

MERGER ANTITRUST LAW

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Tuesdays and Thursdays, 3:30-5:30 pm
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Reading Guidance

Class 10 (October 10): Hertz/Avis Budget/Dollar Thrifty (Unit 7)

In this last class on the contested takeover battle between Hertz and Avis Budget to acquire Dollar Thrifty, we will finish the Class 9 materials on contractual merger antitrust risk allocation, explore the emergence of Avis Budget Group as a competing bidder for Dollar Thrifty, the ensuing bidding war, and the conclusion with Hertz as the winning bidder. We also will briefly look at the 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.

After Hertz and Dollar Thrifty signed their 2010 merger agreement, Avis Budget Group launched a “topping” bid (pp. 141-144). You might wonder how Avis Budget could come into the picture with a competing bid after Hertz and Dollar Thrifty had signed (with board approval) a definitive merger agreement. The answer is that Delaware corporate law—and most corporations, including Hertz Global Holdings and Dollar Thrifty Automotive Group, are Delaware corporations—holds that iron-clad lockups of a company violate the fiduciary duties of the target company’s board of directors (so-called *Revlon* duties). As a result, merger agreements contain provisions that permit the target company to terminate a signed agreement prior to the approval of the target’s shareholders in order to accept a superior bid from a third party. This is called a “fiduciary out.” I have a short note on this in the reading materials (pp. 145-151).

In years past, I have assigned the press releases, investor presentations, and SEC filings that tell the entire story of the bidding war. This year I have made those materials optional and moved them out of the required reading materials.¹ Even so, I strongly recommend that you read them. Despite their apparent length, they are quick and easy-going reads. They will give you an excellent feel of how a contested takeover proceeds. If you look at these optional materials, I suggest that you read them on-screen. The bulk of the materials are press releases, letters, and the occasional investor presentation, transcripts of an analyst call, and excerpts from an SEC filing. Read them like a novel. Look for how Dollar Thrifty maneuvered to obtain both a higher deal price and risk-shifting provisions that provided for a higher probability of closing. At the same time, watch for how and with what success Hertz and Avis Budget each resisted. Finally, keep in mind that except for these materials, Hertz and Avis Budget knew very little about what the other was doing in the bidding.

Next, we turn to the outcome of the FTC merger review. Read the FTC press release and the administrative complaint (pp. 153-160). Make sure that you understand the FTC’s theory of the case and see how well you would have predicted the consent decree relief if you had known

¹ See [Unit 7: Hertz/Avis Budget/Dollar Thrifty Optional: The Bidding War](#).

some of the basic facts. You may find it useful to know that most airports collect data on airport rental car operations, so you may assume that you would have the locations of each airport in which Hertz and Dollar Thrifty overlapped, the names of the other airport rental car competitors, and the revenues or revenue market shares of each of the companies.² If your client is one of the merging parties, you will also know what their expansion plans are for the future so that you can do at least one side of the potential competition analysis.

Also, note that the FTC complaint alleges *two* separate and distinct violations. As we have discussed in an earlier unit, this is standard FTC practice. I will ask in class what is the difference between them. By contrast, DOJ complaints charge only violations of Section 7 of the Clayton Act. What is going on here?

Once the FTC accepted the consent decree subject to public comment on November 15, 2012 (sometimes called *provisional acceptance*), it permitted the Hertz/Dollar Thrifty deal to close.³ The deal was consummated five days later (p. 161). The FTC rules require that a provisionally accepted consent order be placed on the public record and published in the Federal Register with an invitation for comment on the order. That notice was published on November 26, 2012, and the period for public comments closed on December 17, 2012.⁴ Usually, there are no public comments and the Commission often votes on final acceptance of the order in about four to six weeks after the end of the public comment period. Here, however, the Commission did not finally accept the consent order (and then in a slightly modified form) until July 10, 2013 (p. 163). What does this suggest about the provisionally accepted consent order?

The remaining materials deal with what happened after the Commission approved the consent decree (pp. 165-203). The story is a modern legend in antitrust circles. The FTC's consent order required Hertz to divest Simply Wheelz LLC d/b/a Advantage Rent A Car to a joint venture between Franchise Services of North America (FSNA) (the owner of the U-Save brand) and Macquarie Capital, a private equity investor. As part of the divestiture, Simply Wheelz leased 24,000 vehicles from Hertz. The Hertz master lease agreement required Simply Wheelz to bear the residual value risk of the leased fleet.

Rental car companies maintain a new car fleet by selling their cars every six months or so. When Simply Wheelz, as part of ordinary course fleet management activities, began to auction off its older leased fleet vehicles, it immediately began to experience significant losses. As of October 25, 2013, Simply Wheelz had sold 5,295 vehicles for an average loss of \$1,633 per vehicle and a total loss of approximately \$8,600,000. On October 9, 2013, Simply Wheelz failed to make a required payment to Hertz under the lease agreement. On November 2, 2013, after

² For some examples of statistics on airport car rental operations, see the monthly reports from the [Denver International Airport](#), the [Kansas City International Airport](#), and the [Charleston International Airport](#).

³ The Commission's vote approving the complaint and provisionally accepting the proposed settlement order was 4-1, with Commissioner J. Thomas Rosch dissenting. Commissioner Rosch explained: "I voted against acceptance of the consent decree because I found it inadequate to resolve the competitive concerns at several dozen other airports affected by the transaction. I would have instead voted to challenge the transaction because of the significant risk of post-merger coordinated interaction among the remaining competitors." See Fed. Trade Comm'n, News Release, [FTC Requires Divestitures for Hertz's Proposed \\$2.3 Billion Acquisition of Dollar Thrifty to Preserve Competition in Airport Car Rental Markets](#) (Nov. 15, 2012).

⁴ See Fed. Trade Comm'n, [Hertz Global Holdings, Inc., Analysis of Agreement Containing Consent Orders To Aid Public Comment](#), 77 Fed. Reg. 70440 (Nov. 26, 2012).

negotiations between Simply Wheelz and Hertz to restructure the credit arrangement failed to conclude, Hertz gave notice that it was terminating the Master Lease Agreements and seeking the return of Hertz Leased Fleet. Simply Wheelz filed for bankruptcy in order to freeze the lease agreement.

On November 5, 2013, four months after the Commission approved the consent order in final, Advantage filed for bankruptcy.⁵ As part of the bankruptcy proceedings, Franchise Services of North America conducted an auction to sell certain of Advantage's assets. The Catalyst Group, Inc. was the winning bidder for purchase 40 locations, leaving Advantage with 28 locations. The bankruptcy court approved the sale. Under paragraph V of the FTC's consent order, FSNA was also required to obtain the prior approval from the FTC before disposing of any assets it acquired as the original divestiture buyer. The FTC granted approval on January 30, 2014 (pp. 165-188). FSNA then petitioned the Commission to sell 22 of the remaining locations to Hertz (10 locations) and Avis (12 locations), which the Commission granted on May 29, 2014 (pp. 189-201). Subsequently, FNSA petitioned to sell one closed Advantage location in San Jose to Sixt Rent-a-Car, LLC, and another closed advantage location in Portland to Avis Budget Group, which the Commission approved on September 2, 2014.⁶

On June 26, 2017, FSNA filed for Chapter 11 bankruptcy protection in federal bankruptcy court in Mississippi. The company's decision to seek bankruptcy protection was necessitated by several factors, including liquidity issues associated with expenses incurred in pending litigation by and against its former financial advisor, Macquarie Capital (USA) Inc., and two Macquarie employees who also served as directors of the company, in connection with the acquisition of Simply Wheelz.

Enjoy the reading! Email me if you have any questions.

⁵ *In re* Simply Wheelz d/b/a Advantage Rent-A-Car, No. 13-03332, Chapter 11 (Bankr. S.D. Miss. filed Nov. 5, 2013).

⁶ This petition and approval letter are not included in the reading materials.