MERGER ANTITRUST LAW

LAW 1469 — Tuesdays and Thursdays, 3:30 pm – 5:30 pm
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Reading Guidance

Class 9 (September 22): Hertz/Avis Budget/Dollar Thrifty (Unit 4)

In this class, we will examine how Hertz and Dollar Thrifty allocated antitrust risk in their 2010 merger agreement. We also will use the subsequent bidding war with Avis, the FTC review of the competing proposals, Hertz's eventual acquisition of Dollar Thrifty, the FTC settlement, and the post-closing failure of the divestiture buyer to examine how the parties' assessment and allocation of antitrust risk played out.

Antitrust risk. Recall from Class 3 that we divided a transaction's antitrust risk into three nested buckets: (1) inquiry risk—the risk that the transaction's merits will be seriously examined; (2) substantive risk—the risk that the transaction violates the antitrust laws; and (3) remedies risk—the consequences of a conclusion that the transaction violates the antitrust laws, including the possibility and cost of an acceptable fix, litigation, or termination. Substantive risk arises only if there is an inquiry, and remedies risk arises only if the transaction presents a substantive problem.

Lawyers give advice; clients make decisions. At the beginning of a deal, merger counsel should assess these risks sufficiently to enable the client to make informed decisions about whether and how to proceed. In practice, the risks are interrelated and often assessed together. The contractual allocation of these risks—who bears which risk, under what conditions, and with what limitations—is the central focus of today's class.

Antitrust risk allocation. This is a critical and challenging topic in merger antitrust law and worth careful thought. Remember that the seller does not get its money unless the deal closes. The seller therefore wants provisions that maximize the probability of closing, including provisions requiring the buyer to take whatever steps may be necessary to obtain antitrust clearance. The buyer, by contrast, does not want to be obligated to accept an antitrust remedy that eliminates so much of the deal's benefit that the transaction is no longer in the buyer's business interest. The buyer therefore wants to limit what it may be contractually required to do to resolve antitrust problems identified by the investigating agency and to preserve the right to walk away if the required remedy exceeds those limits. These opposing interests create the central tension in negotiating the antitrust-related provisions of a merger agreement. One of the antitrust deal lawyer's most important roles is to advise the client and assist the negotiating team in obtaining the best contractual protection against antitrust risk reasonably available to the client.

Before turning to the merger agreement, read the S-4 excerpt describing the negotiation of the 2010 Hertz/Dollar Thrifty merger agreement (pp. 52-60). Focus on how the parties' differing assessments of antitrust risk shaped the negotiations and why Dollar Thrifty sought contractual protection against the possibility that the transaction would not close.

I have included the complete 2010 Hertz/Dollar Thrifty merger agreement in the reading materials (pp. 61-151). You need only read the highlighted antitrust-related provisions, but I want you to see those provisions in the context of the entire agreement.

I suggest you approach the merger agreement by working through the class notes on allocating antitrust risk in merger agreements and, at each stage, examining the language that Hertz and Dollar Thrifty actually agreed to accept.

- First, the class notes introduce terminology used in merger agreements (slide 4) and then examine the objectives each party seeks to achieve (slides 5-7). It is important to get a good feel for the parties' objectives—which, not surprisingly, differ considerably between buyer and seller—because those differences create the tensions in the negotiations.
- Second, after a quick refresher on the possible outcomes of the DOJ/FTC merger review process (slide 9), consider how the provisions in the merger agreement can further or impede each party's objectives (slides 10-12).
- Third, take a quick look at the organization of a typical merger agreement (slides 13-18). As you read these slides, look at the table of contents of the Hertz/Dollar Thrifty agreement (pp. 62-66). Formally, antitrust provisions may appear throughout a merger agreement; functionally, the principal risk-allocation mechanisms are closing conditions, termination provisions, and affirmative covenants.
- Fourth, examine the specific provisions in a merger agreement that allocate antitrust risk (slides 19-47). As you read each type of provision, locate the corresponding highlighted provision or provisions in the Hertz/Dollar Thrifty agreement and ask what the parties agreed to do in this transaction and where the provision falls on the buyer-friendly/seller-friendly spectrum. The supplemental class notes, Risk-Shifting Provisions in Hertz/Dollar Thrifty, provide a provision-by-provision guide if you find it useful.
- Finally, read the summary in the class notes (slides 48-50).

The bidding war. After Hertz and Dollar Thrifty signed their 2010 merger agreement, Avis Budget Group made a competing proposal. Read Avis Budget's initial letter and Dollar Thrifty's response (pp. 153-156). You might wonder how Avis Budget could enter the picture after Hertz and Dollar Thrifty had signed a definitive merger agreement approved by both companies' boards. Delaware law limits deal-protection provisions that would unreasonably preclude or materially impede a topping bid. In light of this law, public company merger agreements commonly include a "fiduciary out" that, subject to specified conditions, permits the target's board to change its recommendation or terminate the agreement to accept a superior proposal. Read the note on *Revlon* duties and fiduciary outs (pp. 157-164). These materials introduce the bidding war; we will trace the rest of the chronology, including the FTC's review of the competing proposals, in class.

In years past, I have assigned the press releases, letters to shareholders and employees, investor presentations, transcripts of analyst calls, and excerpts from SEC filings that tell the entire story of the bidding war. This year, I have made those materials optional and moved them to the Unit 4 supplemental materials.[1] Even so, I strongly recommend that you read them. Despite their

[1] *See* Hertz/Avis Budget/Dollar Thrifty: The Bidding War in the Unit 4 supplemental materials.

apparent length, they are quick and easygoing reads and provide an excellent feel for how a contested takeover proceeds. If you read them, do so on-screen and read them like a novel. Look for how Dollar Thrifty maneuvered to obtain a higher deal price and stronger risk-shifting provisions, how and with what success Hertz and Avis Budget resisted those demands, and how little each bidder knew about what the other was doing beyond the publicly released materials.

The FTC merger review. Next, we turn to the outcome of the FTC merger review. Read the FTC press release and administrative complaint (pp. 165-172). Make sure you understand the FTC's theory of the case and ask how well you would have predicted the relief required by the consent order if you had known the basic facts. Most airports collect data on airport rental car operations, so assume that you would have known the airports at which Hertz and Dollar Thrifty overlapped, the identities of the other airport rental car competitors, and each company's revenues or revenue market shares.[2] If your client were one of the merging parties, you also would have known its expansion plans and therefore could have evaluated at least one side of the potential competition analysis.

Also, note that the FTC complaint alleges *two* separate and distinct violations. This is standard FTC practice. By contrast, DOJ complaints charge only violations of Section 7 of the Clayton Act. What is going on here?

On November 15, 2012, the FTC accepted the proposed consent order subject to public comment (sometimes called *provisional acceptance*) and permitted the Hertz/Dollar Thrifty transaction to close without interference.[3] The parties consummated the transaction five days later (p. 173). As we saw in Unit 1 on antitrust settlements, the FTC's rules require a provisionally accepted consent order to be placed on the public record and published in the Federal Register with an invitation for public comment. The notice was published on November 26, 2012, and the public comment period closed on December 17, 2012.[4] Usually, the Commission receives no comments and votes on final acceptance about four to six weeks after the comment period closes. Here, however, the Commission received six comments and did not make the order final—and then did so in a slightly modified form—until July 10, 2013, seven months later (p. 175). What does that delay suggest about the provisionally accepted order?

The aftermath. The remaining materials deal with what happened after the Commission made the consent order final (pp. 177-215). 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

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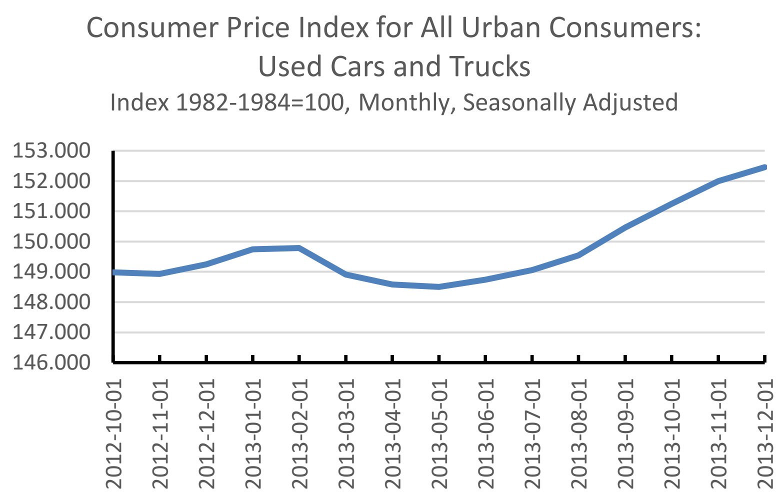
[2] For some examples of statistics on airport car rental operations, see the monthly reports for Seattle–Tacoma International (SEA), Los Angeles International (LAX), Portland International (PDX), and Harry Reid International (LAS).

[3] The Commission's vote approving the complaint and provisionally accepting the proposed consent 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* News Release, Fed. Trade Comm'n, 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).

[4] *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).

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. Title to the car then 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.

At the time, rental car companies maintained a new fleet by replacing their cars every six months or so.[5] When Simply Wheelz began auctioning off its older leased fleet vehicles as part of ordinary course fleet management activities, it began to experience significant losses because used car prices were falling. The following chart (which tracks retail prices) is indicative of the dip in wholesale prices:



Source: U.S. Bureau of Labor Statistics, Consumer Price Index for All Urban Consumers: Used Cars and Trucks in U.S. City Average [CUSR0000SETA02], retrieved from FRED, Federal Reserve Bank of St. Louis; https://fred.stlouisfed.org/series/CUSR0000SETA02, August 13, 2023.

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 $8.6 million. 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, Hertz gave notice that it was terminating the Master Lease Agreements and seeking the return of the entire Hertz Leased Fleet.

5 Today, rental-car fleets are generally much newer than privately owned cars, but their replacement cycles are commonly measured in roughly one to three years. Hertz's 2025 annual reporting, for example, states that the company's planned holding period for revenue-earning vehicles at December 31, 2025 typically averaged 27 months. Hertz Global Holdings, Inc., Form 10-K, at 49 (annual report for the fiscal year ending December 31, 2025).

On November 5, 2013, four months after the Commission made the consent order final, Simply Wheelz filed for Chapter 11 bankruptcy protection.[6] As part of the bankruptcy proceedings, Simply Wheelz conducted an auction to sell certain Advantage assets. The Catalyst Capital Group Inc. submitted the winning bid for assets associated with 40 core locations; assets associated with 28 locations were excluded from the sale. The bankruptcy court approved the sale. Under Paragraph V of the FTC's consent order, FSNA was required to obtain the FTC's prior approval before disposing of assets it had acquired as the original divestiture buyer. The FTC approved the sale to Catalyst on January 30, 2014 (pp. 177-200). FSNA then petitioned the Commission to sell 22 of the 28 non-transferred locations to Hertz (10 locations) and Avis (12 locations), which the Commission approved on May 29, 2014 (pp. 201-215). Subsequently, FSNA 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. The Commission approved those sales in a letter dated September 2, 2014, and announced the approval on September 5, 2014.[7]

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 driven 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.

The story illustrates how a poorly chosen or poorly capitalized divestiture buyer can undermine a consent order's effectiveness and leave the agency with limited remedies once the transaction has closed. It also illustrates why remedies risk does not end when the agency accepts a settlement: the divestiture must create a viable competitor that can survive after closing. As you read these materials, ask what the FTC knew or should have learned about FSNA's capitalization, the Hertz fleet lease, and the residual value risk before it approved the divestiture buyer.

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

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

[7] This petition and approval letter are not included in the reading materials.