

MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2017

Tuesdays and Thursdays, 3:30-4:55 pm
Dale Collins
dale.collins@shearman.com
www.appliedantitrust.com

Links to the required reading and the class notes may be found on the assignments page of Canvas and on the [Merger Antitrust Law](#) page of [AppliedAntitrust.com](#).

Class 9 (September 26): Hertz/Avis Budget/Dollar Thrifty (Unit 1)

We finish the Hertz/Avis Budget/Dollar Thrifty case study in Class 9 by looking 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.

Start by reading the FTC press release and the administrative complaint (pp. 311-318). 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 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.¹ 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 a potential competition analysis.

Also, note that the FTC complaint alleges *two* separate and distinct violations. 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 Thrift deal to close. The deal was consummated five days later (p. 319). The FTC rules require that a provisionally accepted consent order be placed on the public record and a published in the Federal Register inviting comments on the order. That notice was published on November 26, 2012, and the period for public comments closed on December 17, 2012.² Usually, there are no public comments and the Commission can vote 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. 321). What does this suggest about the provisionally accepted consent order?

¹ 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](#).

² 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).

The Hertz/Dollar Thrifty consent order was heavily negotiated. Given the resulting complexity, I decided not to include the consent decree materials in the reading. Instead, we will look at a more garden variety settlement: Albertsons/Safeway.

First, review the Albertsons/Safeway complaint in the Class 1-3 materials. Next, review the remedies section in the introductory notes (Merger Antitrust Law: Introduction to Substance and Process slides 51-59). Now read the FTC news release and the Agreement Containing Consent Order (pp. 323-331). The Agreement Containing Consent Order is literally the settlement contract between the staff of the Federal Trade Commission and the merging parties. Associated Food Stores, AWG, and Supervalu, the divestiture buyers, also signed the Agreement Containing Consent Order. Why did the FTC require them to sign? When you look at the Decision and Order, you will see that only the merging parties are named as respondents in the case.³ Doesn't that mean that only one of the merging parties can violate the order and be sanctioned for a violation? What is going on here? What obligations, if any, do the divestiture buyers have and how would they be enforced?

The Decision and Order, which is technically an attachment to the Agreement Containing Consent Order, is worth careful read (pp. 332-348). Note first that the order is not dated and lacks the seal of the Commission (p. 348). That is because the order is only provisional and has not been finally accepted by the Commission. As noted above, the FTC rules require that before a consent order can be finalized, the FTC must place the proposed consent order on the public record and give interested parties notice and the opportunity to comment on whether the Commission should accept, modify, or reject the provisionally accepted consent order. Be sure that you understand the basic structure of the Decision and Order and the obligations it imposes.

There are two other consent decree documents to read. The Order to Maintain Assets (pp. 349-355), which is a final order (see p. 355), essentially ensures that the parties will maintain the viability, marketability, and competitiveness of the Albertsons and Safeway assets to be divested pending their divestiture. The form of the order is standard, including the provisions in Section III relating to the appointment of a Monitor to report to the Commission on the parties' compliance. You need only skim the Analysis of Agreement Containing Consent Order, which explains the provisionally accepted consent order and is published as part of the notice in the Federal Register.⁴

The remaining materials deal with FTC settlement procedure and policy. The first few pages set for the major provisions in the FTC Act governing administrative proceedings, order, and penalties for order violations (pp. 369-372). The final document is a statement by the FTC's Bureau of Competition on the FTC's policies in negotiating merger settlements. While it is a bit dated, it still reflects how the Bureau of Competition operates in negotiating settlements.

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

Dale

³ Technically, a respondent is the party in an action against whom a petition has been filed. For reasons that are probably lost to antiquity, the party against whom an FTC administrative complaint is filed is called a "respondent" and any resulting relief is entered in what is called a "desist and desist order."

⁴ See Fed. Trade Comm'n, *Cerberus Institutional Partners V, L.P., AB Acquisition LLC, and Safeway Inc.; Analysis of Proposed Consent Order to Aid Public Comment*, 80 FR 5753 (Feb. 3, 2015).