MERGER ANTITRUST LAW

LAWJ/G-1469-05
Georgetown University Law Center
Fall 2022

Tuesdays and Thursdays, 3:30-5:30 pm
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CLASS 8 WRITTEN ASSIGNMENT—INSTRUCTOR'S ANSWER

Instructions

Submit by email by 3:30 pm on Thursday, September 22
Send to wdc30@georgetown.edu
Subject line: Merger Antitrust Law: Assignment for Class 8

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). 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 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).

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[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 you to include any particular downsides for the buyer for each type of provision in your discussion.

This matter is very confidential. To minimize the risk of disclosure, code names are used. Never include the actual 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, 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—the seller 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 give the key managers important roles can materially, and sometimes fatally, decrease this enthusiasm.

The 2015 Anthem/Cigna deal, a $48.4 billion transaction, 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 Antitrust Division was still challenging the deal, 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 elicit testimony from its own CEO and Anthem witnesses that aided the DOJ's case, proposed trial exhibits that undermined Anthem's claimed efficiencies, and even cross-examined Anthem's CEO and its economic expert. Cigna also refused to comment on Anthem's proposed findings of fact and conclusions of law and instructed Anthem's counsel to remove Cigna's name from the signature block. Judge Amy Berman Jackson, the trial judge in the DOJ's case, was incredulous:

> What am I supposed to make of that? I wasn't going to ask you that question in open court because they're just drafts to this point, but since you brought it up, your name isn't on them; Cigna's name isn't on them.
>
> What am I supposed to think that tells me? What does that mean?

After the district court permanently enjoined the transaction (which was affirmed on appeal[2]), 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 $1.85 billion antitrust reverse termination fee provided in the agreement and to recover $14.7 billion in damages resulting from Anthem's alleged breaching of the agreement's regulatory efforts covenant.[3] Anthem countersued, seeking $21.1 billion in expectation damages for Cigna's alleged breach of the acquisition agreement for failing to abide by its covenants to cooperate in litigation to defeat the entry of the injunction and for its alleged breach of the covenant to use its reasonable best efforts to consummate the merger.[4]

On August 31, 2020, in a 306-page unpublished memorandum opinion summarily affirmed by the Delaware Supreme Court, Vice Chancellor J. Travis Laster rejected the claims of both parties.[5]

In assessing Anthem's claims, Vice Chancellor Laster found that Cigna willfully breached its efforts covenants by engaging "in a knowing and intentional effort to undermine Anthem's position in the Antitrust Litigation."[6] However, Laster accepted Cigna's proof that even if Cigna had fulfilled its contractual obligations, the DOJ still would have succeeded in proving its Section 7 claim and the district court would have enjoined the merger. Hence, Laster refused to award Anthem damages for Anthem's failure to prove a causal link to any damages causally related to Cigna's breaches.[7]

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[2] United States v. Anthem, Inc., No. CV 16-1493 (ABJ), 2017 WL 527923 (D.D.C. Feb. 8, 2017), *redacted opinion issued*, 236 F. Supp. 3d 171 (D.D.C. 2017), *aff'd*, 855 F.3d 345 (D.C. Cir. 2017)

[3] News Release, Cigna Corporation, *Cigna Terminates Merger Agreement with Anthem* (Feb. 14, 2017).

[4] News Release, Anthem, Inc., *Anthem Files Suit Against Cigna Seeking a Temporary Restraining Order to Enjoin Cigna from Terminating the Merger Agreement, Specific Performance Compelling Cigna to Comply with the Merger Agreement and Damages* (Feb. 15, 2017).

[5] Memorandum Opinion, *In re* Anthem-Cigna Merger Litig., C.A. No. 2017-0114-JTL, 2020 WL 5106556 (Del. Ch. Aug. 31, 2020) (unpublished), *aff'd sub nom.* Cigna Corp. v. Anthem, Inc., 251 A.3d 1015 (Del. May 3, 2021) (unpublished).

[6] *Id*. at 259.

[7] *Id*. at 6-7, 273.

In assessing Cigna's claims, Laster found that Cigna had failed to prove that Anthem's strategy for defending the deal breached its regulatory efforts covenant.[8] Moreover, the merger agreement provided for the award of damages only if the breach was "willful," and Laster found that even if Cigna had proved that Anthem breached its covenant, the breach was not willful.[9]

With respect to Cigna's claim for the reverse termination fee, Laster found that Anthem validly terminated the Merger Agreement on May 13, 2017, under a termination right that did not trigger the fee.[10] Cigna sent Anthem earlier two notices of termination, both of which the court found ineffective. The court found the February 14, 2017, notice ineffective because Cigna sent it before Cigna had a unilateral contractual right to terminate the agreement. Cigna's sent its second notice on May 12, 2017, in violation of a temporary restraining order entered by the Chancery Court in this action enjoining Cigna from terminating the merger agreement to permit Anthem to appeal the district court's antitrust decision. By the time Cigna sent Anthem a third notice of termination on May 13, hours after Anthem had sent its termination notice, there was no longer an agreement for Cigna to terminate.[11]

If you have any questions, please let me know.

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[8] *Id*. at 7.

[9] *Id*. at 7,

[10] *Id*. at 8, 294-305.

[11] For a good, short analysis of the case and its implications, see Wilson Sonsini, *The Anthem-Cigna Merger Litigation Saga: Key Insights for Future Deals* (May 5, 2021).

NB: If the document is privileged, be sure to include a legend to this effect. This will allow the document to be easily identified through an electronic search for a privilege review in the event of a second request or discovery.

ABLE & BAKER LLP

INSTRUCTOR'S ANSWER

TO: John Taylor, Esq.
General Counsel, Albertsons Companies

FROM: Dale Collins

Project Ceres

You have asked me to prepare a short memorandum on the types of provisions that Jupiter could propose—or Juno could demand—to be in the acquisition agreement to give comfort to Juno 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 Juno is willing to take the risk).

Once a definitive purchase agreement is signed, the transaction will close at some point unless (1) one or more conditions precedent have not been satisfied by the termination date (sometimes called the "drop-dead date"), and (2) after that, one of the parties exercises its unilateral right to terminate the purchase agreement without cause. Certainty of closing for the seller means that all conditions precedent will be satisfied before the termination date, which triggers the contractual obligation for the buyer to consummate the transaction.

There are typically two if not three antitrust-related closing conditions, although the precise wording can differ from agreement to agreement: (1) expiration or termination of the Hart-Scott-Rodino Act waiting period, (2) no injunction or other legal restraint would make the closing of the transaction unlawful, and (3) sometimes, no threatened or pending litigation under the antitrust laws by a government agency seeking to block or alter the transaction.[12]

Expiration of the HSR Act waiting period. Since this transaction would be subject to the reporting and waiting period requirements under the HSR Act, the standard first condition will be that the waiting period under the HSR Act either has expired or been terminated earlier by the enforcement agencies. This provision may be modified to provide that any voluntary commitment under a timing agreement between the buyer and the investigating agency not to close the transaction before some specified date will be satisfied before the merger agreement's termination date.

To ensure that this closing condition is satisfied, the typical purchase agreement requires the parties to submit their respective HSR Act filings within ten business days of the signing of the

[12] This memorandum only considers a waiting period imposed by the HSR Act. If the transaction is subject to a waiting period in a jurisdiction in addition to the United States, then the purchase agreement provisions would be modified as necessary to take these jurisdictions into account.

agreement. This starts a 30-calendar day "initial waiting period" (15 days in an all-cash tender offer), during which time the HSR Act bars the parties from closing their transaction.

If the reviewing agency decides to open a full investigation, it will issue a request for additional information and documentary material (a so-called "second request") before the end of the initial waiting period. The issuance of a second request extends the waiting period for the time it takes both the buyer and the seller to properly respond to their respective second requests plus an additional 30 calendar days (10 days in an all-cash tender offer). To ensure that the parties will complete their responses to the second request in time for the waiting period to expire before the termination date, the purchase agreement may rely on the general efforts clause, which usually requires the parties to take all steps reasonably necessary and appropriate to complete the transaction as early as practical and in any event before the termination date. If the termination date is the typical 12 months after the signing of the agreement and the parties submit their required HSR Act filings within ten business days of signing, there should be no difficulty for each party to respond to its second request in time for the waiting period to expire before the termination date, and a failure to do so would result in a breach of the efforts clause.

In addition, some purchase agreements contain a timing limit on compliance with the second request (often three or four months), ensuring that the waiting period will expire well before the termination date. This can be important where, as here, the investigating agency is likely to require a consent decree to permit the parties to close their transaction without litigation. The negotiation of a consent decree with the investigating agency and the provisional acceptance of the consent decree by the Federal Trade Commission can be expected to take at least six weeks and may take months (especially if the investigating agency insists on a buyer upfront and the merging parties want to conduct an auction for the divestiture assets). In negotiating the timing of compliance with a second request, the seller needs to keep in mind that both the 30-day final waiting period and the expected additional amount of time necessary for the successful negotiation of a consent decree must not exceed the merger agreement's termination date, or else the buyer will have a unilateral right to terminate the agreement and walk away from the deal.

The FTC has taken the position that since the HSR Act waiting period is set by statute, the waiting period cannot be extended by agreement between the merging parties and the investigating agency. To provide more time to the investigating agency to review the transaction, however, the merging parties can and often do enter into a timing agreement with the agency not to close the transaction before a specified date (frequently 30 to 60 days after the expiration of the HSR Act waiting period). Accordingly, if the agreement contemplates that the parties may enter into a timing agreement, the closing conditions and affirmative covenants should be modified to apply to any extensions granted under a timing agreement (including a prohibition that any timing agreement must expire before the termination date).[13]

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[13] Many purchase agreements contain closing conditions that provide that the HSR Act waiting period "and any extensions thereof" shall have expired or been terminated. The term "extensions" is intended to be a commitment not to close under a subsequently executed timing agreement with the investigating agency, but technically the closing condition misstates the law. Still, if the parties both intended the closing condition to include any commitments not to close under a timing agreement, almost certainly a court construing the purchase agreement would give effect to the parties' mutual intent and disregard the technical mistake of law.

No injunction or legal restraint. The second antitrust closing condition provides that no temporary restraining order, preliminary or permanent injunction, statute, law, rule, legal restraint, or prohibition is in effect that makes the consummation of the transaction illegal.

No threatened or pending litigation. This closing condition often appears in purchase agreements. It differs from a "no injunction" or legal restraint condition in that it requires only that litigation be threatened or pending (usually limited to actions by a government agency) and does not require that an injunction or other order blocking the closing actually be entered. As to its ultimate effect on the likelihood of closing, the no threatened or pending litigation adds little to a "no injunction or legal restraint condition." If the parties insist on an injunction, the investigating agency will simply file its complaint in time for a court to enter a temporary restraining order and ultimately a preliminary injunction before the waiting period or timing agreement expires.

Affirmative covenants. There are four types of affirmative covenants that the purchase agreement might include to ensure that the closing conditions are satisfied.

First, the *general efforts clause* imposes an obligation on the parties to defend the transaction in the investigation.[14] Most purchase agreements also contain explicit obligations to defend the transaction in the investigation, including obligations on the parties to cooperate with one another, be given the opportunity to review in advance any communications with the investigating agency, and to participate in any telephone conversations or meetings that the other party has with the investigating agency (to the extent the investigating agency will permit).[15] Some purchase agreements also contain a provision that assigns final control over the defense of the transaction to the buyer.

Second, the purchase agreement may contain a provision obligating the parties to *defend against any litigation* to enjoin or alter the transaction. If a party wants this provision, they will also want an option of extending the termination date for a time reasonably necessary for a court to render a decision on a preliminary injunction. As a general rule, courts in the District of Columbia can be expected to render a decision on a preliminary injunction within 6.5 months of the filing of the complaint. Accordingly, a typical provision will permit the extension of six months after the original 12-month termination date. If the extension time is less than six months, then the party seeking the option to litigate should want to impose time limits on compliance with the second request and any timing agreement to ensure that the investigation will continue and a complaint filed no later than 6.5 months before the extended termination date.

Third, the purchase agreement may impose obligations on the buyer to *propose and accept a consent settlement* that would restructure the transaction, usually by divesting lines of business or assets to a third party acceptable to the investigating agency, to eliminate the concerns of the

[14] A typical efforts clause reads: "Subject to the terms and conditions of this Agreement, each of the [parties] 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."

[15] The DOJ and FTC usually have no objection to the parties and their counsel participating jointly in telephone calls and meetings. If confidential information of one party is to be discussed, the agencies will ask the employees of the other party to leave the room, but they usually allow outside counsel to stay in the room if there is a joint defense agreement in place that prohibits outside counsel for sharing this confidential information with their client.

investigating agency that the original transaction would result in a substantial lessening of competition in one or more markets. This type of consent settlement, known colloquially as a "fix," is common in retail transactions such as Ceres. The provision usually obligates the buyer to propose and accept a consent settlement requiring it to divest up to a specified number of stores. In the Walgreens/Rite Aid transaction, for example, the original purchase agreement required Walgreens to agree to divest up to 1000 stores.[16] The maximum number of stores the buyer will have to divest is usually a subject of intense analysis and negotiation between the parties. Operationally, if the investigating agency will not enter into a consent settlement unless the buyer is willing to divest more stores than the maximum number specified in the purchase agreement, the buyer will not be required by the purchase agreement to accept the consent settlement. If the buyer does not accept the consent settlement, the investigating agency will commence litigation and, if necessary, seek to obtain a temporary restraining order or preliminary injunction blocking the deal. Litigation in this circumstance is likely to cause one or more closing conditions to fail to be satisfied through the termination date, after which the buyer can unilaterally terminate the purchase agreement without cause. When the seller insists on an affirmative covenant to propose and accept consent settlement, the buyer should consider requiring the purchase agreement to obligate the seller to cooperate in the defense of any litigation and to provide for adequate time to litigate the case to a decision on a preliminary injunction. Otherwise, the buyer will have no way to push back on an agency's demand for a consent settlement that the buyer thinks is unreasonable.

Fourth, the purchase agreement may require the buyer to pay the seller a "reverse termination fee" if one or more of the antitrust-related closing conditions are not satisfied by the termination date and the purchase agreement terminates. The median amount of an antitrust reverse termination fee is around 4.6 percent in public transactions, although the percentages vary considerably and naturally are intensely negotiated by the parties. Many think of reverse termination fees as payment to a seller for the harm experienced due to the failed deal, but this is not how parties should think of the fee or how the seller should negotiate the fee. Rather, the better view is that the purpose of the fee is to financially incentivize the buyer to accept consent settlements that the affirmative covenants in the purchase agreement do not otherwise require. The idea is that the buyer, confronted with a settlement demand from the investigating agency, can either (1) accept the settlement, make the required divestitures, and close the deal, or (2) reject the settlement, (eventually) terminate the purchase agreement, and pay the seller the reverse termination fee. If the gain to the buyer of doing the restructured deal (subtracting off payment of the purchase price, any losses the buyer is likely to face in divesting the required assets in a "fire sale," and any losses of expected synergies because of the divestitures) is more than the reverse termination fee, the buyer will accept the consent settlement. Here, too, the buyer may wish to require a litigation obligation and an extension of the termination date to have a way to push back on an agency's demand for a consent settlement that the buyer thinks is unreasonable.

I would be delighted to discuss this further with you if you have any questions or would like more detail on any of these provisions.

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[16] A provision of this type that contains a limit on the buyer's obligation to divest is known as a "qualified hell or high water" provision. If the number of stores is not capped, it is known as an "unqualified hell or high water" provision.