MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2020

Tuesdays and Thursdays, 3:00-5:00 pm
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CLASS 6 WRITTEN ASSIGNMENT

Instructions

Submit by email by 3:00 pm on Thursday, September 17
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 6

Assignment

Time: Early 2014
Calls for a memorandum to the client

John Taylor, the general counsel of Albertsons (not really), has called to tell you that the Albertsons CEO has had a quiet conversation with the Safeway CEO about a possible acquisition of Safeway for cash. Safeway's CEO has expressed interested in proceeding with discussions, but told the Albertsons CEO that two things need to be agreed upon first in the negotiations: (1) the purchase price, and (2) the steps Albertsons will take to ensure deal certainty (that is, certainty that the deal will close and that the Safeway shareholders will get their money). The Safeway's CEO told the Albertsons CEO that there will be no give on this and that unless and until there is an agreement on the purchase price and the steps Albertsons will take to ensure deal certainty, nothing else will be discussed.

Albertsons has the funds available to do the deal and will not ask for a financing condition precedent (a "financing contingency") in the acquisition agreement, so that there will be no risk of not closing due to Albertsons' inability to obtain financing.[1] But Albertsons recognizes that in some areas Albertsons and Safeway are two of only a few competitors and in some small towns they are the only two, so that there is meaningful antitrust risk in the deal.

Taylor has asked you to prepare a short memorandum on the types of provisions that Albertsons could propose—or Safeway could demand—to be in the acquisition agreement to give comfort to Safeway that the deal will close (or at least that the residual risk of the deal not closing will be sufficiently small that given the purchase price Safeway is willing to take the risk).

[1] A financing continency is a condition precedent in the contract that the buyer can borrow the necessary funds to make the acquisition. If the buyer cannot borrow the funds, then the condition is not satisfied and the buyer is not required to close the deal. If the condition remains unsatisfied until the drop-dead date, the buyer can unilaterally terminate the contract without cause. When a financing condition precedent is included in the purchase agreement, the seller may insist on a reverse termination fee in the event that the condition is not satisfied and the buyer terminates the purchase agreement. Financing reverse termination fees are even more common than antitrust reverse termination fees.

Taylor understands that you have not yet performed any substantive analysis on the transaction and so cannot, for example, tell him which geographic areas may present serious antitrust concerns or how many Albertsons and Safeway stores may be implicated in these concerns. He is only asking that you describe at a general level the types of provisions that could be included in an acquisition agreement to give comfort to the seller that the deal is sufficiently likely to close so that he can discuss the concepts intelligently with his management team. To this end, Taylor also would like for you to include in your discussion any particular downsides for the buyer for each type of provision.

This matter is very confidential. To minimize the risk of disclosure, code names are used. Never include the real name of the counterparty in a confidential transaction in a memorandum or email. Whenever possible, it is a good idea to use the same code names as the client uses. If the client has not given you one, you can either ask or make up your own. In this matter, the client's code name for the transaction is Project Ceres and the codenames are Jupiter and Juno for Albertsons and Safeway, respectively.

Notes

1. Smart sellers will want the purchase price and the antitrust risk-shifting provisions to be the gating items in the negotiations. The idea is that the buyers are usually anxious to move forward with the negotiations and get the deal signed up, and that therefore they will be marginally more amenable to giving away more in terms of the risk-shifting provisions at the beginning of the negotiations than at the end when it is much more certain that the deal is going to sign. Conversely, smart buyers, while they recognize that they will have to give at least an "indication of interest" of what they are willing to pay at the beginning, will want to wait to address the antitrust risk-shifting provisions until the very end of the negotiations. The idea is that after sellers "have tasted the money"—that is, come to expect that they will do a deal with a premium in the purchase price they really like—they will be less ready to walk away and refuse to sign the acquisition agreement if the buyer will not give them all they want in the antitrust risk-shifting provisions. Here, the Safeway CEO, who surely talked to counsel before the meeting, has been well advised. Who succeeds in this game of chicken is largely a function of which side wants the deal the most (they lose).

2. One thing that the Safeway CEO could have raised in the initial discussion—which often would occur in a one-on-one meeting of the CEOs over dinner—is what are colloquially called "social issues." This is the question of what roles the target's senior management, beginning with the CEO, will have in the merged company. Giving the CEO and a few key managers important roles in the target company can greatly increase the key management decision makers' enthusiasm for doing a deal. Conversely, refusing to commit to give the key managers important roles can materially, and sometimes fatally, decrease this enthusiasm.

The Anthem/Cigna deal, a $48.4 billion transaction we will study later in the course, provides a great object lesson. Anthem had committed, albeit informally, in the negotiations to give the Cigna CEO a very significant role in the merged company's management. Later, after the deal had been signed and approved by the shareholders of the two companies but while the deal was still being challenged by the Antitrust Division, Anthem backed away from its commitment. That turned Cigna against the deal, although in the absence of a breach of a contractual commitment, Cigna could not terminate the acquisition agreement. What it did, however, was to refuse to

cooperate with Anthem in defending the antitrust litigation the DOJ had brought to block the deal. Cigna went so far as to testify against the synergies Anthem claimed for the deal and even cross-examined one of Anthem's witnesses. After the district court permanently enjoined the transaction (which was affirmed on appeal), the parties terminated the acquisition agreement. Cigna then sued Anthem in Delaware state court for breach of the acquisition agreement for refusing to pay the antitrust reverse termination fee set forth in the agreement, and Anthem countersued Cigna for breach of the acquisition agreement for failing to abide by its covenants to cooperate in litigation to defeat the entry of the injunction. The matter continues to be actively litigated in Delaware state court.

If you have any questions, please let me know.