

## MERGER ANTITRUST LAW

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Georgetown University Law Center  
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Tuesdays and Thursdays, 3:00–5:00 pm  
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### Reading Guidance

#### **Class 6 (September 17): Hertz/Avis Budget/Dollar Thrifty (Unit 5)**

In this class, we will examine how Hertz and Dollar Thrifty allocated the antitrust risk in the 2010 merger agreement. We also will briefly examine the bidding war with Avis following the announcement of the 2010 Hertz/Dollar Thrifty deal, the FTC review of both proposed deals, Hertz’s success in the bidding war and the settlement it reached with the FTC to avoid litigation and permit the deal to close, and the aftermath following the closing.

*Antitrust risk allocation.* 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 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 to be restructured through a consent decree to “fix” the antitrust problems if 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 interest. Accordingly, the buyer wants to negotiate limitations as to what it may be contractually obligated 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 and walk away from the purchase agreement if the fix demands too much. Negotiating the antitrust-related provisions is one of the most important things an antitrust deal lawyer does.<sup>1</sup>

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.

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<sup>1</sup> 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 price and antitrust risk-shifting provisions 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.

- 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.

In past classes, I have carefully walked through each of the slides on the various risk shift-provisions. In my postmortem with students, the universal feeling was that the slides were sufficiently self-explanatory and that the time in class could be more productive elsewhere. So this year I leave it to you to study the slides and I will spend the class time discussing the more of the strategic considerations of the buyer and the selling in negotiating these provisions.

*The bidding war.* 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 the approval of their respective boards of directors) 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 ironclad 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 a provision 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 provision is commonly called a “fiduciary out.” I have a short note on fiduciary outs in the reading materials (pp. 145-151).

In years past, I have assigned the press releases, letters to shareholders and employees, the occasional investor presentations, transcripts of analyst calls, and excerpts from an 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.<sup>2</sup> Even so, I strongly recommend that you read them. Despite their apparent length, they are quick and easygoing 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. 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 the Dollar Thrifty demands. 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.

*The FTC merger review.* 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

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<sup>2</sup> See [Hertz/Avis Budget/Dollar Thrifty: The Bidding War](#) in the Unit 6 supplemental materials.

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 known 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.<sup>3</sup> If your client is one of the merging parties, you would also have known what their expansion plans were 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 the difference is 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.<sup>4</sup> 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.<sup>5</sup> 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 aftermath.* 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 rental car 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. In practical terms, this meant that at the end of the lease term for a car, Simply Wheelz would pay Hertz the contractually specified residual value of the car and title to the car would pass to Simply Wheelz, which would sell the car at auction. Simply Wheelz would make money if the auction price was greater than the contractually set residual value for the car and lose money if the auction price was less than the contractually set residual value.

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<sup>3</sup> 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](#).

<sup>4</sup> 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).

<sup>5</sup> 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).

Rental car companies maintain a new car fleet by replacing 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 because used car prices were falling. 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 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 the entire Hertz Leased Fleet.

On November 5, 2013, four months after the Commission approved the consent order in final, Simply Wheelz filed for bankruptcy in order to freeze the lease agreement.<sup>6</sup> 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 its approval of the sale to the Catalyst Group on January 30, 2014 (pp. 165-188). FSNA then petitioned the Commission to sell 22 of the 28 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.<sup>7</sup>

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.

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<sup>6</sup> *In re* Simply Wheelz d/b/a Advantage Rent-A-Car, No. 13-03332, Chapter 11 (Bankr. S.D. Miss. filed Nov. 5, 2013).

<sup>7</sup> This petition and approval letter are not included in the reading materials.