

MERGER ANTITRUST LAW

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Georgetown University Law Center
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Tuesdays and Thursdays, 3:30-5:30 pm
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Reading Guidance

Class 9 (October 1): Hertz/Avis Budget/Dollar Thrifty (Unit 7)

In this second of three classes on the contested takeover battle between Hertz and Avis Budget to acquire Dollar Thrifty, we will explore the antitrust obstacles that Hertz and Dollar Thrifty perceived in closing their 2010 deal and how the parties allocated the antitrust risk associated with these obstacles in the merger agreement.¹

First, read the excerpts from the Background and Reasons for the Offer in the Form S-4 that Hertz filed on May 9, 2011 (pp. 40-47).² This describes the sequence of negotiations between Hertz and Dollar Thrifty leading to the signing of the 2010 agreement.

Cast of Characters

Mark P. Frissora, Hertz's Chairman and Chief Executive Officer
Debevoise & Plimpton LLP, Hertz's deal and co-regulatory counsel
Jones Day, Hertz's co-regulatory counsel

Scott L. Thompson, Dollar Thrifty's President and Chief Executive Officer
Cleary Gottlieb Steen & Hamilton LLP, Dollar Thrifty's deal and regulatory counsel

As you read these excerpts, note that to the Dollar Thrifty board "transaction certainty was of paramount importance" and that as a result "regulatory issues" (i.e., antitrust obstacles) were a major consideration. Focus on the role that regulatory issues and the allocation of risk play in these negotiations. In particular, note how Dollar Thrifty maneuvered to both increase the bid price and the certainty of closing.

Next, we will examine how Hertz and Dollar Thrifty allocated the antitrust risk in the 2010 merger agreement. This is both a critical and challenging topic in merger antitrust law and worth some careful thought. Keep in mind that the seller does not get its money unless the deal

¹ For a more complete collection of materials on the Hertz/Avis Budget/Dollar Thrifty transaction than are in the reading materials, including press releases, investor presentations, SEC filings, background information, and commentary, see the [DOJ/FTC Merger Review and Settlement Procedures](#) page on AppliedAntitrust.com.

² A Form S-4 is required by the Securities and Exchange Commission (SEC) in connection with the registration under the Securities Act of 1933 of securities to be issued. Since Hertz was issuing new securities as part of the consideration to be paid to the Dollar Thrifty shareholders, it had to file a Form S-4. This particular S-4, while it covers the 2010 deal, was filed in connection with a subsequent attempt by Hertz to acquire Dollar Thrifty, so do not get confused by the dates. For more on S-4s, see Practical Law Corporate & Securities, [Registration Statement: Form S-4 and Business Combinations](#).

closes. The merger agreement is where the seller can negotiate for provisions that increase the probability of closing. Conversely, the buyer does not want to be required to close a deal that has been restructured through a consent decree to “fix” the antitrust problems when the restructured deal eliminates so much of the buyer’s benefit of the deal that the deal is no longer in the buyer’s business interests. Accordingly, the buyer wants to negotiate limitations in what it may be required to do to fix the antitrust problems in the face of a challenge by the investigating agency and to be able to escape its closing obligations if the fix demands too much.³

I have included the entire 2010 Hertz/Dollar Thrifty agreement in the reading materials (pp. 49-139). The antitrust-related provisions are highlighted and you need only read these, but I wanted to give you the opportunity to see the provisions in the context of the entire merger agreement. I suggest that you read the agreement on-screen and do not print it out.

My suggestion for approaching the merger agreement is to start with the class notes on allocating antitrust risk in merger agreements.

- First, the deck explores some terminology used in merger agreements (slide 2) and then looks at the objectives each of the parties would like to achieve in the merger agreement (slides 3-5). It is important to get a good feel for the objectives of the merging parties—which not surprisingly differ considerably between buyer and seller—since they create the tensions in the negotiations.
- Second, after a quick refresher of the possible outcomes of the DOJ/FTC merger review process (slide 6), we turn to how the provisions in the merger agreement can generally affect the objectives of each party (slides 7-9).
- Third, we take a quick look at the organization of a typical merger agreement (slides 10-14). After (or while) you are reading these slides, look at the table of contents of the Hertz/Dollar Thrifty agreement (pp. 50-54).
- Finally, we examine the specific provisions in the Hertz/Dollar Thrifty agreement that allocate the antitrust risk (slides 15-27). As you read each of the specific provisions, locate the actual provision(s) in the Hertz/Dollar Thrifty agreement and see what the parties agreed to do in this deal. The bulk of the class will be going through the risk-shifting provisions in the 2010 agreement in some detail.

While historical experience strongly suggests that our discussion of the merger agreement will carry us into Class 10, I still suggest you prepare as if we will complete risk-shifting provisions in Class 9. Negotiating the antitrust-related provisions is one of the most important things an antitrust deal lawyer does. It is important to see all of the pieces at once because of the way the various provisions interact with one another.

³ Remember that there are three major things that merger antitrust lawyers do: (1) they anticipate antitrust obstacles presigning that may impede the closing of the deal, preliminarily assess the strength of the substantive defenses and the likelihood they will be able to overcome the obstacles on the merits, and use the results of this analysis to inform their negotiation of the merger agreement; (2) they defend the deal on the merits in the agency merger review and, if necessary, in litigation; and (3) to the extent that defense is not successful but the merging parties (usually only the buyer is necessary) is willing to fix the problems through a consent decree, negotiate the consent decree with the investigating agency. This class focuses on the first exercise.

In Class 10, we will finish discussing the antitrust-related provisions in the Hertz/Dollar Thrifty deal and then spend the remainder of class on a discussion of the emergence of Avis Budget Group as a competing bidder and the ensuing bidding war. We also will briefly look at FTC merger review, including the problems the FTC found (at least as revealed in the FTC complaint), the consent order that the FTC and the parties negotiated to “fix” these problems, and the aftermath of the fix.

If you have any questions or comments, send me an e-mail.