

SUPPLEMENTAL CLASS NOTES

Unit 7. Risk-Shifting in Hertz/Dollar Thrifty

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Hertz/Avis Budget/Dollar Thrifty



Party objectives in M&A agreements

■ Sellers

1. Obtain the highest purchase price possible

- In other words, extract in the purchase price all of the gains from trade that the buyer expects to obtain from the deal

2. Close the transaction prior to the *termination date*

- Called *certainty of closing*
- Sellers do deals in order to get paid
- Seller tends to lose value during pendency of the transaction
 - Loses going concern value (the “damaged goods” problem)
 - Often lack strategic direction and focus during pendency of transaction
 - Key employees often leave company for jobs in other companies
 - Purchase price in a second auction after a failed transaction typically much less even after accounting for damaged goods problem

3. Minimize the delay between signing and closing

- Usually a very minor concern to sellers compared to the purchase price and certainty of closing

Party objectives in M&A agreements

■ Buyers

1. Obtain the lowest purchase price possible
 - In other words, retain in the purchase price all of the gains from trade that the buyer expects to obtain from the deal
2. Close the transaction provided the deal generates sufficient value; otherwise, walk away from transaction without loss of value
 - a. The DOJ/FTC might require divestitures that would reduce the benefits of the deal and perhaps even make them negative
 - b. The market/regulatory environment might change in ways that make the deal a bad deal
 - c. The target might suffer an material adverse change in its business
 - d. The buyer might suffer an material adverse change in its business
3. Minimize the delay between signing and closing
 - Usually a more important consideration to buyers than to sellers

Negotiating the contract

■ Mutual goals

1. Neither party wants to be contractually obligated to close a deal that would be illegal and subject the party to sanctions
2. Each party wants a way out of the deal if the party no longer finds it in its interest to close the deal
3. Each party wants to maximize the probability that the deal *will* close if the party *wants* the deal to close
 - *Objective*: Include provisions in the contract that will obligate the merger partner to act so that the deal can be closed before the *termination date*
 - That is, contractually prevent the other side from acting in ways that would tank the deal and allow the other party to walk away

The structure of a merger agreement

- Sections of the contract with antitrust risk-shifting content
 - Conditions precedent (“closing conditions”)
 - Termination provisions
 - Can provide for extensions in certain contingencies
 - Affirmative covenants
 - To increase the probability that the conditions precedent will be satisfied prior to the termination date

Where are the agreements and tensions between the parties on these provisions?

Conditions precedent

- Standard antitrust-related provisions
 1. Regulatory authorizations
 2. No injunction or legal restraint
 3. 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.

Note: The “CBC” is the Canadian Competition Bureau

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

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

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).

Termination provisions

- Standard provisions

1. At any time by mutual consent
2. By either party 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)

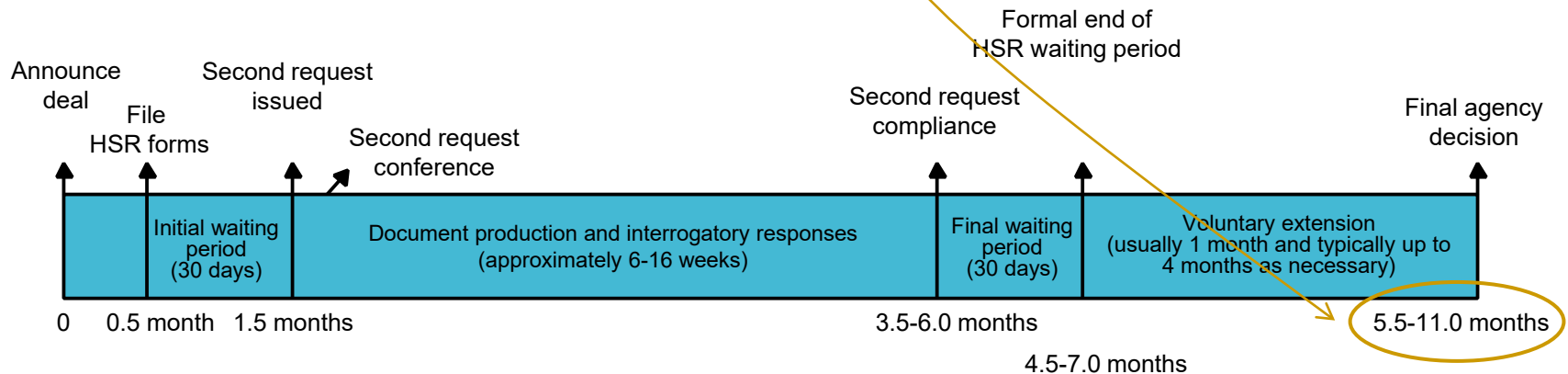
(b) by either Parent or the Company:

(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;

- Typically written so that it may not be invoked by a party whose breach of its contractual obligations resulted in the failure of the deal to close
- May be extended for additional time in specified circumstances
 - Example: To permit litigation

Termination provisions

■ Typical domestic transaction



- | | | | |
|------------------|--|--|--|
| Customer rollout | <ul style="list-style-type: none"> - First telephone call (voluntary request) - First presentation - Follow-up meetings - First DOJ/FTC customer interviews - First DOJ/FTC competitor interviews - Filings in other jurisdictions | <ul style="list-style-type: none"> - Second request conference - Collect and review documents - Prepare interrogatory responses - Depositions of employees - Additional meetings - Follow-up DOJ/FTC customer interviews and affidavits - Follow-up DOJ/FTC competitor interviews | <ul style="list-style-type: none"> - Final meetings with staff - Meetings with senior staff - Negotiate consent decree (if necessary) |
|------------------|--|--|--|

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;**

- Typically written so that it may not be invoked by a party whose breach of its contractual obligations resulted in the failure of the deal to close
- May be extended for additional time in specified circumstances
 - Example: To permit litigation

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 prosecuting defense
7. Obligations to “fix” the agency's concerns
8. Obligations to litigate
9. Limitations on the obligation to “fix” the antitrust concerns
10. Obligations not to make acquisitions that could impede the closing

Covenants

■ General “efforts” clause

- “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.

- “Reasonably best efforts”
 - An undefined oxymoron
 - Where used, the parties intend for the required efforts are more than “reasonable” but less than “best,” but without a precise standard
 - This allows the parties to reach agreement and move on, and litigate the standard later in the unlikely event the parties cannot settle a breach of contract dispute

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;

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 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.

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 - 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.

- The obligation to consult extends to any timing agreement with the investigating agency
- The proviso excludes consent settlements from the obligation to consult

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.

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 in subsequent language
- Advantage is explicitly identified as a line of business subject to divestiture

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) [**these are the antitrust conditions**] **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

- This provision essentially says that, if the antitrust reverse termination is paid, no other remedies are available except in the case of a willful and material breach

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**

Risk-shifting summary

	Buyer-friendly	←————→	Seller-friendly
Level of efforts	Commercially reasonable efforts	Reasonable best efforts	Best efforts
Obligation to make divestitures	Silent/expressly excluded	Divestitures up to cap – measured in asset or revenue terms or MAC applying to part or all of acquired or merged business	Obligation to make any and all divestitures necessary to gain clearance no matter how much or what impact is (HOHW)
Timing for other aspects of regulatory review	Silent/may be deadline for submission of HSR filing	Silent/may be deadline for submission of HSR filing	Express timing for submission of filing, Second Request compliance and other milestones
Timing for offering divestitures	Silent	Silent	Express timing for offering remedies to obtain clearance
Control of regulatory process	Buyer controls; require cooperation from Seller and may give access and information	Buyer leads; Seller entitled to be present at meetings, calls; obligation on Buyer to communicate certain matters to Seller	Full involvement of Buyer in negotiations with regulators; Seller prohibited from communicating without Buyer (except as required by law)
Obligation to litigate	Silent/expressly exclude/litigate at buyer's option	Silent/expressly exclude	Obligation to litigate if regulators block exercisable at seller's option; does not relieve buyer of obligations to make divestitures
Termination provisions	Open-ended, extendable at buyer's option	Tolling at either party's option	Tolling at seller's option
Reverse break-up fee	None	Possible	Substantial fee; provision for interim payments and interest
Time to termination date	As long as buyer anticipates needing to fully defend transaction on merits, plus ability to extend at buyer's option	Tolling at either party's option	Tolling at seller's option at specified inflection points (e.g., second request compliance, commencement of litigation)
"Take or pay" provision	None	None	Requires payment of full purchase price by termination date even if transaction cannot close