GETTING THE DEAL DONE: ANTITRUST RISK-SHIFTING PROVISIONS IN MERGER AGREEMENTS

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Introduction

As competition agencies around the world have increased their scrutiny of mergers and acquisitions, businesses and their antitrust counsel must increasingly pursue strategies to manage merger-related antitrust risk. It is no longer viable not to involve antitrust counsel at the earliest stages of deal considerations to assess potential risk and to develop strategies to mitigate that risk, and, if necessary, protect vital business interests in the event of a challenge to a transaction by a competition bureau.

Antitrust counsel cannot evaluate and pursue strategies to mitigate risk without understanding the likelihood that an antitrust enforcement agency will investigate, issue a Second Request or other requests for information, require divestitures, or ultimately challenge the deal. To properly assess antitrust risk, counsel must work closely with their clients to identify areas of the merging parties' businesses that overlap or may otherwise raise antitrust concerns. After properly assessing risk, counsel can help their clients mitigate their risk exposure by drafting merger agreements that anticipate and provide for the repercussions each party may face if the deal is blocked or must be altered to gain antitrust approval. The primary means for mitigating and/or allocating antirust risk are (1) reverse breakup fees, (2) divestiture limitations, and (3) obligations to litigate.

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Other merger agreement provisions, however, including "best efforts" clauses, material adverse change ("MAC") clauses, termination clauses and conditions to closing, and fee provisions, may also allocate antitrust risk. Importantly, strategies for managing antitrust risk do not exist in a vacuum. Counsel must consider how these strategies interact with one another to pursue the optimal degree of protection for their clients, while allowing the deal to proceed. The purpose of this article is to review the strategies that are available to antitrust practitioners who wish to counsel and protect clients in deals with significant antitrust risk.

Reverse Breakup Fees

Traditionally, breakup fees, which are paid by the seller to the buyer, have three essential functions: they mitigate the buyer's risk associated with the time, expense, and opportunity cost of pursuing a deal; they deter third-party bidders; and they pre-determine damages in the event that a deal fails to close. Reverse breakup fees, on the other hand, are paid by the buyer to the seller. While reverse breakup fees are still not commonly found in most merger agreements, target companies are increasingly using reverse breakup fees to shift a portion of the costs they bear during the merger process onto the acquiring company and mitigate the risk of a deal not clearing antitrust review.

Two high-profile deals announced in 2011 – Google/Motorola and AT&T/T-Mobile – highlight this trend. Not only were the dollar amounts of the reverse breakup fees much higher than the amounts seen in most prior deals[2] ($2.5 billion in the Google/Motorola merger agreement and $6 billion in cash and assets for the AT&T/T-Mobile agreement); the fees also represented a large percentage

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[2] *See e.g.,* Darren S. Tucker & Kevin L. Yingling, *Keeping the Engagement Ring: Apportioning Antitrust Risk with Reverse Breakup Fees*, 22 ANTITRUST, no. 3 at 73 (2008) (Sampling of deals found that reverse termination fees averaged $248 million in absolute terms and 3.9% of the value of the deal.); Independent research confirms that historically antitrust breakup fees have typically been less than 5% of the deal value, but a number of recent deals have indicated a trend of breakup fees well over 5% (For example, Google's proposed acquisition of Motorola (20%), AT&T's proposed acquisition of T-Mobile (15%), Smithfield Food's acquisition of Premium Standard Farms (12%), Grifols' attempted acquisition of Talecris (9%), among others).

of the total deal values (20% for Google/Motorola and 15% for AT&T/T-Mobile).[3] After the AT&T/T-Mobile deal was announced, Deutsche Telekom's Chief Financial Officer Timotheus Hoettges stated that the existence and magnitude of the reverse breakup fee was "very important" during the merger negotiations.[4]

Reverse breakup fees are often thought to primarily benefit sellers, but both sellers and buyers can benefit from their inclusion in the merger agreement. For sellers, the amount of the reverse breakup fee is important. Although in some transactions, no amount of money will be able to compensate the seller for damage to its business during a prolonged investigation or after a failed deal, a high fee can function much like a "hell or high water" provision, which essentially guarantees the seller the acquisition price by requiring the buyer to take all actions necessary to get antitrust approval. While buyers rarely are willing to agree to hell or high water provisions, a high breakup fee can similarly incentivize the buyer to take all actions necessary to obtain regulatory approval. Buyers can also benefit from reverse breakup fees in two ways. First, reverse breakup fees can encourage otherwise reluctant sellers to proceed with deals that may involve significant antitrust risk. Second, buyers can benefit by treating the fees like an option that allows the buyer to walk away prior to the termination date for any reason once the fee is paid.[5] Two factors – (1) the dollar amount and (2) the conditions that trigger payment of the fee – determine the amount of protection it affords the parties.

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[3] Serena Saitto& Zachary Mider, *Google Deal Said to Have $2.5 Billion Reverse Breakup Fee*, Bloomberg Businessweek, August 15, 2011, http://www.businessweek.com/news/2011-08-15/google-deal-said-to-have-2-5-billion-reverse-breakup-fee.html).

[4] Serena Saitto& Jeffrey McCracken, *Cash, Breakup Fee Gave AT&T Edge with T-Mobile*, Bloomberg News, March 21, 2011, http://seattletimes.nwsource.com/html/businesstechnology/2014563659_ticktock22.html; Michael de la Merced, *What's Behind the Hefty Motorola Breakup Fee*, New York Times Dealbook, August 16, 2011, http://dealbook.nytimes.com/2011/08/16/whats-behind-the-hefty-motorola-break-up-fee/).

[5] *Id.* At 70-71.

First, in deals where there is a high likelihood of regulatory intervention, seller's counsel should aim to negotiate a large fee to help protect their client from the business risks associated with a lengthy review process, such as the loss of customers and employees or a decrease in valuation if the deal fails to close. The AT&T/T-Mobile deal is instructive: because of the antitrust risk associated with the deal, Deutsche Telekom negotiated a $6 billion reverse breakup fee that includes a $3 billion cash payment by AT&T along with $2 billion worth of spectrum and a roaming agreement valued at $1 billion.[6] As noted above, however, in many cases, no fee is sufficient to compensate the seller for the damage done to its business during regulatory review or if the deal ultimately fails. In the alternative, even if there is a fee amount that would be sufficient to compensate the seller should the deal fail, that amount may be so high that the buyer is unwilling to agree to it. Counsel for the buyer should provide advice concerning the costs and potential benefits of a reverse breakup fee, including incentivizing the seller to move forward with a risky transaction. In any event, proper assessment of the antitrust risk is paramount to determining whether a reverse breakup fee is necessary to incentivize the seller to move forward, as well as the likelihood the buyer will ultimately be required to pay the fee.

Beyond the amount of the fee, the triggers that determine payment of the reverse breakup fee can and should be carefully considered and negotiated.[7] In cases where the antitrust risk is significant, failure to obtain regulatory approval is a common trigger. The parties each should consider the risks specific to their deal to determine which triggers offer the best protection, but still allow the deal to move forward. Counsel for sellers should push for broadly-worded triggers that require payment if the deal fails for any reason. Buyer's counsel, on the other

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[6] Nadia Damouni&ParitoshBansal, *AT&T, T-Mobile USA Break-up is $6 Billion: Sources*, Reuters, May 12, 2011, http://www.reuters.com/assets/print?aid=USTRE74B5H220110512.

[7] A 2009 study found that the top five triggers of reverse breakup fees, in order of frequency, were: (1) Incurable breach; (2) Breakup in connection with the buyer pursuing a competing transaction; (3) Changes in buyer's board recommendation; (4) Merger not consummated for any reason; and (5) Failure to obtain financing. AfraAfsharipour, *Transforming the Allocation of Deal Risk Through Reverse Termination Fees*, 63 Vand. L. Rev. 1161, 1199-00 (2010).

hand, will generally want to narrow the triggers for the fee, or require additional conditions to be met before payment is necessary. The Google/Motorola deal demonstrates a narrowly tailored reverse breakup fee. In that agreement, Google's payment of the fee to Motorola is triggered only if the deal is blocked by a governmental entity or the "Outside Date" (between 12 to 18 months after agreement) is reached and the deal is still pending while all other conditions have been satisfied.[8] Thus, the triggers narrowly address the antitrust risk of the deal.

Furthermore, reverse breakup fees must be considered in tandem with other strategies. For example, they may be used as a trade-off for other concessions that are undesirable to the buyer, such as agreeing to make divestures or to litigate should the government sue to block the transaction. On the other hand, reverse breakup fees may provide sellers with additional protection where divestitures are difficult or they would lose significant business should the deal require lengthy review or litigation. However used, reverse breakup fees alone are generally perceived by sellers as insufficient to protect their interests, but their inclusion will influence the need for, and the extent of, other protective measures included in the merger agreement. Depending on the type of risk involved, reverse breakup fees may or may not be the best way to allocate risk. Other strategies are detailed below.

Divestiture Limitations

In addition to reverse breakup fees, divestiture provisions also allocate risk, but in some cases, they are either disadvantageous or will have potentially undesirable implications for how the government reviews the transaction. Divestiture limitations specify the extent to which parties must divest, sell or license assets in order to obtain regulatory approval. The seller can require the buyer to "make any and all divestitures that are a prerequisite to the FTC, DOJ or EC's clearance of the transaction" or the buyer can specify the monetary

[8] Agreement and Plan of Merger By and Among Google, Inc. and Motorola Mobility Holdings, Inc. § 7.03(c).

boundaries within which divestitures will be considered. There are two primary varieties of divesture provisions to consider when negotiating the merger agreement. The provision can specify (1) the specific assets that a company is willing to divest, or (2) the maximum revenues or values of the assets the company is willing to divest. These discussions should include consideration of the technical, marketing, operational, and sales dependencies between the businesses that are included in the set that the buyer commits to divest if required and businesses that the buyer is unwilling to divest.

The recent deal between Express Scripts and Medco includes a detailed divestiture provision that lists the specific assets each party is willing to sell and sets a ceiling for any further divestitures that may be requested by the government. If the government requests divestitures above that amount, the agreement allows the parties to walk away.[9] In deals where there are significant market overlaps, both parties should carefully consider which assets they are willing and able to include in a divestiture provision. If the parties choose to include a divestiture provision, counsel for the parties should consult with their clients on potential overlaps between business divisions that may be targeted by

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[9] Express Scripts, Inc. Form 8-K, Filed July 22, 2011 , § 5.8(e): "… in no event shall Aristotle [Express Scripts] . . . (nor shall Plato [Medco] . . . be permitted to agree unless Aristotle so directs them . . . (i) divest, license, hold separate or otherwise dispose of, . . . any portion of its or their respective businesses, assets or Contracts or (ii) take any other action that may be required or requested by any Governmental Entity in connection with obtaining the consents, authorizations, orders or approvals . . . that would have an adverse impact, in any material respect, on the business of Aristotle, Parent, Plato or their respective Subsidiaries; provided, however, that, Aristotle shall agree, . . . to the extent necessary . . . to (1) the divestiture or disposition of one mail order dispensing facility of Aristotle, Plato or any of their respective Subsidiaries, provided it shall not be the Aristotle facility located in St. Louis, Missouri, (2) the divestiture or disposition of property, plant and equipment associated with specialty pharmacy dispensing or infusion facilities of Aristotle, Plato or any of their respective Subsidiaries having a net book value not in excess of $30 million in the aggregate, provided it shall not include any property, plant or equipment at the Aristotle facility located in Indianapolis, Indiana, (3) the divestiture, disposition, termination, expiration, assignment, delegation, novation or transfer of Contracts of Aristotle, Plato or their respective Subsidiaries which generated, collectively, EBITDA not in excess of $115 million during the most recently available twelve (12) calendar month period . . . (3), in no event shall, in the case of pharmacy benefits management customer Contracts of Aristotle, Plato or their respective Subsidiaries, the aggregate annual number of adjusted prescription drug claims subject to the foregoing obligation exceed 35 million . . .; provided, further, as between Aristotle and Plato, the determination of how any of the actions specified in (1)-(3) above will be implemented shall be made by Aristotle."

the antitrust authorities and determine which assets their clients would be willing to sell.

While divestiture provisions may provide the advantage of increased certainty in the event the government requires a remedy, they also signal to the government the magnitude of the divestitures the parties are willing to make and which assets or businesses the merging parties believe the government will find problematic from an antitrust perspective. Therefore, the parties must consider how the proposed divestiture provision is likely to affect the government's review of the transaction. To some extent, the parties may avoid signaling the government by agreeing to divestitures under a certain sales amount or market value, rather than specific assets or businesses. Nonetheless, any divestiture provision provides the government with a guideline regarding divestitures on which the parties are willing to agree to obtain approval. For this reason, divestiture provisions sometime state that the parties will not make "material" divestitures. That said, the meaning of material can be unclear between the parties, and, if so, it is best not to leave it to a court interpreting the merger agreement to decide what divestitures would be material.

Beyond concerns about signaling antitrust enforcers, in some cases, divestitures are not possible without fundamentally changing the value of the deal. In others, while the divestiture provision is useful, it may not address all of the risk inherent in the deal. Thus, divestiture provisions should be considered with other provisions, including reverse breakup fees and obligations to litigate. For example, as noted above, a significant reverse breakup fee may incentivize a seller to move forward with a deal, despite an inability to negotiate satisfactory divestiture provisions. In deals where the parties reach agreement on a strong divestiture provision, on the other hand, that agreement can obviate the need for litigation commitments because the government is unlikely to challenge a deal if the parties agree to sufficient divestitures. We examine obligations to litigate below.

Obligations to Litigate

In deals where litigation is likely, reverse breakup fees and divestiture provisions may not provide sufficient protection for the parties. Litigation is likely to occur when the antitrust agencies seek greater divestitures than specified in the agreement or when the agency will not accept any remedy presented by the parties. In these instances, obligations to litigate are especially important. The litigation provision should include the stage of litigation to which the parties commit (e.g., final and non-appealable judgment) and identify who is responsible for decisions related to the litigation, as well as describe fee arrangements. For example, the AT&T/T-Mobile agreement has the following clause concerning litigation (which, of course, requires AT&T to defend the current litigation, if it chooses not to pay T-Mobile a fee to walk-away):

> ". . Seller and Purchaser shall cooperate with each other and use, . . . their respective reasonable best efforts to take or cause to be taken all actions, . . . to consummate the Transaction as promptly as reasonably practicable . . . , including . . . (vi) ***defending against the entry of any decree, order, or judgment that would restrain, prevent or delay the Closing,*** including defending any lawsuits or other legal proceedings, whether judicial or administrative, challenging this Agreement or the consummation of the Transaction." § 4.6(a)

Particularly where the parties have not negotiated a strong divestiture package, or where the reverse breakup fee is insufficient to account for the antitrust risk, seller's counsel should seek to require the buyer to litigate and place the burden of litigation on the acquiring company. The seller is likely to have suffered significant business losses if there is an extended antitrust investigation, and will face even further losses if the deal ultimately fails. The costs of a lengthy court battle can also greatly reduce the value of the target company. By shifting the risk of litigation to the buyer, the seller can encourage the buyer to agree to greater divestitures or to signal its confidence that the deal will get approved, either with or without any of the divestitures contemplated in the agreement. By negotiating litigation commitments, the buyer can gain certainty that its costs will be limited, either because it is not obligated to litigate or obligated to litigate only to a relatively early stage. Where the parties have negotiated a strong divestiture package, buyers are generally more willing to accept greater responsibility in the litigation process, since it is less likely that deal approval will require litigation. Ideally, each party should carefully weigh the antitrust risk the deal entails and consider whether it has negotiated sufficient divestitures to avoid litigation.

" Best Efforts" Clauses

Although reverse breakup fees, divestiture provisions and litigation commitments are the main ways in which parties allocate antitrust risk, other provisions, including "best efforts" clauses, also manage risk. Merger agreements typically require parties to use their "best efforts" to ensure clearance of any shareholder and regulatory obstacles to closing the deal. For example, the Google/Motorola merger agreement states:

> ". . . each of the parties hereto shall cooperate with the other parties and use (and shall cause their respective Subsidiaries to use) their respective ***reasonable best efforts*** to promptly [among other things] take, or cause to be taken, all actions, . . . proper or advisable to cause the conditions to Closing to be satisfied as promptly as reasonably practicable and to consummate and make effective, in the most expeditious manner reasonably practicable, the transactions described herein." § 5.04(a)

Unfortunately, the meaning of "best efforts" when used in the antitrust provisions of a merger agreement is vague and has been treated inconsistently by courts in different jurisdictions, interpreting the laws of different states. The distinction between "best efforts," "reasonable best efforts," and "reasonable efforts" has been blurred as some courts use the term "reasonable" to define what is meant by "best efforts," while other courts have determined that the use of the word "reasonable" should confer some other meaning to the phrase.[10] Nonetheless, the phrase has been interpreted to be "more exacting then the usual contractual duty of good faith."[11]

Generally, the determination of whether "best efforts" were applied is a question of fact.[12] However, the Southern District of New York has stated that it is a "question of law from the four corners of the contract."[13] Given the uncertainty surrounding these clauses, practitioners should not rely on them without also defining "best efforts" within the agreement. Furthermore, because the meaning of "best efforts" is uncertain, merger agreements that do not specify divestiture and litigation requirements leave the parties vulnerable to the courts' determination of what level of divestitures or litigation are required to meet the "best efforts" standard. Therefore, counsel should ensure that the parties have defined and reached agreement on what is meant by "best efforts" in the merger agreement, and have agreed to divestitures and litigation commitments to reduce any potential ambiguity. The parties can also provide more clarity by including choice of law and choice of forum clauses that specify a governing law and forum for the resolution of disputes that will give effect to their common view of how a "best efforts" obligation should be interpreted. Alternatively, because different

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[10] *Coady v. Toyota Motor Distributors*, 361 F.3d 50, 59 (1st Cir. 2004) (The First Circuit held that '"best efforts' is implicitly qualified by a reasonableness test."); *Stewart v. O'Neil,* 225 F. Supp. 2d 6, 14 (D.D.C. 2002) (The court held "best efforts" meant "all reasonable efforts."); *Krobeth v. Brent*, 215 A.D.2d 813, 814 (N.Y. App. Div. 1995) (The court held that "best efforts" meant that the party had to use "all reasonable methods" to fulfill its obligations.); See also, *Stamicarbon, N.V. v. Am. Cynamid Co.,* 506 F.2d 532 (2d Cir. 1974) (The court considered the meaning of a "reasonably best efforts" provision, observing that the word "reasonably" must add some meaning to "best efforts."); *In re Chateaugay (LTV Aerospace and Defense v. Thomson)*, 198 B.R. 848, 854 (S.D.N.Y. 1996) (The court addressed the obligations under a "reasonable efforts" clause, and stated that it was "indisputably less stringent than that imposed by the 'best efforts' clauses contained elsewhere in the Agreement.").

[11] *Crum & Crum Enters., Inc. v. NDC of California*, No. 09-145, at *4, (D. Del. Nov. 3, 2010) (citing cases from the Third Circuit, Kansas, and New York).

[12] *Baron Financial Corp. v. Natanzon*, 509 F.Supp.2d 501, 515 (D. Md. 2007); *Crum & Crum Enters., Inc. v. NDC of California*, No. 09-145, at *5, (D. Del. Nov. 3, 2010) ("[I]t is well-accepted that " 'best efforts' depends upon the factual circumstances surrounding an agreement") (citing *Triple-A Baseball Club Associates v. Northeastern Baseball*, 832 F.2d 214, 228 (1st Cir. 1987)).

[13] *In re Gulf Oil/Cities Service Tender Offer Litigation*, 725 F.Supp.712, 730 (S.D.N.Y. 1989).

state and federal courts have interpreted "best efforts" clauses differently, the buyer and sellers can each propose the law and forum that favors their view of the clause.

Material Adverse Change ("MAC") Clauses

Throughout the merger review process, outside events may negatively impact the value of a deal for one or both parties. Material adverse change, or "MAC" clauses allow parties (usually the purchaser) to terminate the agreement, often without penalty, if there is a significant change in circumstances during the pendency of a deal. MAC clauses, however, are similar to "best efforts" clauses in that there is no clear legal standard for determining when something "material" has occurred. Therefore, counsel for both parties should clearly define the parameters of what constitutes a "material" change.

Definitions in the MAC clause may include changes related to the specific deal, such as loss of customers or employees, damaged supplier relationships, or disruption of business. MACs also generally include several carve-outs describing events not to be considered MACs, such as acts of god, natural disasters, and changes in the overall economy. Counsel for sellers should negotiate for a narrow definition of what constitutes a MAC, for example by negotiating broad carve-outs. Counsel for buyers should generally seek a broad definition that allows them to abandon the agreement if the value of the deal significantly changes or it becomes much more likely that antitrust enforcers will challenge the deal, and should limit carve-outs.

Although the MAC clause is often separate from the reverse breakup fee, the two should be considered together because the occurrence of a MAC generally terminates the agreement without further obligation on the part of the buyer, which would also negate the obligation to pay a reverse breakup fee. Therefore, sellers should ensure that the occurrence of a MAC does not release the buyer from payment of the reverse breakup fee. This may be especially important in deals where the seller faces significant risk to its daily business as a result of the deal. The parties should therefore consider whether the occurrence of a MAC will trigger the reverse breakup fee or not.

Termination Clauses and Conditions to Close

Distinct from other provisions that allow the parties to terminate the deal, termination clauses define the circumstances under which the parties may terminate the agreement. They are included in virtually every merger agreement and generally include an "outside" or "drop dead" date beyond which either party may terminate the agreement if the deal is still pending. Similar to MAC provisions, termination clauses may also allow for termination in case of certain events, including changes in the companies' relative market positions such as bankruptcy, or a competition agency's launching an investigation, announcing it will challenge the transaction, obtaining an initial order barring the deal, or obtaining a final non-appealable court order prohibiting the transaction.

The level of antitrust risk is an important consideration when setting the drop-dead date and other events that allow the parties to terminate the agreement. If there is significant antitrust concern, an earlier drop-dead date or inclusion of event-based conditions may alleviate the risk of a lengthy antitrust investigation, whereas a later drop-dead date or narrow event-based conditions will allow for a protracted investigation. For example, antitrust clearance is usually listed as a condition to close the transaction. The agreement should be clear about the level of clearance required. For example, buyers will generally push for the condition that no suits or injunctions be "threatened" to block the transaction, whereas sellers will prefer that no suits have been filed or injunctions granted to block the transaction. The language of the condition required should reflect possible agency actions in any jurisdiction in which notification is required. In addition, if the merger will require notification in multiple jurisdictions, the parties should consider how different antitrust enforcement agencies' timelines should influence the drop-dead date. Sellers in particular will want to ensure that the drop-dead date is not so early that the parties will not have gained antitrust clearance in all mandatory jurisdictions by that date, allowing the buyer to terminate. Thus, the conditions to closing should inform the termination clause. Furthermore, the event-based conditions contained in termination clauses can be linked to other provisions in this article. Counsel for buyers, in particular, should consider linking the termination date to divestitures or litigation.

Payment of Antitrust/Regulatory Fees and Expenses

For deals that pose little antitrust concern, review by the regulatory agencies can be over within weeks, but for deals with significant antitrust risk, review in the United States alone can take over a year if a Second Request is issued. A lengthy antitrust investigation can be extraordinarily expensive, and allocating those expenses is another way to shift antitrust risk. Each party may end up spending several million dollars in legal fees, economic consulting fees and document production expenses to comply with a Second Request in the United States – and that does not include the costs of investigations that could occur in the other 80-plus nations with merger control systems. These costs can double if the government ultimately decides to challenge the deal in court. Therefore, in deals where the parties expect antitrust issues, smaller sellers should negotiate to have a portion or all of their costs related to an antitrust investigation paid by the buyer. Sellers should negotiate for payment of these fees in addition to the reverse breakup fee and buyers should consider setting limits on the amount of expenses that they will pay. That said, merely allocating fees and expenses will be insufficient to protect sellers from the business risks associated with antitrust review or provide sufficient incentives for sellers to move forward with risky transactions.

Conclusion

Each of these methods for limiting or allocating antitrust risk has advantages and disadvantages. Reverse break-up fees, although unlikely to fully compensate the seller, may incentivize a seller to move forward with a risky transaction, and may provide the buyer with an option to terminate the deal prior to the termination date, if it is willing to pay the fee. Divestiture limitations provide certainty regarding the assets or businesses the parties are willing to divest to obtain antitrust approval, but are not possible in all mergers and may signal regulators reviewing the transaction. Obligations to litigate are important where divestitures would significantly impair the value of the deal or antitrust regulators may be unwilling to accept any divestiture as a remedy. Beyond the primary three methods of allocating antitrust risk, other provisions, including "best efforts" clauses, material adverse change ("MAC") clauses, termination clauses and conditions to closing, and fee provisions, can also help mitigate antitrust risk exposure.

The most important step before employing any single strategy or combination of strategies in negotiating merger agreements is to properly assess the antitrust risk in the deal. Once counsel has determined the likelihood of investigation, requests for information, divestitures, and litigation, they can discuss with clients the trade-offs between these strategies and determine the optimal set of strategies to pursue. Properly assessing antitrust risk and developing an integrated approach to protect clients in the face of antitrust risk can save significant time and money and help ensure either that a deal survives regulatory review or that the parties are able to quickly move on if the deal is off.