

Class 9-10 Slides

Hertz/Avis Budget/Dollar Thrifty

Merger Antitrust Law

Fall 2018

Georgetown University Law Center

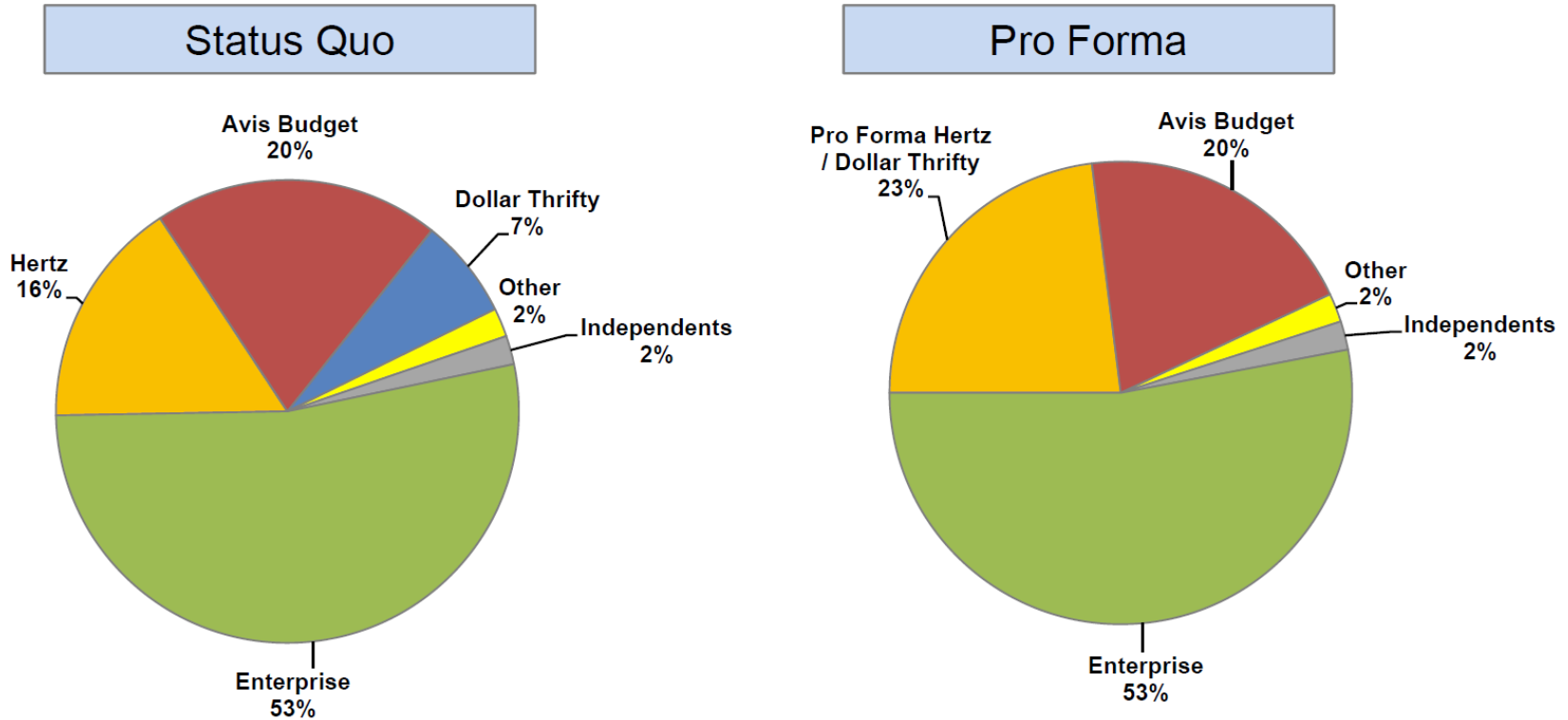
Dale Collins

Hertz/Avis Budget/Dollar Thrifty



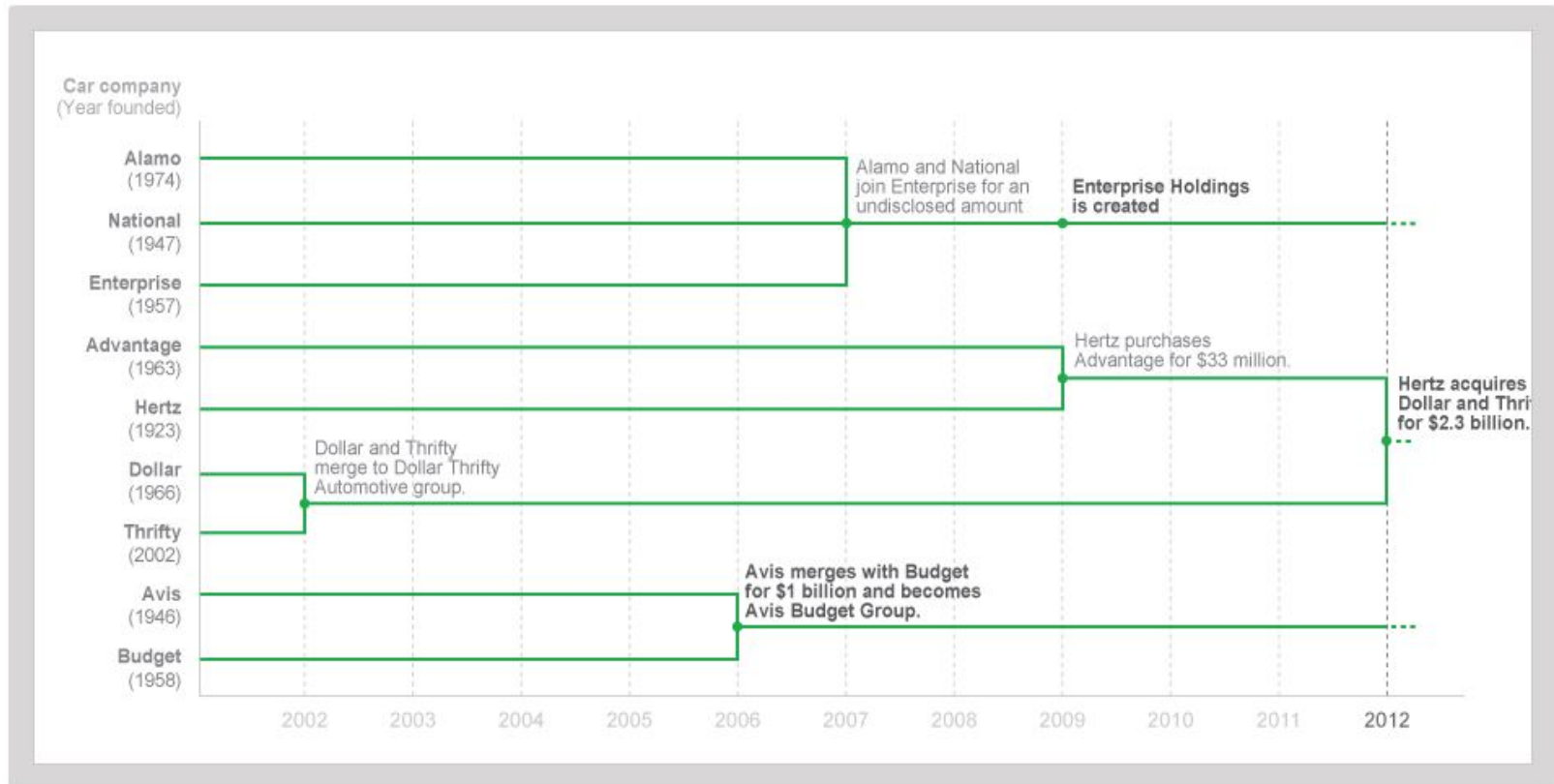
Hertz business rationale

Total U.S. Rental Car Market Revenue Share 2009



Source: Auto Rental News, 2010 Fact Book

The competitive landscape



Source: USA TODAY research
By Kevin A. Kepple, Maureen Linke and Denny Gainer, USA TODAY

Allocating Antitrust Risk

Antitrust risk

■ Generally

- To the seller: Risk that the deal will not close/seller will not get the purchase price
- To the buyer: Risk that the buyer will be forced to close a restructured deal at a loss (a “bad” deal)

■ Party objectives

- Seller wants deal to close before the termination date
- Buyer—
 - Wants the deal to close before the termination date if a good deal
 - Does not want the deal to close before the termination date if a bad deal

Antitrust risk

- What was the antitrust risk in the 2010 deal?

The Competitive Landscape

■ U.S. rental car market in 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%

Source: Auto Rental News, Fact Book 2011.

The Competitive Landscape

■ U.S. rental car market 2011

Company	Overall ¹			Airport ²
	Cars	Locations	%Cars	%Cars
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%	
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	1,760,761		100.0%	

¹ Auto Rental News, Fact Book 2011.

² Gary Stoller, Hertz Buying Dollar Thrifty for about \$2,3 Billion, USA Today, Aug. 28, 2012.

Deal Statistics

■ Nationally

	Overall	Airport
Combined share	24.9%	51.0%
Pre-HHI	3374	2601
Delta	244	1300
Post-HHI	3618	3901

■ Revenues from airport locations

- Hertz: 78.6%
- Dollar Thrifty: 87.5%

How do the parties allocate the antitrust risk?

- Closing conditions
- Termination
 - Can provide for extensions in certain contingencies
- Affirmative covenants
 - 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/
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.

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.**

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”)

(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 covenants].

Termination provisions

- Standard provisions

1. At any time by mutual consent
2. By either party without cause after the Termination Date (“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:

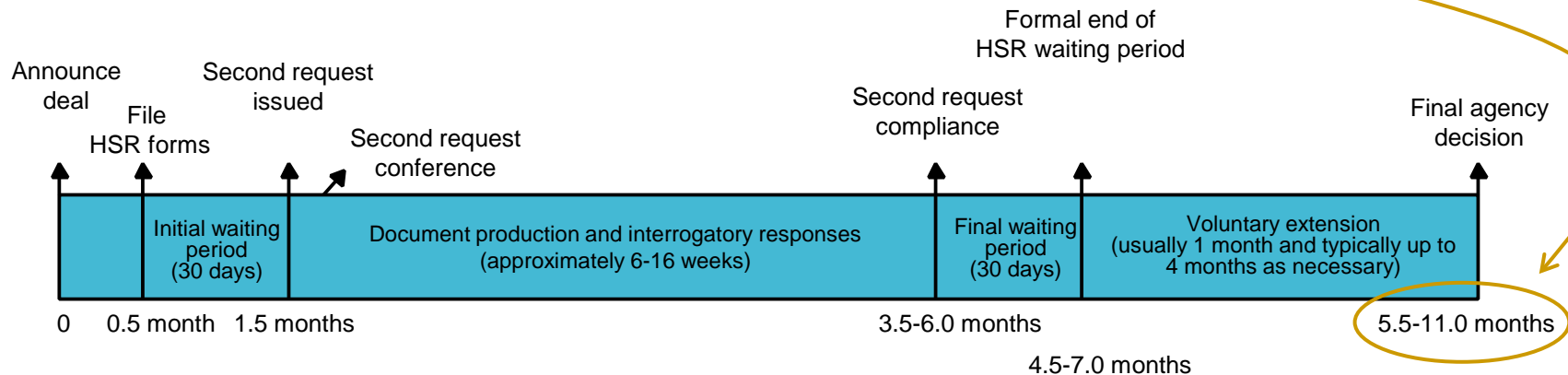
(i) if the Merger shall not have been consummated on or before 12 months after the date hereof (the “Termination Date”); provided, however, that the right to terminate this Agreement under this Section 8.01(b)(i) shall not be available to any party whose breach of any provision of this Agreement resulted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

- The bulk of merger agreements have a 12-month termination date

Termination provisions

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

- BUT a 12-month drop-dead date is not going to provide a credible litigation threat to the investigating agency



- | | | | |
|------------------|--|--|---|
| Customer rollout | - First telephone call (voluntary request) | - Second request conference | - Final meetings with staff |
| | - First presentation | - Collect and review documents | - Meetings with senior staff |
| | - Follow-up meetings | - Prepare interrogatory responses | |
| | - First DOJ/FTC customer interviews | - Depositions of employees | |
| | - First DOJ/FTC competitor interviews | - Additional meetings | |
| | - Filings in other jurisdictions | - Follow-up DOJ/FTC customer interviews and affidavits | - Negotiate consent decree (if necessary) |
| | | - Follow-up DOJ/FTC competitor interviews | |

Termination provisions

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

- Extension to provide credible litigation threat
 - Example:

by either Parent or the Company, if the Merger shall not have been consummated by February 15, 2018 (the “Outside Date”), ***provided, that if the Closing shall not have occurred prior to such date and all the conditions to Closing, other than the conditions set forth in Section 7.1(b) or 7.1(c) (as it relates to the HSR Act or any Antitrust Law), shall have been satisfied or shall be capable of being satisfied at such time, the Outside Date may be extended on one occasion by either Parent or the Company for a period of six (6) months by written notice to the other party, and such date, as so extended, shall be the Outside Date;*** *provided, further,* that the right to terminate this Agreement pursuant to this Section 8.1(b) shall not be available to any party that has breached in any material respect its obligations under this Agreement in any manner that shall have caused the failure of a condition to the consummation of the Merger;

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;**

- Eliminates right to extend of a party whose breach of its contractual obligations resulted in the failure of the deal to close
 - *Example:* Failing to respond properly to the second request, so that the waiting period never expired

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 (or limit) 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 defending the transaction
7. Obligations to “fix” the agency's concerns
8. Limitations on the obligation to “fix” the antitrust concerns
9. Obligations to litigate
10. Obligations not to make acquisitions that could impede the closing

Covenants

1. General “efforts” clause

- ❑ Common formulations
 - “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 [the conditions precedent] 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;

- More common time limit for HSR filing is 10 days after signing

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
 - 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, 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, **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; **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**.

Covenants

7. Obligations to “fix” the agency’s concerns

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

In furtherance, and not in limitation of the foregoing, each of the Company and Parent **agrees to cooperate** with each other and use its **reasonable best efforts to resolve such objections**, if any, as may be asserted by the United States **Federal Trade Commission**, the **Antitrust Division** of the United States Department of Justice, the **CBC**, **state antitrust enforcement authorities** or **competition authorities of any other nation** or other jurisdiction or any other Governmental Authority of competent jurisdiction with respect to the transactions provided for in this Agreement under Antitrust Laws, to permit the Merger and the other transactions contemplated hereby to be consummated prior to the Termination Date.

- Remember, this is in furtherance of the “reasonable best efforts clause,” and illuminates but does not expand the obligation

Covenants

8. Obligations to litigate

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

If any **administrative or judicial action** or proceeding, **including any proceeding by a private party, is instituted** (or threatened to be instituted) challenging the transactions provided for in this Agreement as violative of any Antitrust Laws or that would otherwise prevent, materially impede or delay the consummation of the Merger and the other transactions contemplated hereby, each of the Company and Parent shall use its **reasonable best efforts** to **cooperate** and 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 as promptly as reasonably practicable **vigorously contest** and resist any such action or proceeding, including appeal, and to **have vacated**, lifted, reversed, or overturned any **decree**, judgment, injunction or other order, whether temporary, preliminary or permanent, that is in effect and that restrains, enjoins, prohibits, prevents, or restricts or would otherwise materially impede or delay the consummation of the Merger and the other transactions contemplated hereby, to permit the Merger and the other transactions contemplated hereby to be consummated in the most expeditious manner practicable.

Covenants

9. Limitations on the obligation to “fix” the antitrust concerns
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(c)

For purposes of Section 6.03(a) and (b), Parent’s **“reasonable best efforts” shall include an obligation** of Parent and its Subsidiaries to license, franchise, **divest** or hold separate any **business locations or business lines** of the **Company, Parent** or their respective Subsidiaries **(including the Advantage business locations and business line** owned by Parent and its Subsidiaries (“Advantage”)), or to take any similar measure, reasonably necessary to secure HSR Approval or CBC Approval (a “Divestiture Action”).

- Standing alone, this is an unqualified hell or high water provision
- May be qualified

Covenants

9. Limitations on the obligation to “fix” the antitrust concerns
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(c)—Qualification

Notwithstanding the immediately preceding sentence, “reasonable best efforts” **shall not require** Parent or its Subsidiaries to license, franchise, divest or hold separate any business locations or business lines of the Company, Parent or their respective Subsidiaries other than

- (i) **Advantage** and
- (ii) **in addition to Advantage, business locations or business lines that produced aggregate gross revenues in an amount not in excess of \$175 million** (“Divested Revenues”) for Parent, the Company and their respective Subsidiaries during the 2009 calendar year, calculated in accordance with GAAP, on a basis consistent with the accounting principles used in preparing their respective 2009 financial statements included in the Company SEC Reports or Parent SEC Reports, as applicable.

Covenants

9. Limitations on the obligation to “fix” the antitrust concerns
 - Example: 2010 Hertz/Dollar Thrifty § 6.03(c)—Qualification (con’t)

For the avoidance of doubt, **in calculating Divested Revenues**, only the business locations (or in the case of an entire business line, the business locations within such business line) for which a Divestiture Action is taken, shall be included. For example, if a Divestiture Action is required at an airport where the Parent and the Company each have a business location (or multiple business locations), only the business location at such airport that is divested shall be included in the calculation of Divested Revenues.

Covenants

10. Obligations not to make acquisitions that could impede the transaction

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

Neither the Company nor Parent shall, nor shall they permit their respective Subsidiaries to, **acquire** or agree to acquire any business, person or division thereof, or otherwise acquire or agree to acquire any assets, **if, upon advice of such party's outside legal counsel**, the entering into of a definitive agreement relating to or the consummation of such acquisition,

- (i) would reasonably be expected to **delay** or to **increase the likelihood of not obtaining the applicable action**, nonaction, waiver, clearance, consent or approval under the HSR Act or applicable requirements of the Competition Act in connection with the Merger and the other transactions contemplated hereby prior to the Termination Date or
- (ii) would reasonably be expected to **require any action**, nonaction, waiver, clearance, consent or approval of any Governmental Authority **not listed on Section 7.01** of the Company Disclosure Schedule with respect to the transactions contemplated hereby.

Antitrust reverse termination fee

■ Basic idea

- Provides to the payment by the buyer to the seller of a fixed fee (or other value) in the event that the transaction does not close because of a failure of the antitrust conditions
 - Can be written as liquidated damages (or not)
 - May provide a carve-out for any willful and material breach
- May also provide for payment of transaction expenses
 - Example: Section 8.02(d)—Providing for DT's transaction expenses up to \$5 million

Antitrust reverse termination fee

- Standard provision

- Example: 2010 Hertz/Dollar Thrifty § 8.02(c)

In the event that

- (i) this **Agreement has been terminated** by either the Company or Parent pursuant to Section 8.01(b)(i), Section 8.01(b)(ii) or, as a result of a material breach under Section 6.03, [or] Section 8.01(d), **and**
- (ii) the **condition** set forth in the first sentence of Section 7.01(d), Section 7.01(f) (in the case of any Restraint arising out of any suit, action or proceeding brought by any person or Governmental Authority in respect of or under any Antitrust Law) or Section 7.02(d) **has not been satisfied as of the date of such termination** but all other conditions to Closing set forth in Section 7.01 and Section 7.02 shall otherwise have been satisfied (other than those conditions that by their nature are to be satisfied at Closing, but which conditions would have been satisfied if the Closing Date were the date of such termination), then . .

Antitrust reverse termination fee

- Standard provision
 - Example: 2010 Hertz/Dollar Thrifty § 8.02(c) (con't)

then concurrently with such termination (in the case of a termination by Parent) or within three business days following such termination (in the case of a termination by the Company), Parent shall pay to the Company a **fee equal to \$44,600,000 (the “Parent Termination Fee”)** by wire transfer of immediately available funds to a bank account provided to Parent by the Company.

Antitrust reverse termination fee

- Carve-out for material breach
 - Example: 2010 Hertz/Dollar Thrifty § 8.03

Effect of Termination. In the event of termination of this Agreement by either the Company or Parent as provided in Section 8.01, this **Agreement shall forthwith become void** and have no effect, without any liability or obligation on the part of Parent, Merger Sub or the Company [with listed exceptions],

provided that nothing herein (including the payment of any amounts under Section 8.02) shall relieve any party from any liability for any **willful and material breach** hereof prior to such termination. For purposes of this Agreement, “willful and material breach” shall mean a material breach that is a consequence of an act undertaken by the breaching party with the actual knowledge that the taking of such act would, or would be reasonably expected to, cause a material breach of this Agreement

Antitrust reverse termination fee

- Reimbursement of Seller's transaction expenses
 - Example: 2010 Hertz/Dollar Thrifty § 8.02(d)

In the event that a Parent Termination Fee is payable by Parent to the Company, Parent shall pay to the Company an amount equal to the sum of the Company's documented **Transaction Expenses** by wire transfer of immediately available funds to a bank account designated to Parent by the Company, as promptly as reasonably practicable (and, in any event, within three business days after the Company provides Parent with an invoice for such amount and related documentation); **provided**, that in no event shall Parent be required to reimburse the Company's Transaction Expenses in excess of **\$5,000,000** in the aggregate

Avis Budget Enters the Bidding

2012 Hertz/Dollar Thrifty deal

Contested Takeover Dance

April 26, 2010	Hertz to buy at \$1.2 billion (original deal)
May 3, 2010	Avis sends letter to DT saying it will make a “superior offer”
May 13, 2010	Avis files HSR form for an open market purchase
May 14, 2010	Hertz files HSR form for April 26 deal
June 15, 2010	Avis receives a second request
June 16, 2010	Hertz receives a second request
July 28, 2010:	Avis offers \$1.33 billion (\$46.50 per share 80/20 cash/stock)
Aug. 3, 2010	DT rejects offer as “superior” because of <ul style="list-style-type: none">—Lack of deal certainty (no JDA → no exchange of AT analysis)—No antitrust reverse breakup fee
Aug. 31, 2010	Hertz releases comparative AT analysis <ul style="list-style-type: none">—Avis is 3 → 2 in mid-tier value brands—Avis closer in average rental price than Hertz to DT—Avis would require a much larger brand divestiture—Avis deal provides less contractual protection on AT risk (\$250m v. \$335m in U.S. HOHW revenue cap; no ARTF v. \$44.6m)

2012 Hertz/Dollar Thrifty deal

Contested Takeover Dance

Sept. 2, 2010	Avis raises bid to \$1.36 billion —Rejects significance of ARTF —Hertz has higher leisure revenue than Avis Budget (AAA)
Sept. 12, 2010	Hertz to \$1.43 billion (\$50/share)—Begins to divest Advantage
Sept. 23, 2010	Avis raises bid to \$1.5 billion (\$52.71/share v. \$50.25/share)
Sept. 24, 2010	Hertz affirms bid is “best and final”
Sept. 27, 2010	DT rejects Avis bid and affirms recommendation for Hertz merger
Sept. 27, 2010	Avis announces it will launch a (hostile) exchange offer for DT —Asks that DT shareholder vote be delayed from 9/30 until 12/30
Sept. 29, 2010	Hertz announces it will terminate merger agreement if DT shareholders reject merger agreement
Sept. 30, 2010	DT shareholders rejects Hertz merger agreement
Sept. 30, 2010	Hertz announces it will terminate 2010 merger agreement
Sept. 30, 2010	Avis reaffirms commitment to acquire DT and pursue exchange offer

2012 Hertz/Dollar Thrifty deal

Contested Takeover Dance

Oct. 5, 2010	Avis and DT agree to cooperate in seeking regulatory approval
Jan. 11, 2011	FTC update—review continuing
May 9, 2011	Hertz offers \$2.1 billion (\$72/share 80/20) [ARTF ?]
May 12, 2011	Hertz and DT to cooperate in seeking regulatory approval
May 24, 2011	Hertz commences exchange offer for DT
June 6, 2011	DT recommends that shareholders take no action on either deal
July 14, 2011	Hertz files HSR form for exchange offer
Aug. 15, 2011	Hertz receives second request
Aug. 21, 2011	DT wants best and final offers by Oct. 10
Sept. 14, 2011	Avis pulls out of bidding
Oct. 10, 2011	No new proposals submitted by Hertz or Avis DT formally terminates solicitation process
Oct. 27, 2011	Hertz withdraws bid
Aug. 23, 2012	DT major shareholders say they would accept a \$2.4 billion bid
Aug. 27, 2012	Sign deal at \$2.3 billion

2012 Hertz/Dollar Thrifty deal

- Comparison with 2010 deal

	2010 Deal	2012 Deal
Total price	\$1.3 billion	\$2.3 billion
Price per share	\$41.00 (80/20)	\$87.50 all cash
Deal structure	Rev. triangular	Tender offer*
Annual synergies	\$180 million	\$160 million
Termination date	12 months	4 months
HOHW cap	Advantage + ≤ \$175 m rev.	Advantage presold + undisclosed “Proposed Consent Agreement”
ARTF	\$44.6 million	None
Reimbursement of expenses	Up to \$5 million	Up to \$5 million

* Pursuant to Agreement and Plan of Merger between Hertz and Dollar Thrifty.

2012 deal premium

■ Parameters

- The going concern value V_c of DTAG appears to be \$1.4 billion
 - Hertz set the corporate enterprise of DTAG postmerger at \$2.3 billion, which equals 7.8x the midpoint of DTAG's EBITDA guidance for 2012 (\$298 million)
 - Hertz said the multiple represented a 40% premium over DTAG's premerger multiple
 - Discounting for the 40% premium gives a V_c of \$1.4 billion
 - Compares to \$932 million (after dividend) in 2010
- Hertz claimed an expected annually recurring synergy gain of \$160 million
 - Value as a 10-year annuity:

$$V_g = A \left[\frac{1 - (1 + r)^{-n}}{r} \right] = \$160 \text{ million} \left[\frac{1 - (1 + 0.07)^{-10}}{0.07} \right] = \$1.12 \text{ billion}$$

- So Hertz expects that the total value V_t of Dollar Thrifty postmerger will be:

$$\begin{aligned} V_t &= V_c + V_g = \$1.4 \text{ billion} + \$1.12 \text{ billion} \\ &= \$2.52 \text{ billion} \end{aligned}$$

Implies that Hertz gave up most of the synergies to DTAG shareholders *under our assumptions*

2012 deal premium

- Comparison with 2010 deal premium

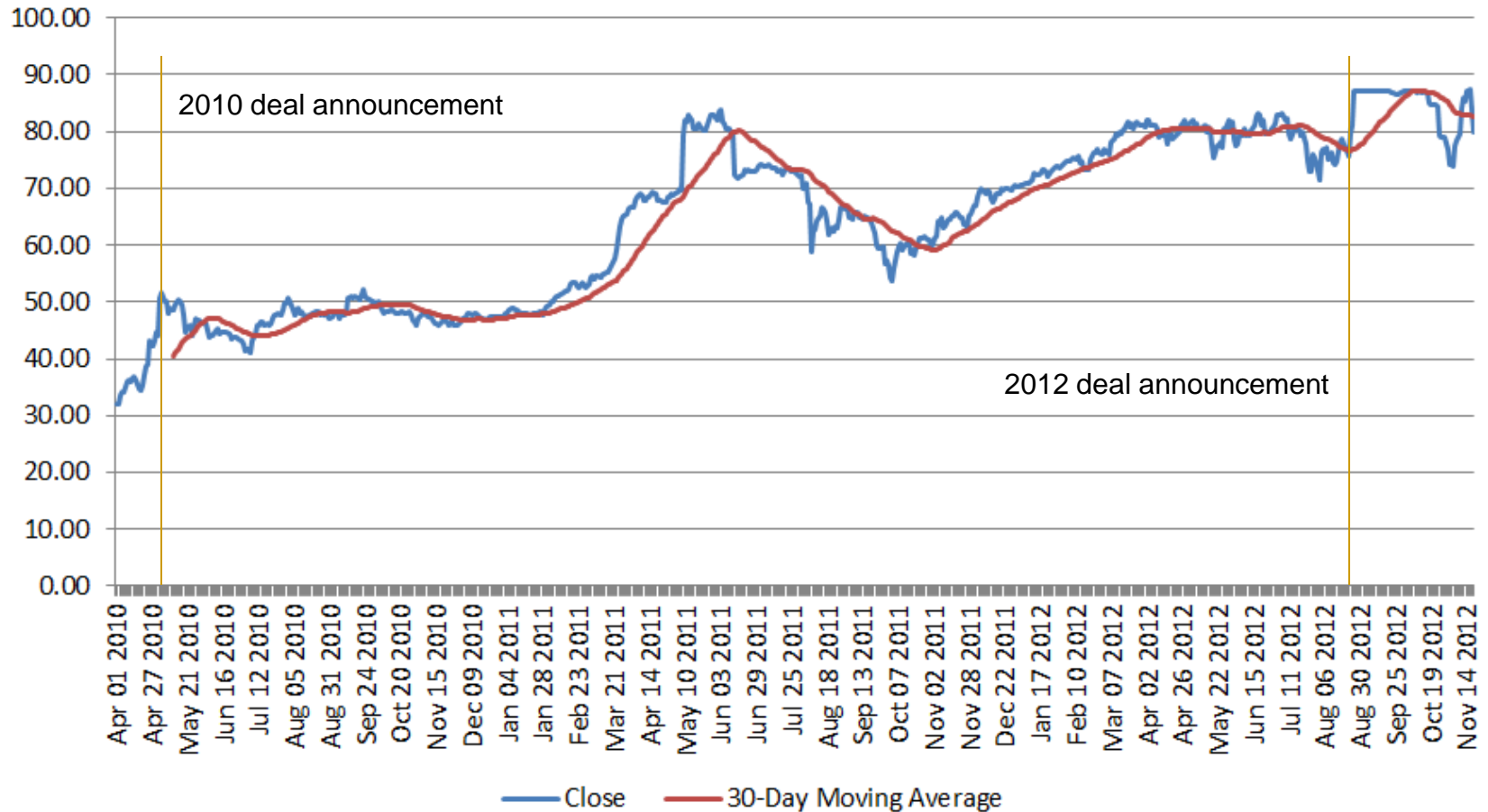
	2010 Deal	2012 deal
DT going concern value (V_c)	\$932 million ¹	\$1.4 billion
Synergies (10-yr DPV) (V_g)	\$1.26 billion	\$1.12 billion
Total value (V_t)	\$2.17 billion	\$2.52 billion
Hertz share of total value	\$2.075 billion	\$2.52 billion ²
Deal price	\$1.2 billion	\$2.3 billion
Gain to Hertz shareholders	\$875 million	\$220 million

¹ After special dividend.

² All cash.

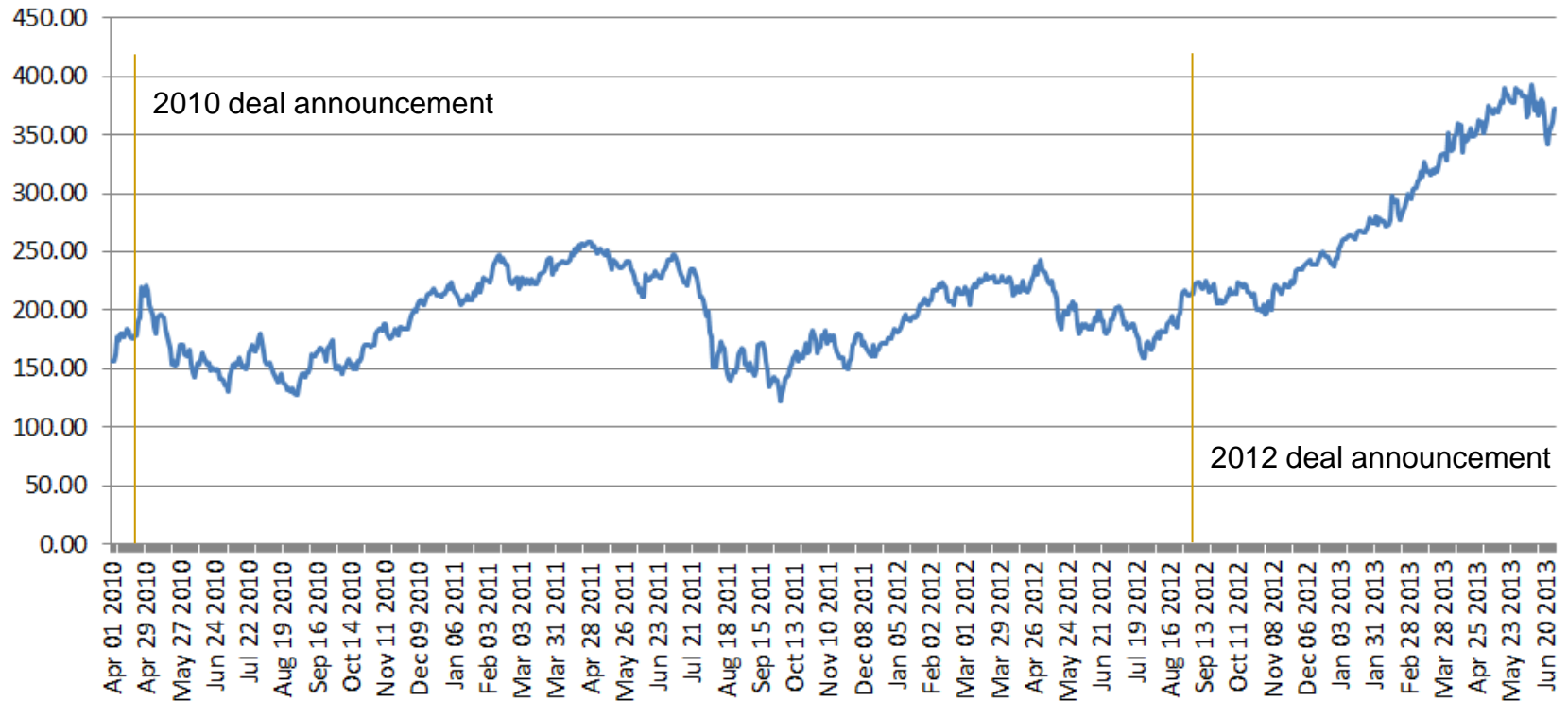
Dollar Thrifty stock prices

Dollar Thrifty Closing Prices April 1, 2010 — June 30, 2012



Hertz stock prices

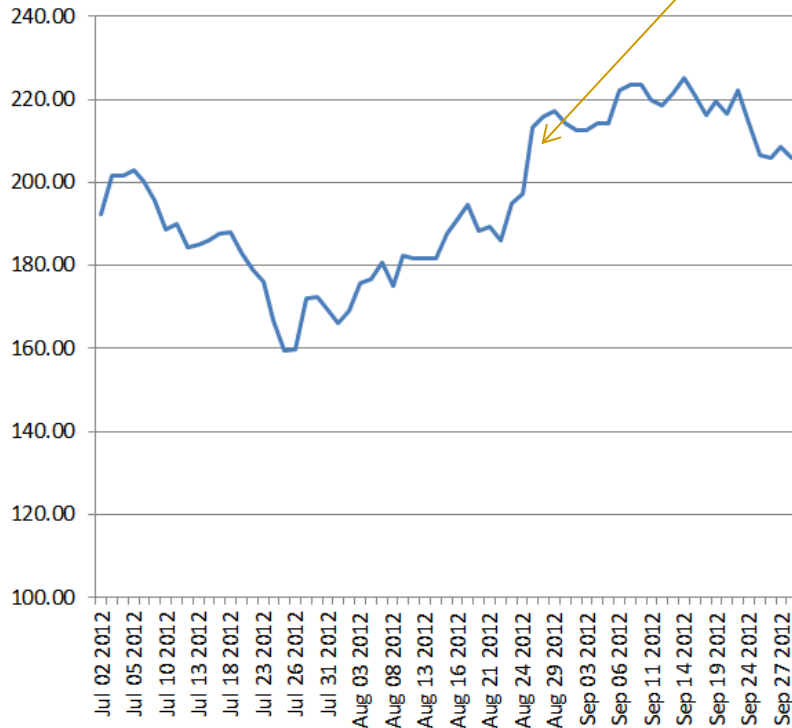
Hertz Closing Prices
April 1, 2010 — June 30, 2012



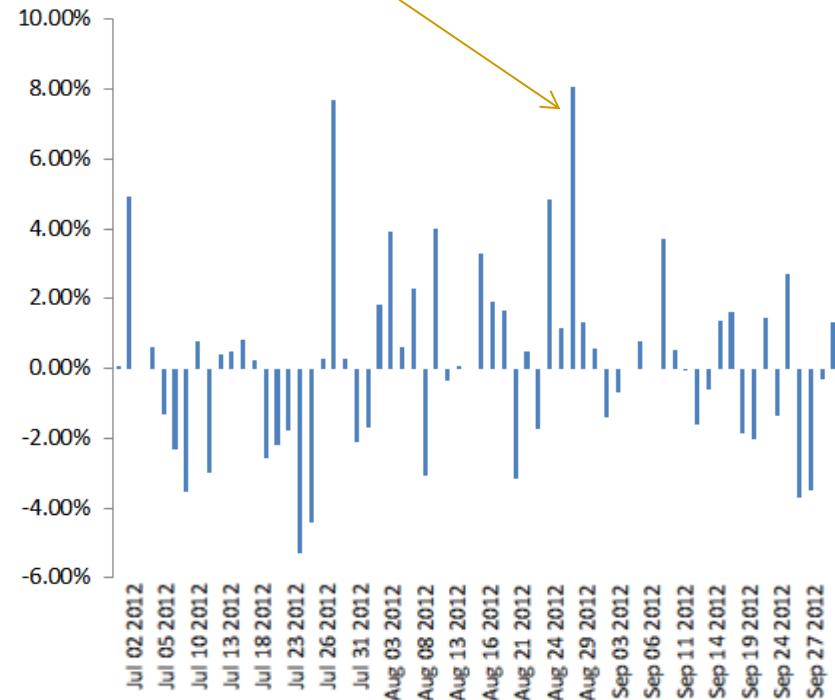
Hertz stock prices

Announcement: + 8.06%

Hertz Closing Prices
July 2, 2012 — Sept. 28, 2012



Hertz Closing Prices
Day-to-day percentage changes



The FTC Consent Order

FTC Complaint

- Issued November 15, 2012
 - Eight-month investigation
- Relevant markets
 - Product market: Airport car rentals
 - Alternative: Non-contracted airport car rentals (excludes rentals made at prenegotiated rates and terms)
 - Geographic markets: 72 airports
- Competitive effects
 - Eliminates direct competition between parties (all markets)
 - Eliminates future competition between parties (several markets)
 - Increases likelihood of unilateral exercise of market power by Hertz
 - Increases likelihood of coordinated interaction
 - Increases likelihood that customers will pay higher prices

FTC Complaint

- No ease of entry—Need:
 - On-airport concession locations
 - Recognized brand
 - Relationships with online travel agencies and other distribution channels
 - Sufficient size to achieve economies of scale
- Violations
 - Acquisition, if consummated, would violate Clayton Act § 7 and FTC Act § 5
 - Acquisition agreement violates FTC Act § 5

FTC Consent Order

- Agreement containing consent order(s)
 - Negotiated and signed by parties prior to Commission vote
 - Parties
 - Hertz Global Holdings, Inc.—merging party
 - Franchise Services of North America Inc. (FSNA) (operates U-Save rental business)—divestiture buyer
 - Macquarie—providing financing for divestiture buyer

FTC Consent Order

- Proposed consent order: Hertz to divest—
 - Its Advantage Rent-a-Car business + 16 Dollar Thrifty on-airport locations where Advantage does not yet operate to FNSA/Macquarie jv
 - Advantage: 15 days after the Effective Date or December 12, 2012, whichever is later
 - DT assets: 90 days after the Effective Date
 - Purchase price: \$16 million—1/2 of what Hertz paid to acquire Advantage out of bankruptcy in 2009
 - 13 Dollar Thrifty on-airport locations to FNSA/Macquarie jv or another Commission-approved buyer (post-acquisition)
 - 60 days after signing of Agreement to submit signed divestiture agreement
 - 6 months after the Effective Date to divest
- Hold to maintain assets
 - Contrast with Hold Separate Order

FTC Consent Order

- Commission vote to provisionally accept consent order
 - 4-1, with Rosch dissenting from acceptance of consent order (insufficient as relief at several dozen airports)
- Subsequent events
 - November 26, 2012: Federal Register notice published to begin comment period
 - 30 days for the FTC under Commission rules
 - 60 days for the DOJ under the Tunney Act
 - December 17, 2012: Comment period ends
 - Six comments received
 - July 11, 2013: Final Commission acceptance
 - 3-0-1, with Rosch dissenting and Wright not participating

Aftermath

- Divestiture arrangement and leasing risk
 - JV buyer to lease 24,000 vehicles from Hertz and bear the residual value risk
 - When JV began to turn over fleet, experienced significant losses
 - October 25, 2013: JV had lost \$8.6 million
- Deal falls apart
 - October 2, 2013: JV missed scheduled payment to Hertz
 - November 2, 2013
 - Refinancing negotiations fail
 - Hertz terminates Master Lease Agreement and seeks return of all leased vehicles
 - November 5, 2013: JV seeks bankruptcy protection

Aftermath

■ Subsequent transactions

- January 30, 2014: FTC grants FSNA's petition FTC to sell Advantage to Catalyst Capital Group (winning bidder in bankruptcy auction—40 locations, excluded 28))
- May 30, 2014: FTC grants FNSA's petition to sell 22 former Advantage locations to Hertz (10) and Avis (12)
- September 5, 2014: FTC grants FNSA's petition to sell Portland location to Avis and San Jose locations to Sixt Rent-A-Car