

## ADR AND CAPITOL ONE'S ACQUISITION OF DISCOVERY

*Yakov Schwalb*

On February 19<sup>th</sup> Capitol One announced that it was buying Discover for \$35.3 billion.<sup>1</sup> If approved, this acquisition would make Capitol One the United States' sixth largest bank and its third largest credit-card issuer.<sup>2</sup> However, many have voiced concerns with this deal. Senators from both sides of the aisle have called on the Federal Trade Commission ("FTC") to block this transaction as a violation of antitrust law.<sup>3</sup> Senator Hawley from Missouri said that "[i]f consummated, this merger will create a new juggernaut in the credit card market, with unprecedented powers to extort American consumers,"<sup>4</sup> while Senator Elizabeth Warren of Massachusetts wrote in a letter to the Federal Reserve that "[t]his merger is bad for consumers."<sup>5</sup>

Congress enacted the Sherman Antitrust Act in 1890 due to public hostility towards large corporations such as Standard Oil and the American Railway Union.<sup>6</sup> The Act outlawed any "restraint of trade or commerce among the several states."<sup>7</sup> However, the language of the

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<sup>1</sup> Elisabeth Buchwald, *Capitol One is buying Discover for \$35 billion in biggest deal so far this year*, CNN (Feb. 20, 2024, 12:19 PM), <https://www.cnn.com/2024/02/19/business/capital-one-buying-discover/index.html> [https://perma.cc/F8WS-CJYU].

<sup>2</sup> James Surowiecki, *Regulators keep blocking mergers, but here's why Capitol One and Discover could get a pass*, FAST CO. (Feb. 22, 2024), <https://www.fastcompany.com/91033033/why-capital-one-discover-merger-regulator-ftc-approval> [https://perma.cc/92S2-VJ2B].

<sup>3</sup> Breck Dumas, *Capital One's purchase of Discover faces political and regulatory hurdles*, FOX BUS. (Feb. 23, 2024, 7:00 AM), <https://www.foxbusiness.com/markets/capital-ones-purchase-discover-faces-political-regulatory-hurdles> [https://perma.cc/BK2R-YY54].

<sup>4</sup> *Hawley Calls on DOJ to Block Capital One-Discover Merger*, HAWLEY SENATE (Feb. 22, 2024), <https://www.hawley.senate.gov/hawley-calls-doj-block-capital-one-discover-merger> [https://perma.cc/NL54-B9CY].

<sup>5</sup> *Warren, 12 Lawmakers Call on Regulators to Block Capital One-Discover Merger*, WARREN SENATE (Feb. 26, 2024), <https://www.warren.senate.gov/newsroom/press-releases/warren-12-lawmakers-call-on-regulators-to-block-capital-one-discover-merger#:~:text=February%2026%2C%202024-,Warren%2C%2012%20Lawmakers%20Call%20on%20Regulators,Block%20Capital%20One%2DDiscover%20Merger&text=%E2%80%9CThis%20merger%20is%20bad%20for,risk%20in%20the%20financial%20system.%E2%80%9D> [https://perma.cc/P7FG-NRLR].

<sup>6</sup> Will Kenton, *Sherman Antitrust Act: Definition, History, and What It Does*, INVESTOPEDIA (June 29, 2022), <https://www.investopedia.com/terms/s/sherman-antitrust-act.asp> [https://perma.cc/GT5J-74AQ].

<sup>7</sup> Troy Segal, *Clayton Antitrust Act of 1914: History, Amendments, Significance*, INVESTOPEDIA (Apr. 18, 2023), <https://www.investopedia.com/terms/c/clayton-antitrust-act.asp#:~:text=The%20Clayton%20Act%2C%20in%20conjunction,greater%20innovation%2C%20and%20wider%20choice> [https://perma.cc/XC8B-4HC3].

Sherman Antitrust Act proved to be too vague and as a result Congress enacted the Clayton Act in 1914.<sup>8</sup> The Clayton Act has twenty-seven sections and section 7 prohibits the acquiring of assets that would “substantially lessen competition, or tend to create a monopoly.”<sup>9</sup> Violations of the Clayton Act can be enforced by either the Department of Justice’s Antitrust Division or the FTC.

In the past several years, the US government has prevented several large mergers from occurring. One example is the proposed acquisition of Albertson supermarkets by Kroger.<sup>10</sup> Kroger, the nation’s second-largest grocery chain, in an effort to become a greater competitor of Walmart, sought to buy Albertson, the nation’s fourth-largest grocery chain.<sup>11</sup> In an effort to improve the chances of the merger occurring both chains sold hundreds of stores.<sup>12</sup> Nevertheless, the FTC still sued to block this merger from occurring.<sup>13</sup> A second merger that was blocked was JetBlue’s takeover of Spirit Airlines.<sup>14</sup> The US government was concerned that the deal was detrimental for consumers and sued to block the merger.<sup>15</sup> The government ultimately succeeded in January 2024, when a District Court judge ruled that JetBlue’s

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<sup>8</sup> *Id.*

<sup>9</sup> 15 U.S.C. § 18.

<sup>10</sup> Melissa Repko, *FTC sues to block Kroger, Albertsons merger, arguing deal would raise grocery prices and hurt workers*, CNBC (Feb. 26, 2024), <https://www.cnbc.com/2024/02/26/ftc-sues-to-block-kroger-albertsons-grocery-store-merger.html> [https://perma.cc/ZDW6-7HES].

<sup>11</sup> Melissa Repko, *Kroger agrees to buy rival grocery company Albertsons for \$24.6 billion*, CNBC (Oct. 14, 2022, 3:57 PM), <https://www.cnbc.com/2022/10/14/kroger-agrees-to-buy-albertsons-for-24point6-billion.html> [https://perma.cc/7NAW-BWBM].

<sup>12</sup> Michelle Chapman, *Kroger and Albertsons sell hundreds of stores in a bid to clear merger of the 2 largest US groceries*, AP NEWS (Sep. 8, 2023, 11:03 AM), <https://apnews.com/article/kroger-albertsons-merger-cs-wholesale-grocer-401520f2a25ea2ae5fd06be4973b7c48> [https://perma.cc/S72M-TPXS].

<sup>13</sup> Repko, *supra* note 10.

<sup>14</sup> Rajesh Kumar Singh & Abhijith Ganapavaram, *JetBlue wins Spirit takeover battle with \$3.8 billion deal*, REUTERS (July 28, 2022, 3:40 PM), <https://www.reuters.com/business/aerospace-defense/spirit-airlines-agrees-be-bought-by-jetblue-38-billion-deal-2022-07-28/> [https://perma.cc/N94E-WLQL].

<sup>15</sup> Nate Raymond, *US seeks to block JetBlue's Spirit Airlines deal at trial*, REUTERS (Oct. 31, 2023, 3:55 PM), <https://www.reuters.com/markets/deals/us-seeks-block-jetblue-spirit-airlines-merger-trial-2023-10-31/> [https://perma.cc/YF2Z-QHS5].

acquisition of Spirit would reduce competition and raise prices<sup>16</sup> and on March 4<sup>th</sup> the merger was canceled.<sup>17</sup>

The use of Alternative Dispute Resolution (“ADR”) methods such as negotiation, mediation, and binding arbitration has been prevalent for many years in mergers and acquisitions.<sup>18</sup> Pfizer’s acquisition of Wyeth is an example of the effective use of negotiation in a merger.<sup>19</sup> Pfizer negotiated the sales price and how much of the sale would be in cash as opposed to stocks assuaging concerns on both sides.<sup>20</sup> Mediation can be helpful in these scenarios because it is cost efficient, confidential, and flexible.<sup>21</sup> The mediator does not determine right or wrong, rather they are interested in finding a solution that can resolve the sticking points between the two parties.<sup>22</sup>

Negotiation and Mediation are ADR methods that could be utilized by Capitol One and Discover as a means to propel their merger forward. Similar to how Kroger sold stores to boost the chances that the merger would succeed, Capitol One and Discover could negotiate and plan a scheme to similarly dilute their market share. This could be accomplished by Capitol One divesting or selling bank branches in certain local markets.<sup>23</sup> The two companies could also

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<sup>16</sup> Justice Department Statements on District Court Decision to Block JetBlue’s Acquisition of Spirit Airlines, DEP’T JUST. (Jan. 16, 2024), <https://www.justice.gov/opa/pr/justice-department-statements-district-court-decision-block-jetblues-acquisition-spirit> [https://perma.cc/D57V-665X].

<sup>17</sup> Alison Sider, *JetBlue and Spirit Airlines Call Off Merger Deal*, WALL ST. J. (Mar. 4, 2024, 5:26 PM), <https://www.wsj.com/business/airlines/jetblue-airways-scraps-3-8-billion-takeover-of-spirit-airlines-el014b0> [https://perma.cc/XPJ3-86DH].

<sup>18</sup> Daniel Avery, *2020 Trends in Private Target M&A: Alternative Dispute Resolution Provisions*, BLOOMBERG L. (Jan. 2021), <https://www.bloomberglaw.com/external/document/X9JIUEB0000000/m-a-professional-perspective-2020-trends-in-private-target-m-a-a> [https://perma.cc/56QX-T5XS].

<sup>19</sup> Aaron Ross Sorkin, *Pfizer Said to Be Closing in on Deal for Wyeth*, N.Y. TIMES (Jan. 23, 2009), <https://www.nytimes.com/2009/01/24/business/24drug.html> [https://perma.cc/E8MC-ZBS2].

<sup>20</sup> *Id.*

<sup>21</sup> Hoang Nguyen Ha Quyen, *Mediation in Mergers and Acquisitions (M&A)*, LNT & PARTNERS (Jan. 17, 2024), <https://www.lntpartners.com/legal-briefing/hoa-giai-thuong-mai-trong-hoat-dong-mua-ban-sap-nhap-m-a---mot-giai-phap-giai-quyet-tranh-chap-ven-toan> [https://perma.cc/96NU-ZZE7].

<sup>22</sup> *Id.*

<sup>23</sup> Robert L. Webb, *Divestiture: A Prescription for Healthy Competition*, FED. RSVRV. BANK ST. LOUIS (Jan. 1, 2001),

negotiate amongst themselves or go to mediation to plan what their strategy should be if the FTC sues to block the deal. These methods represent a few ways in which Capitol One and Discover could utilize ADR methods to achieve their merger.

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<https://www.stlouisfed.org/publications/regional-economist/january-2001/divestiture-a-prescription-for-healthy-competition> [<https://perma.cc/Z7TT-RY3G>].