cause the **conditions set forth in Article VII to be satisfied on a timely basis** so as **to permit the consummation** and effectiveness of the Merger and the other transactions contemplated by this Agreement **prior to the Termination Date**;

Covenants

3. Obligations to make HSR and other merger control filings
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Without limiting the foregoing, each of the Company and Parent shall

...

(ii) as promptly as reasonably practicable **prepare and file the required submissions under all Antitrust Laws** that the Company and Parent deem necessary, advisable or appropriate, in each case, with respect to the Merger and the other transactions contemplated hereby, provided, that the submissions required for the **HSR Approval shall be filed within 20 days** following the date hereof and the submissions required for the **CBC Approval shall be filed within 10 days following the filing date of the submissions required for the HSR Approval**;

Covenants

4. Obligations to obtain government consents and clearances
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Without limiting the foregoing, each of the Company and Parent shall

...

(iii) use their respective **reasonable best efforts to obtain** all necessary actions or nonactions, waivers, **clearances**, consents and approvals from **Governmental Authorities** (including the **HSR Approval** and the **CBC Approval**) and the making of all necessary registrations and filings and the taking of all steps as may be necessary to obtain an approval or waiver from, or **to avoid an action or proceeding by any Governmental Authority**, prior to the **Termination Date**;

Covenants

5. Obligations to respond to government requests (including second requests)
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Without limiting the foregoing, each of the Company and Parent shall

...

(iv) **as promptly as reasonably practicable** following the receipt thereof, **respond to** (or properly reduce the scope of) any formal or informal **request for additional information or documentary material** received by the Company, Parent or any of their respective Subsidiaries from any Governmental Authority; and

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Without limiting the foregoing, each of the Company and Parent shall

...

(v) **consult and cooperate with each other** and consider in good faith the views of each other in connection with any analyses, appearances, presentations, memoranda, briefs, arguments, opinions or proposals made or submitted by or on behalf of the Company or Parent in connection with proceedings before any Governmental Authority with respect to the Merger and the other transactions contemplated hereby.

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall cooperate with each other to the extent necessary to assist each other in the preparation of its filing or submission under any such Antitrust Law and, if requested, to promptly amend or furnish additional information thereunder. Each of the Company and Parent shall use its reasonable best efforts to (x) furnish to each other all information required for any filing or submission under any Antitrust Law and (y) keep each other reasonably informed with respect to the status of each action or nonaction, waiver, consent or approval sought from a Governmental Authority, in each case, in connection with the Merger and the transactions contemplated hereby.

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall cooperate with each other to the extent necessary to assist each other in the preparation of its filing or submission under any such Antitrust Law and, if requested, to promptly amend or furnish additional information thereunder. **Each of the Company and Parent shall use its reasonable best efforts to (x) furnish to each other all information required for any filing or submission under any Antitrust Law and** (y) keep each other reasonably informed with respect to the status of each action or nonaction, waiver, consent or approval sought from a Governmental Authority, in each case, in connection with the Merger and the transactions contemplated hereby.

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 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall cooperate with each other to the extent necessary to assist each other in the preparation of its filing or submission under any such Antitrust Law and, if requested, to promptly amend or furnish additional information thereunder. Each of the Company and Parent shall use its reasonable best efforts to (x) furnish to each other all information required for any filing or submission under any Antitrust Law and **(y) keep each other reasonably informed with respect to the status of each action or nonaction, waiver, consent or approval sought from a Governmental Authority**, in each case, in connection with the Merger and the transactions contemplated hereby.

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall, in connection with the Merger and the other transactions contemplated hereby, without limitation:

(1) **promptly notify** the other of, and if in writing, **furnish the other with copies** of (or, in the case of oral communications, advise the other of) **any communications from or with any Governmental Authority** with respect to the Merger or the other transactions contemplated hereby,

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall, in connection with the Merger and the other transactions contemplated hereby, without limitation:

...

(2) **permit the other to review and discuss in advance**, and consider in good faith the view of the other in connection with, **any proposed written or oral communication with any Governmental Authority,**

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall, in connection with the Merger and the other transactions contemplated hereby, without limitation:

. . .

(3) **not participate** in any **substantive meeting** or have any **substantive communication with any Governmental Authority unless** it has **given the other a reasonable opportunity to consult** with it in advance and, to the extent permitted by such Governmental Authority, **gives the other the opportunity to attend and participate** therein,

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall, in connection with the Merger and the other transactions contemplated hereby, without limitation:

. . .

(4) **furnish the other party's outside legal counsel with copies of all filings and communications** between it and any such Governmental Authority with respect to the Merger and the other transactions contemplated hereby, . . .

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall, in connection with the Merger and the other transactions contemplated hereby, without limitation:

...

(4) furnish the other party's outside legal counsel with copies of all filings and communications between it and any such Governmental Authority with respect to the Merger and the other transactions contemplated hereby, **provided** that **such material may be redacted** as necessary (I) to comply with **contractual arrangements**, (II) to address **good faith legal privilege** or **confidentiality concerns** and (III) to **comply with applicable Law**

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each of the Company and Parent shall, in connection with the Merger and the other transactions contemplated hereby, without limitation:

. . .

(5) **furnish the other party's outside legal counsel** with such **necessary information and reasonable assistance** as the other party's outside legal counsel may reasonably request **in connection with its preparation of necessary submissions of information to any such Governmental Authority**.

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each party shall consult with the other party and **consider in good faith** the views of the other party **prior to entering into any agreement**, arrangement, undertaking or understanding (oral or written) **with any Governmental Authority** relating to any Antitrust Law with respect to the Merger or the other transactions contemplated hereby; . . .

Covenants

6. Obligations to consult in prosecuting defense
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(a) (con't)

Each party shall consult with the other party and consider in good faith the views of the other party prior to entering into any agreement, arrangement, undertaking or understanding (oral or written) with any Governmental Authority relating to any Antitrust Law with respect to the Merger or the other transactions contemplated hereby; **provided**, that subject to its undertakings in Section 6.03(c), **the final determination as to the appropriate course of action shall be made by Parent.**