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Antitrust Reverse Termination Fees

Dale Collins

This post updates one we did a year ago analyzing antitrust reverse breakup fees in public deals since January 1, 2005. In two related notes, we discussed [various means of allocating antitrust risk in an acquisition agreement](#) and provided some [sample risk-shifting provisions](#) that have been used in actual deals.

An antitrust reverse termination fee (ARTF), sometimes called an antitrust reverse breakup fee, is a particular means of allocating antitrust risk: it is a fee payable by the buyer to the seller in the event that the deal cannot close because the necessary antitrust approvals or clearances have not been obtained. The idea behind an antitrust reverse termination fee is twofold: (1) it provides a financial incentive to the buyer to propose curative divestitures or other solutions to satisfy the competitive concerns of the antitrust reviewing authorities and so permit the deal to close, and (2) it provides the seller with some compensation in the event the deal does not close for antitrust reasons.

This note examines a sample of 633 strategic negotiated transactions announced between January 1, 2005, and June 30, 2012. Fifty-eight of these transactions, or about 9.2% of the total, had pure antitrust reverse termination fees, that is, reverse termination fees that were triggered only by a failure of the antitrust conditions precedent. As we will see later in this note, the fees were very idiosyncratic and showed no statistically significant relationship to the transaction value of the deal or trend over time. The average antitrust reverse termination fee for the sample was 5.8% of the transaction value. Since several high-percentage fees skewed the distribution to the high end, a better indicator may be the median, which was 3.9% of the transaction value.

Before turning to an analysis of the sample, we illustrate an antitrust reverse termination fee provision with the one found in the recent [Cardinal Health/Kinray stock purchase agreement](#). This is a fairly typical provision, although, not surprisingly, the provisions vary considerably from deal to deal. Next, we examine the triggering events for an antitrust reverse termination fee. The middle sections explain how we created our sample set, analyze the occurrence and the magnitudes of antitrust reverse termination fees in the sample, and look at a few sample outliers. Finally, we look at the three deals in which the antitrust conditions failed and the antitrust reverse termination fee was paid.



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An example: Cardinal Health/Kinray

A fairly typical antitrust reverse termination fee is contained in the November 2010 [stock purchase agreement](#) in connection with Cardinal Health's acquisition of Kinray:

Section 8.1. Termination. This Agreement may be terminated and the transactions contemplated by this Agreement abandoned at any time prior to the Closing:

...

(b) by either Seller or Buyer, if the Closing shall not have occurred on or before August 17, 2011 (the "Termination Date"), unless extended by written agreement of the parties hereto; provided, however, that the right to terminate this Agreement under this paragraph shall not be available to any party whose failure to fulfill any obligation under this Agreement has been the cause of, or resulted in, the failure of the Closing to occur on or prior to such date;

(c) by either Seller or Buyer, if any Governmental Authority shall have issued a judgment, injunction, writ, preliminary restraining order, or other order or decree of any nature restraining, enjoining or otherwise prohibiting the consummation of the transactions contemplated by this Agreement and such judgment, injunction, writ, preliminary restraining order, or other order or decree shall have become final and nonappealable; [or]

...

(f) by Buyer, upon the commencement of a Proceeding by any Governmental Authority seeking to enjoin, make illegal or otherwise prohibit or prevent the consummation of the transactions contemplated hereby; provided, however, that the right to terminate under this paragraph shall not be available if the failure to fulfill any obligation under Section 6.4 has been the cause of, or resulted in, the failure of the Closing to occur on or prior to such termination.

Section 8.2. Effect of Termination

(b) (i) In the event that either Seller or Buyer is entitled to terminate, and terminates, this Agreement pursuant to Section 8.1(b) or 8.1(c) and, at the time of such termination, the government approval which is the subject of the conditions to the Closing set forth in Section 7.1(b) has not been received, but all of the other conditions to the Closing under Section 7.1 and Section 7.2 have been or are capable



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of being satisfied as of the date of termination or (ii) in the event that Buyer is entitled to terminate, and terminates, this Agreement pursuant to Section 8.1(f),

then in either the case of (i) or (ii), Buyer shall pay to Seller a termination fee equal to \$65,000,000 (the “Reverse Termination Fee”) on or before the fifth Business Day following such termination by wire transfer of immediately available funds to an account designated in writing to Buyer by Seller no later than two Business Days after such termination. Seller agrees that, notwithstanding anything in this Agreement to the contrary, in the event that the Reverse Termination Fee is paid to Seller pursuant to this Section 8.2(b), other than claims of and causes of action arising from fraud or willful misconduct, the payment of such Reverse Termination Fee shall be the sole and exclusive remedy of Seller and its Affiliates against Buyer or any of its Affiliates, and in no event will Seller, the Company or any of their respective Affiliates be entitled to recover any other money damages or any other remedy, whether in law or equity or any other type, with respect to (A) any Loss suffered as a result of the failure of the transactions contemplated by this Agreement or any other Transaction Document to be consummated, (B) the termination of this Agreement, (C) any Liabilities arising under this Agreement, or (D) any claims or actions arising out of or relating to any breach, termination, or failure of or under this Agreement, and upon payment to Seller of the Reverse Termination Fee, Buyer shall have no further Liability to Seller or the Company relating to or arising out of this Agreement or any other Transaction Document or the transactions contemplated hereby or thereby. For all purposes of this Agreement, “willful misconduct” shall mean a conscious, voluntary act or omission taken with intentional disregard of legal or contractual duty and knowledge that such action or omission is a breach of such legal or contractual duty.

The antitrust reverse termination fee in Cardinal Health/Kinray is \$65 million, or 5% of the purchase price of \$1.3 billion, payable by the buyer to the seller if the agreement is terminated in one of three scenarios:

1. the buyer or the seller terminates the agreement after the drop-dead date, where government approval has not been received and all other conditions have been or are capable of being satisfied as of the date of termination, as provided in Section 8.1(b);
2. the buyer or the seller terminates the agreement after a Governmental Authority has issued a final and nonappealable injunction or other order prohibiting the consummation of the transaction as provided in Section 8.1(c); or



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3. the buyer terminates the agreement following the commencement of a government proceeding to prohibit the consummation of the transaction as provided in Section 8.1(f).

In scenarios 1 and 2, to ensure that the antitrust reverse termination fee is triggered by the failure of an antitrust closing condition and nothing else, all of the other conditions must have been or were capable of being satisfied as of the date of termination. Similarly, the buyer can terminate in scenario 3 only if it has discharged its affirmative obligations to obtain the necessary antitrust clearances. These obligations include, among other things, an obligation to accept a consent decree requiring a curative divestiture, provided that the impact of the divestiture and the other obligations of the consent decree would not exceed \$75 million measured in revenues in calendar year 2009.

Section 8.2 of the Cardinal Health/Kinray agreement also provides that in the event that the deal does not close and the buyer pays the antitrust reverse termination fee, that fee is the sole and exclusive remedy of the seller against the buyer for any breach of the contract other than claims arising from fraud or willful misconduct. This is a limited type of so-called “optionality,” since if the reverse termination fee is the only remedy for breach of the antitrust covenants, the purchase agreement essentially becomes an option to purchase on the part of the buyer if antitrust problems arise. Many purchase agreements with an antitrust reverse termination fee do not have any optionality and permit the seller to pursue its full range of remedies, including damages or specific performance, for a breach by the buyer in addition to receiving the termination fee.

Recent use of ARTFs: The sample set

To examine the recent use of antitrust reverse termination fees, we identified 633 strategic (nonfinancial) negotiated transactions valued at \$400 million or more from January 1, 2005, to June 30, 2012, a period of about 7.5 years.

Specifically, we used the FactSet Mergers database, also known as MergerMetrics, to collect information on transactions with the following characteristics: (1) the target company must be incorporated in the United States; (2) the target company must be publicly traded; and (3) the acquirer must own less than 50% of the target at the time the deal is announced and must be seeking to acquire 100% of the target’s equity.

Within this database, we identified transactions announced between January 1, 2005, and June 30, 2012, in which the merger agreement was publicly filed and had a transaction value of \$400 million or greater. To restrict the sample to negotiated strategic transactions, we then excluded transactions classified by MergerMetrics as (i) a (non-negotiated) tender



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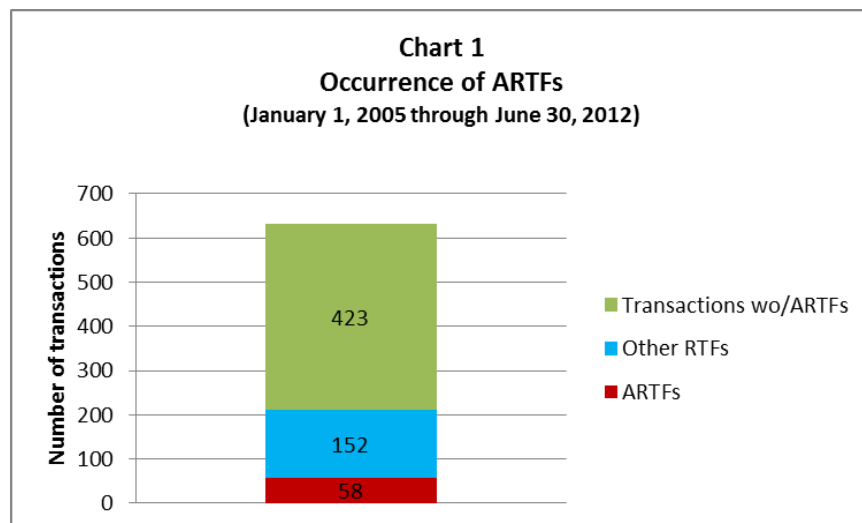
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offer;¹ (ii) a short-form merger; (iii) a management buyout; (iv) a leveraged buyout; (v) a going-private transaction;² (vi) a special purpose acquisition company acquirer; (vii) a financial buyer; or (viii) a club deal. Admittedly, this excludes some interesting cases, including the \$350 million antitrust reverse termination fee that NASDAQ OMX offered in its recent and ultimately unsuccessful contested hostile takeover bid for NYSE Euronext. But since we are interested here in antitrust reverse termination fees that sellers have found acceptable and NASDAQ's bid was never accepted by NYSE, we excluded the NASDAQ/NYSE bid.

Occurrence

Of the 633 transactions in our sample, 210 contained reverse termination fees of some sort. These reverse termination fees contained various antitrust and non-antitrust triggers, such as the buyer's incurable breach of a representation or covenant not related to antitrust clearance, the buyer's termination of the transaction in connection with a competing transaction for the buyer, or, perhaps most commonly, the buyer's failure to obtain the requisite financing for the transaction.

As Chart 1 shows, only 58 of these reverse termination fees, or 9.3% of the total transaction sample, were triggered solely by the failure to close due to antitrust interference. The



¹ We retained five negotiated tender offers in the sample.

² Although a form of going-private transaction, we retain in the sample a strategic acquisition by a private company of a public company, such as Intelsat/PanAmSat and Mars/Wrigley.



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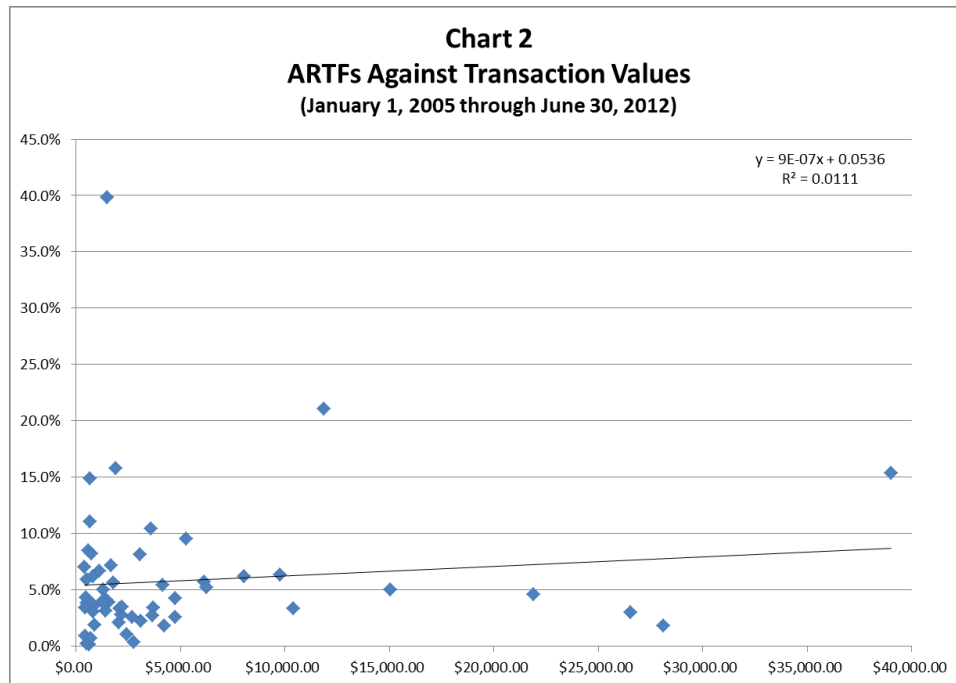
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accompanying data table gives the details for each of these transactions, including whether there was any intervention by the United States or European Union antitrust authorities. In the remaining 210 transactions that contained a reverse termination fee that could be triggered by a non-antitrust event, some could be triggered by an antitrust failure as well. While this would not be the case for a reverse termination fee triggered by the buyer's failure to obtain financing, for example, a reverse termination fee triggered by the buyer's failure to close for any reason would be payable if the antitrust condition failed. But since it is impossible in these cases to know the relative significance to the seller of the various events that could trigger payment, I have excluded transactions with multiple triggers from the remainder of the analysis.

ARTF amounts

In the 58 transactions with an antitrust reverse termination fee, the average fee was 5.8% of the transaction value, and ranged from a low of 0.1% to a high of 39.8%. As Charts 2 and 3 illustrate, the variance in the percentage fees is substantial.



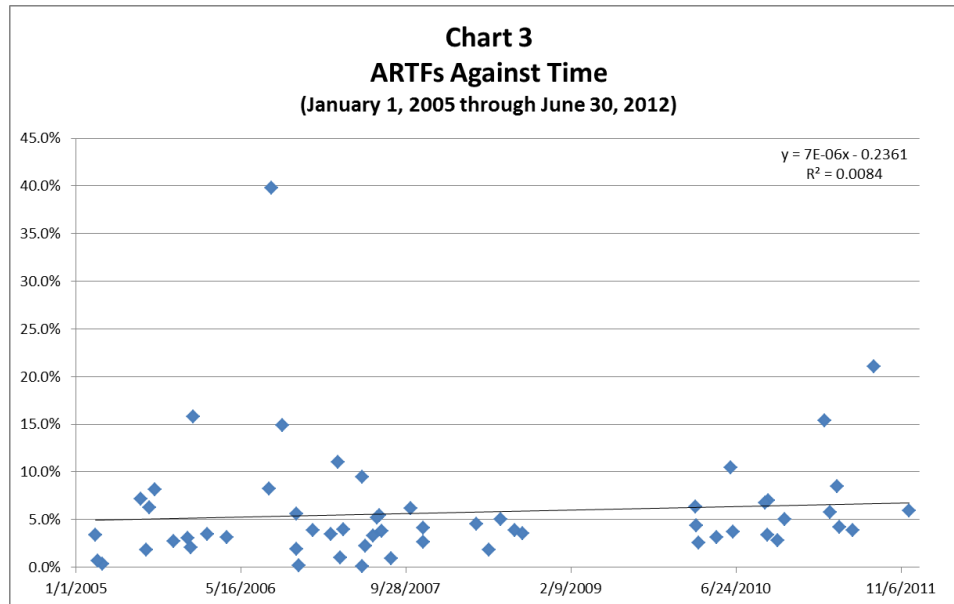


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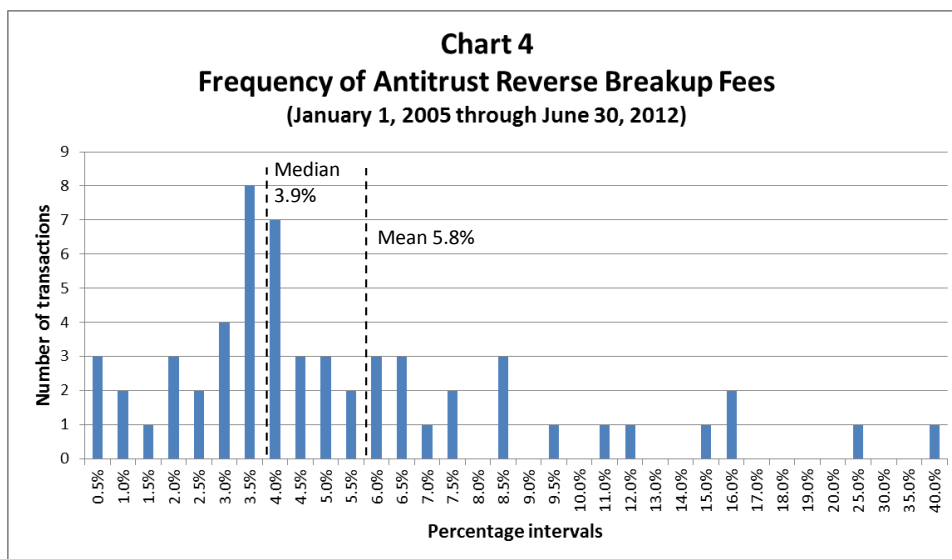
Charts 2 and 3 show that antitrust reverse termination fees as a percentage of the transaction value are very idiosyncratic. Neither the transaction value nor the date of announcement provides a very good predictor of the magnitude of the antitrust reverse termination fee. Although the trend lines in Charts 2 and 3 are both rising slightly, neither trend is statistically distinguishable from zero. As a result, knowing the transaction size or the announcement date will not be helpful in predicting the deviation of the percentage antitrust reverse termination fee from the mean of 5.8%. In neither case does the independent variable (transaction value or time) explain even one percent of the variation in the reverse termination fee.³

Given the wide idiosyncratic variation in antitrust reverse termination fees, it may be more informative to examine the frequency with which percentage antitrust reverse termination fees in the sample occur within various percentage ranges as well as the spread of these fees

³ A multiple regression on both transaction value and time, not surprisingly, adds little. While the trends in both variables remain slightly positive, the coefficients remain statistically indistinguishable from zero and the regression explains less than 2% of the variation in the percentage reverse breakup fee.



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NB: In reading Chart 4, the bar at 8.5%, for example, indicates that there were three transactions in the sample where the percentage antitrust reverse breakup fee was greater than 8.0% and less than or equal to 8.5%. *Note that the percentage intervals on the horizontal axis are not of equal size.*

within each year. Chart 4 illustrates the frequency of antitrust reverse termination fees as a percentage of the transaction value.

Chart 4 shows a high concentration of antitrust reverse termination fees in the 3.0–4.0% range, suggesting that the sample mean of 5.8% is being pulled higher than the typical fee as a result of some unusually high percentage fees. Indeed, the median of the sample (the level at which there are the same number of lower percentage fees as higher percentage fees in the sample) is only 3.9%.

Chart 5 provides a scatter plot of the distribution of percentage antitrust reverse termination fees by year. Again, although the trend line has a slight positive slope, it is not statistically distinguishable from zero.



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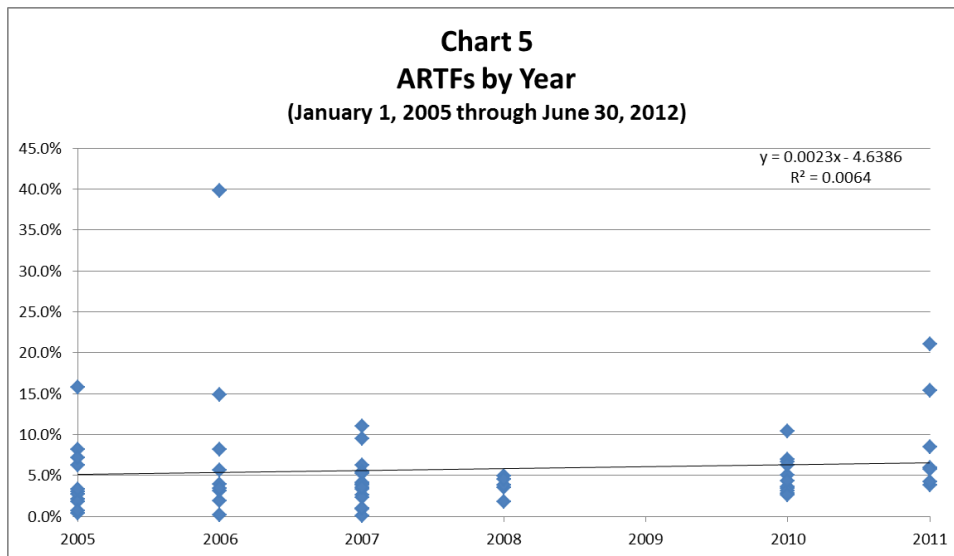
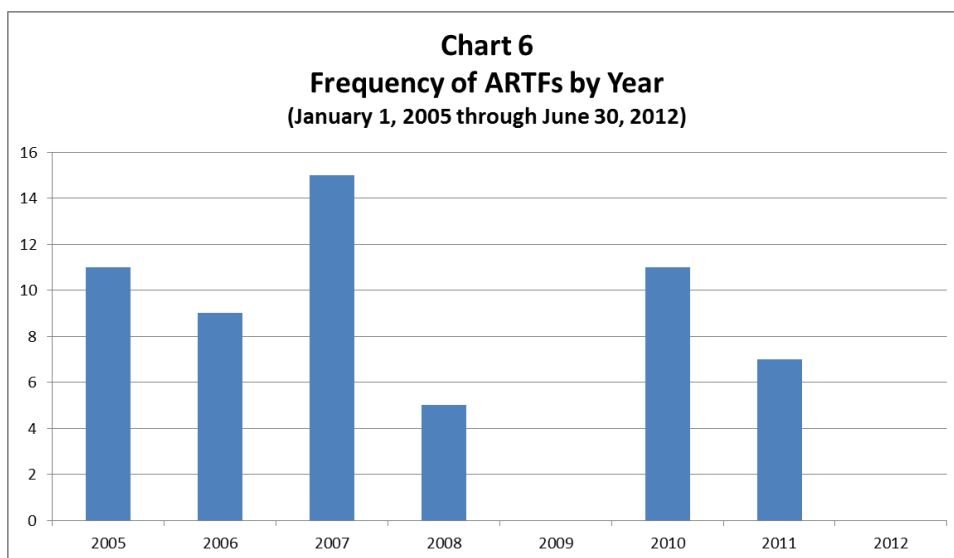


Chart 6, which gives the frequency with which reverse antitrust termination fees occurred by year, gives a slightly different perspective. (Remember that 2012 is only for half a year.)





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Possible reasons for the wide variance of ARTFs

There are undoubtedly a variety of factors that contribute to the wide scatter of antitrust reverse termination fees. Here are five factors that immediately come to mind:

1. Perhaps the most important factor is the perceived magnitude of the antitrust risk in the transaction. A quick look at the data table shows that only 16 of the 58 transactions with antitrust reverse termination fees (or a little less than 28% of the deals) resulted in consent settlements or were abandoned for antitrust reasons. This suggests that there are antitrust reverse termination fees in a substantial number of transactions that probably do not present significant antitrust risk. When a transaction does not present meaningful antitrust risk, the precise magnitude of the antitrust reverse termination fee—at least within the range of common ARTFs—may not be a matter of great concern to the parties and hence may vary from deal to deal without much reason.
2. The magnitude of a negotiated antitrust reverse termination fee depends greatly on the relative bargaining strengths of the contracting parties and the competitive dynamic of the sale process. For example, all other things being equal, an antitrust reverse termination fee is likely to be higher in an auction process where the winning strategic bidder perceives that it is competing with other bidders with little or no antitrust risk than it would be if there were no other competing bidders.
3. Some contracts have affirmative obligations in the contract requiring the buyer to accept a curative divestiture or other remedy necessary to obtain antitrust clearance in addition to an antitrust reverse termination fee provision, while other contracts depend solely on the reverse termination fee to incentivize the buyer to accept a consent decree. All other things being equal, it is reasonable to expect that an antitrust reverse termination fee would be higher where the only antitrust risk allocation provision is the termination fee (or if the payment of the termination fee is the only remedy the seller may obtain if the transaction does not close because of antitrust reasons) than the fee would be if there is an unqualified “hell or high water” obligation or other strong provisions requiring affirmative action on the part of the buyer to ensure that the transaction closes.⁴

⁴ For a purchase agreement with an unqualified “hell or high water” obligation, see [Agreement and Plan Of Merger Among Buccaneer Holdings, Inc., Buccaneer Merger Sub, Inc., and Syniverse Holdings, Inc.](#) (Oct. 28, 2010). For purchase agreements with qualified “hell or high water” provisions, see, for example, [Agreement and Plan of Merger Among Synopsys, Inc., Lotus Acquisition Corp., and Magma Design Automation, Inc.](#) ¶ 5.6(d) (Nov. 30, 2011) (capping divestiture and license obligations to assets that



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4. Contracts also vary as to the length of time to the drop-dead date when the seller can unilaterally terminate the purchase agreement, with a longer period of time providing the buyer with more opportunity should an antitrust concern arise to convince the investigating agency that there is no problem, negotiate a favorable consent settlement, or force the government into litigation. An instructive example is [Google's Agreement and Plan of Merger with Motorola Mobility](#) (August 15, 2011), which provided for an antitrust reverse termination fee of \$2.5 billion, or 21.0% of the transaction value of \$11.9 billion, if the deal terminated due to a failure of the antitrust conditions. The agreement provided for a fairly typical one-year drop-dead of August 15, 2012. However, if the antitrust conditions had not been satisfied, Google had the option of extending the drop-dead date up to three times for two months each time, providing Google with a period of 18 months to close the deal by either continuing the government antitrust review or defending the transaction in litigation, as the case may be.
5. Our sample addresses only the base number. Some contracts vary the magnitude of the antitrust reverse termination fee depending on the circumstances. Many if not most contracts that have a variable fee make the amount of the fee a function of the length of time from the signing to the closing. For example, in [Green Mountain Coffee Roasters' Agreement and Plan of Merger with Diedrich Coffee](#) (December 8, 2009), Green Mountain agreed to pay a base antitrust reverse termination fee of \$8.517 million in a transaction valued at \$290 million (below our sample threshold of \$400 million) with an additional \$1 million for each 60-day period after February 15, 2010, through June 15, 2010, in which the antitrust conditions had not been satisfied before termination.⁵

Finally, there is an important asymmetry between standard termination fees payable by the seller to the buyer and reverse termination fees. Courts have been wary of standard termination fees because, although they can serve a legitimate need, they can also raise the price of a topping bid by another potential acquirer. Delaware courts, in particular, have

produced less than \$5 million in revenue in a specified 12-month period); [Stock Purchase Agreement By And Among Kinray, Inc., Stewart J. Rahr Revocable Trust and Cardinal Health, Inc.](#) ¶ 6.4(a) (November 17, 2010) (capping divestiture obligations to obligations that would have no more than \$75 million impact in revenues measured using fiscal year 2009 operations); [Agreement and Plan of Merger Among Hypercom Corporation, Verifone Systems, Inc. and Honey Acquisition Co.](#) ¶ 6.5(e) (November 17, 2010) (capping divestiture obligations to assets that produced less than \$124 million in revenue in fiscal year 2009).

⁵ The \$8.517 million base antitrust reverse termination fee was equal to the standard termination fee payable by Diedrich Coffee to Peet's Coffee & Tea when Diedrich accepted Green Mountain's topping bid and terminated its previously announced merger agreement with Peet's.



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typically limited standard termination fees to 3.0–4.0% of the transaction value on the grounds that higher percentage fees may deter rival superior bids and thereby violate the seller's *Revlon* duties.⁶ Reverse termination fees in general, and antitrust reverse termination fees in particular, are payable by the buyer to the seller and hence do not have the potential of raising obstacles to superior competing bids. No court to date has put a limitation on the magnitude of an antitrust reverse termination fee, and antitrust reverse termination fees often exceed the levels typically seen for standard termination fees. Indeed, in our sample of 58 transactions with antitrust reverse termination fees, 35, or 60.3% of the sample, exceeded 3.5% of the transaction value, while 13, or 22.4%, exceeded 7%.

On the other hand, the presence or absence of an antitrust reverse termination fee can be very significant in M&A transactions. In contested takeover bids, for example, when there is significant risk that a bid will not close due to a failure to satisfy the antitrust conditions, the absence of a meaningful antitrust reverse termination fee may be grounds for rejecting an otherwise superior bid.⁷

Some outliers

The full universe of 58 transactions contains four interesting outliers:

Monsanto/Delta & Pine Land (August 15, 2006): The antitrust reverse termination fee in this transaction was \$600 million, or 39.8% of the transaction value of \$1.507 billion. This is more than twice the percentage antitrust reverse termination fee in Seagate/Maxtor, which at 15.8% (\$300 million on a \$1.9 billion transaction) was the next highest percentage fee in the sample. The high percentage fee in Monsanto/D&PL was probably due to the fact that Monsanto had attempted to acquire D&PL in 1999. The prior deal failed on antitrust grounds, resulting in the payment by Monsanto to D&PL of an antitrust reverse termination fee of \$81 million.

⁶ See *La. Mun. Police Employees' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1181 n.10 (Del. Ch. 2007) (citing cases). See generally *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that when the sale of a company is inevitable, the board of directors must act so as to obtain the best value reasonably available to the company's shareholders).

⁷ See, e.g., *In re Dollar Thrifty Shareholder Litig.*, 14 A.3d 573 (Del. Ch. 2010) (denying a preliminary injunction in a shareholder litigation to block Dollar Thrifty's merger with Hertz in the face of a substantially higher financial offer from Avis, where the Hertz agreement contained a significant antitrust termination fee as well as affirmative covenants requiring Hertz to agree to curative divestitures if required to obtain antitrust clearance while the Avis bid lacked these elements).



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Northrop Grumman/Essex (November 8, 2006): The antitrust reverse termination fee in this transaction provided for the reimbursement of Essex's transaction costs subject to a cap of \$1 million, or about 0.2% of the transaction value of \$521 million.

CapitalSource/TierOne (May 17, 2007): The antitrust reverse termination fee in this transaction provided for the reimbursement of TierOne's transaction costs subject to a cap of \$700,000, or about 0.1% of the transaction value of \$618.88 million.

AT&T/T-Mobile (March 20, 2011): The cash component of the antitrust reverse termination fee in this transaction was \$3 billion, or 7.7% of the transaction value of \$39 billion. In addition, AT&T agreed that, in the event the deal failed to receive regulatory approval, AT&T would enter into a roaming agreement with Deutsche Telekom (the owner of T-Mobile) and transfer to Deutsche Telekom certain wireless AWS spectrum rights at favorable (presumably non-market) terms. The press has reported that these additional rights would be valued to Deutsche Telekom at \$1 billion and \$2 billion, respectively. In its Form 8-K reporting on the termination of the deal, AT&T valued the breakup fee, including the below-market terms of the agreements, at \$4.2 billion, which amounts to 10.8% of the transaction's value.

Removing these four outliers from the sample set does not change things too significantly, although the average percent antitrust reverse termination fee declines from 5.8% to 5.2% (largely as a result of removing the Monsanto/D&PL fee of 39.8%). The median fee remains the same at 3.9%. The single and multiple regression coefficients on transaction value and year continue to be statistically indistinguishable from zero, indicating that there is no systematic trend in the data as a function of either of these variables.

Payment of antitrust reverse termination fees

Interestingly, AT&T/T-Mobile was the only one of the 58 transactions with antitrust reverse termination fees since January 1, 2005, in which the purchaser actually paid the fee. Forty-two of these transactions, or 72.4%, received unconditional antitrust clearance. Of the remaining 16 transactions where there was an antitrust intervention, one (AT&T/T-Mobile) terminated in the course of litigation with the Antitrust Division, 13 were subject to only a DOJ or FTC consent order, one (Boston Scientific/Guidant) was subject to both an FTC consent order and EC undertakings, and one (Federated/May) was subject to an assurance agreement with a group of state attorneys general.

Outside the sample, there are several transactions in which buyers have paid antitrust reverse termination fees upon failure to achieve antitrust clearance. Two are of special interest.



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Perhaps the most well-known is Echostar/DirecTV (October 28, 2001), where Echostar agreed to pay Hughes Electronics, the owner of DirecTV, a \$600 million fee—3.3% of a transaction valued at \$18 billion—in the event that the transaction failed to close due to antitrust interference. On October 31, 2002, the Antitrust Division and a number of states filed a complaint to block the transaction. Shortly thereafter, the parties terminated their merger agreement and Echostar paid Hughes the \$600 million antitrust reverse termination fee.

An antitrust reverse termination fee also was paid by Monsanto to Delta & Pine Land in 1999. On May 8, 1998, Monsanto and D&PL entered into a merger agreement, which contained a drop-dead date of December 31, 1999, and an obligation to use “commercially reasonable efforts” to obtain consents and clearances. As the December 31 drop-dead date approached, Monsanto announced that it was unable to reach an understanding with the Antitrust Division on a restructuring that was both commercially reasonable and satisfied the Division’s concerns, and so terminated the deal and withdrew its request for antitrust approval. Thereafter, D&PL demanded that Monsanto pay it an \$81 million termination fee: \$80 million for failure to satisfy the governmental approval closing condition and \$1 million for D&PL’s expenses as provided by the merger agreement. Monsanto initially resisted paying the termination fee, but following D&PL’s filing of a complaint in Mississippi state court seeking payment of the fee and additional damages for breach of the commercially reasonable efforts clause, the parties eventually settled and Monsanto paid the \$81 million fee. Notably, eight years later, when this deal was revived, Monsanto agreed to a antitrust reverse termination fee of \$600 million, or 39.8% of the transaction value of \$1.5 billion. The 2008 deal closed with a consent decree with the Antitrust Division.

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