The Future of Airline Mergers after the US Airways and American Airlines Merger

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ON AUGUST 13, 2013, the Antitrust Division of the U.S. Department of Justice (DOJ) filed a complaint in the District of Columbia district court alleging that the proposed merger of American Airlines’ parent company, AMR Corporation, and US Airways Group violated the Clayton Act’s prohibition of activity that “would substantially lessen competition.” This action surprised executives of the firms and garnered mixed reactions from DOJ alumni.

After three months of litigation, the parties reached a proposed settlement just a few days before the scheduled trial date. The terms of the settlement required the merged entity to divest certain assets that, in the opinion of the DOJ, would increase airline competition by strengthening the ability of low-cost carrier airlines to compete with the larger and more dominant legacy airlines. This settlement is significant not only because it paved the way for the world’s largest airline but also because it affects the future of antitrust law and the airline industry.

This comment argues that the DOJ settlement allowing the merger of US Airways and American Airlines failed to adequately protect present and future competition in the industry and continued the trend of concentration through consolidation.

3 Tiffany Friesen Milone, Experts Ponder Politics of DOJ Settlement in US Airways/American Airlines Merger, 105 Antitrust & Trade Reg. Rep. (BNA) No. 815 (Nov. 25, 2013) (noting that one former assistant attorney general considered the action to be “a welcome break,” but another alumnus and former litigator believed the complaint “missed entirely the competitive nature of the passenger airline industry”).
4 See infra text accompanying note 139.
5 Id.
tion to a dangerous extent, such that it impacts not only the future of airline mergers but also that of antitrust enforcement more generally.

Using both price and quality factors, such as service reliability and satisfaction, as barometers in the analysis, this comment will demonstrate that the settlement falls short of satisfying the goals of antitrust law. Although empirical studies and economic theories supporting the DOJ's decision will be considered, this comment will argue that the anticompetitive consequences of the settlement overwhelm any theoretical positive effects from consolidation. Finally, the analysis will suggest more appropriate action with respect to future airline consolidation and similar activity in other industries.

In support of this argument, Part II will provide the background of antitrust law and merger enforcement by describing the historical development of the governing legal rules and the shift from judicial review to agency oversight of merger law. Part III will thoroughly discuss the antitrust claims and the settlement terms of the US Airways and American Airlines merger, and Part IV will analyze the deal and its impact on the future of antitrust law by critiquing the theories in its support and opposition and by providing suggestions for remedial action.

II. ANTITRUST LAW BACKGROUND

United States antitrust laws exist to protect consumers who are harmed by the absence of competition in the market.7 While the Sherman Act prohibits restraints on competition and monopolistic behavior,8 Section 7 of the Clayton Act prohibits acquisitions when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."9 The legislative history of the Clayton Act reveals the intent to protect "competition, not competitors, and [Congress's] desire to restrain mergers only to the extent that such

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7 See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). But see ABA Section of Antitrust Law, Monograph No. 12, Horizontal Mergers: Law and Policy 5-7 (1986) [hereinafter Monograph No. 12] (explaining the tension between those who believe that increasing consumer welfare through maximizing economic efficiency is the sole objective of antitrust law and those who believe that antitrust laws are based on multiple underlying goals, including social and political values).
9 Id. § 18.
combinations may tend to lessen competition."10 Thus, the anti-trust laws do not exist "to thwart business efficiencies that may be achieved through the combination of two firms' resources."11 Instead, the Clayton Act intends to "cope with monopolistic tendencies in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding"12 by allowing the enforcement agencies, the Antitrust Division of the DOJ and the Federal Trade Commission (FTC), to examine merger activity that may "create, enhance, or facilitate the exercise of market power."13

A. HISTORICAL MERGER ENFORCEMENT

Because the text of the Clayton Act does not explicitly delineate what activity is prohibited,14 insight into the historical development of merger enforcement is useful in determining the current state of the law.15 The legal rules governing merger enforcement are characterized by continual development and evolution, as "there is a necessary tension between the need for certainty on the one hand and the need to consider the peculiar facts of each case on the other."16

10 Brown Shoe Co., 370 U.S. at 320. But see id. at 344 ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.").


13 Mergers and Acquisitions, supra note 11; see also United States v. Columbia Steel Co., 334 U.S. 495, 535-36 (1948) (Douglas, J., dissenting) ("The Curse of Bigness shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing and putative competitors. It can be a social menace—because of its control of prices.").

14 See 15 U.S.C. § 18 (prohibiting acquisitions when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly").

15 See Monograph No. 12, supra note 7, at 28.

16 Id.
The Supreme Court's analysis in *Brown Shoe* in 1962\(^{17}\) established the pattern used in merger enforcement today.\(^{18}\) There, the Court (1) defined the relevant product and geographic markets,\(^{19}\) (2) analyzed the probable effects of the merger by examining the market shares of the firms,\(^{20}\) the current concentration of the industry, the trend toward continued consolidation in the industry,\(^{21}\) and the statements and behavior of the individual firms;\(^{22}\) and (3) found a lack of mitigating factors that would provide procompetitive benefits from the merger.\(^{23}\)

The Court, however, subsequently held that this step-by-step analysis was not necessary in cases in which the merger-created entity "control[s] an undue percentage share of the relevant market, and [the merger] results in a significant increase in the concentration of firms in that market."\(^{24}\) Thus, a merger that involves levels of market share and market concentration high enough to "raise an inference" of illegality is presumed to be anticompetitive, and the merging firms must "rebut the inherently anticompetitive tendency manifested by these percentages."\(^{25}\)

Historically, judicial interpretations and applications of Section 7 provided the basis for the development of the rules governing this area of antitrust enforcement.\(^{26}\) Though courts considered developments and proposals by economic scholars and reports by the Office of the Attorney General,\(^{27}\) the pre-merger notification requirement of the Hart-Scott-Rodino Anti-

\(^{17}\) See generally *Brown Shoe Co.*, 370 U.S. 294.

\(^{18}\) See generally infra Part II.B.

\(^{19}\) *Brown Shoe Co.*, 370 U.S. at 325–28, 336.

\(^{20}\) Id. at 329–31, 343–44.

\(^{21}\) Id. at 331–32, 345.

\(^{22}\) Id. at 332.

\(^{23}\) Id. at 345–46 (holding that the merger must be enjoined since the entity would control 7.2% of retail shoe stores and 2.3% of retail shoe outlets).

\(^{24}\) United States v. Phila. Nat'l Bank, 374 U.S. 321, 363 (1963) ("[T]he intense congressional concern with the trend toward concentration warrants dispensing... with elaborate proof... ").

\(^{25}\) Id. at 366.


\(^{27}\) See MONOGRAPH No. 12, supra note 7, at 28–62.
trust Improvements Act\textsuperscript{28} shifted most of the authority to the enforcement agencies.\textsuperscript{29}

The Hart-Scott-Rodino Act was not the only development that facilitated this increase in governmental regulation rather than judicial power;\textsuperscript{30} the drafting of the Merger Guidelines also assisted in the transition to agency law.\textsuperscript{31} Understanding the difficulty associated with the economic and “multi-valued” nature of the developing legal rules,\textsuperscript{32} the Antitrust Division of the DOJ published Merger Guidelines in 1968 “to acquaint the business community, the legal profession, and other interested groups and individuals with the standards currently being applied.”\textsuperscript{33}

As the rules governing merger enforcement have continued to evolve, the Merger Guidelines have undergone revisions,\textsuperscript{34} and both federal enforcement agencies, the DOJ and the FTC, released the most recent version in 2010.\textsuperscript{35} Although the Merger Guidelines are not mandatory legal authority,\textsuperscript{36} they provide

\begin{itemize}
\item \textsuperscript{28} Pub. L. No. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. § 18a (2012)). This Act established that proposed mergers that exceed a certain size cannot be legally consummated until expiration of the thirty-day waiting period after making the pre-merger filings or waiver by the reviewing agency. See id.; see also Rogers, supra note 26, at 21.\textsuperscript{29}

\item Rogers, supra note 26, at 25 (“Pre-merger notification has, unexpectedly, shifted U.S. merger policy away from the courts and into the hands of the enforcement agencies.”); see also Ashutosh Bhagwat, Modes of Regulatory Enforcement and the Problem of Administrative Discretion, 50 Hastings L.J. 1275, 1275 (1999) (“[T]he procedural changes enacted by the HSR have resulted in an enormous shifting in discretionary and lawmaking power from the courts to the regulatory agencies who implement the HSR preclearance regime.”).\textsuperscript{30}

\item Rogers, supra note 26, at 27 (“The relative secrecy of the merger review process also reduces the transparency hoped for from the pre-merger notification requirement and enhances the agencies’ effective control over merger policy.”).\textsuperscript{31}

\item See id. at 24.\textsuperscript{32}

\item MONOGRAPH No. 12, supra note 7, at 38.\textsuperscript{33}


\item See Christine A. Varney, Comment, The 2010 Horizontal Merger Guidelines: Evolution, Not Revolution, 77 Antitrust L.J. 651, 659 (2011) (“The 2010 Guidelines reflect actual practice and incorporate the accumulated experience of the eighteen years since the last significant Guidelines update.”).\textsuperscript{35}

\item U.S. Dep’t of Justice, Horizontal Merger Guidelines 1 (Aug. 19, 2010) [hereinafter Horizontal Merger Guidelines], available at http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,100 (“These Guidelines describe the principal analytical techniques and the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition.”).\textsuperscript{36}

\item See, e.g., FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1046 (5th Cir. 2008). But see infra note 40.
\end{itemize}
guidance both to "the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions [and to] the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context." 37

Furthermore, the enforcement agencies admit that "the courts have occasionally influenced how the [DOJ and the FTC] have revised the Guidelines." 38 This statement and the difference between the stated purpose of the 1968 Guidelines and that of the 2010 Guidelines 39 reveal the reversal in authority over merger enforcement. 40

B. MERGER GUIDELINES

Because of this shift in merger jurisprudence and the importance of the Merger Guidelines in understanding the enforcement agencies' antitrust analysis, a brief review of the most recent Guidelines is helpful. The enforcement agencies examine "any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition." 41 First, actual evidence of anticompetitive effects attributable to the merger may be dispositive in proving an antitrust violation. 42 However, it is unlikely that this actual evidence is already present, given the prospective nature of the proposed transaction, so the enforcement agencies typically

37 Horizontal Merger Guidelines, supra note 35. The influence of the Merger Guidelines is particularly apparent in examples such as the decision of 3M Company not to pursue its proposed partial acquisition of Avery Dennison Corporation after the DOJ merely informed the firms that it would file a civil antitrust lawsuit. See Press Release, U.S. Dep't of Justice, 3M Company Abandons Its Proposed Acquisition of Avery Dennison's Office and Consumer Products Group After Justice Department Threatens Lawsuit 1 (Sept. 4, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/286647.pdf.


39 Compare supra text accompanying note 33 with supra text accompanying note 37.


41 Horizontal Merger Guidelines, supra note 35, at 2.

42 Id. at 3.
make comparisons based on historical experience, examine market concentration, and calculate subsequent effects from its increase to determine whether a Clayton Act violation exists.\textsuperscript{43} Even though the Merger Guidelines "were never intended to detail how the Agencies would assess every set of circumstances that a proposed merger may present,"\textsuperscript{44} a thorough understanding of them provides great insight into the federal enforcement of Section 7.

1. Market Definition

In order to properly analyze market concentration and potential anticompetitive effects of the merger on the market, the enforcement agencies must define the relevant product and geographic market;\textsuperscript{45} thus, the Merger Guidelines detail various methods for that determination.\textsuperscript{46} Although market definition is discussed before the market-concentration calculation and competitive-effects analysis, the enforcement agencies specifically state that the antitrust "analysis need not start with market definition,"\textsuperscript{47} particularly because market definition and competitive effects may have a circular relationship.\textsuperscript{48} The enforcement agencies have specified, however, that adding this statement about the order of the analysis to the most recent Guidelines does not minimize the necessity and importance of defining relevant markets.\textsuperscript{49} In fact, the DOJ acknowledged that market def-

\textsuperscript{43} Id. ("The Agencies look for historical events, or 'natural experiments,' that are informative regarding the competitive effects of the merger. For example, the Agencies may examine the impact of recent mergers, entry, expansion, or exit in the relevant market.").


\textsuperscript{45} Horizontal Merger Guidelines, supra note 35, at 7 ("The measurement of market shares and market concentration is not an end in itself, but is useful to the extent it illuminates the merger's likely competitive effects.").

\textsuperscript{46} See id. at 8–12 (discussing the product market definition through the use of the hypothetical monopolist test, benchmark prices, and SSNIP size); see also id. at 13–14 (analyzing the geographic market definition based on the locations of suppliers and customers).

\textsuperscript{47} Id. at 7.

\textsuperscript{48} Id. ("Evidence of competitive effects can inform market definition, just as market definition can be informative regarding competitive effects.").

inition could be "a central focus" of the analysis and be outcome determinative.\footnote{Id. at 18 (citing United States v. H&R Block, Inc., 833 F. Supp. 2d 36, 92 (D.D.C. 2011) (holding that the relevant market was digital do-it-yourself tax preparation products, over which the merged entity would have 90% control, and did not include assisted or manual tax preparation)). Because, unlike that of the Sherman Act, a violation of the Clayton Act does not require specific conduct, the market definition can determine whether the presumption of illegality applies. Compare 15 U.S.C. § 2 (2012), with id. § 18.}

2. Market Concentration

A prospective analysis of market concentration may provide evidence of potential anticompetitive effects of a merger. The enforcement agencies often calculate the Herfindahl-Hirschman Index (HHI)\footnote{The HHI is calculated by summing the squares of the market shares of individual firms in the market, so larger market shares have a proportionally greater weight. See H& R Block, Inc., 833 F. Supp. at 71.} to define the concentration of the market and to calculate and attribute the increased concentration to merger activity.\footnote{The increase in HHI from a merger is twice the product of the market shares of the merging firms. See Horizontal Merger Guidelines, supra note 35, at 18–19.} In highly concentrated markets,\footnote{The DOJ and FTC define such markets as those with the HHI above 2,500. See id. at 19.} activity that increases the HHI by 200 points is subject to the presumption that the merger will enhance market power, but persuasive evidence to the contrary can rebut this presumption.\footnote{This term is used in light of the well-established failing company defense discussed infra text accompanying notes 75–77. See William J. Kolasky & Andrew R. Dick, The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 207, 214 (2003), available at http://www.justice.gov/atr/hmerger/11254.pdf.}

The doctrine established in United States v. General Dynamics\footnote{415 U.S. 486, 526 (1974).} provides firms with the opportunity to use facts specific to the firm or its particular industry to rebut the government’s statistical evidence of the anticompetitive effects of a merger.\footnote{In this case, the Court determined that because “reserves rather than past production are the best measures of a company’s ability to compete” in the coal market, the merger would not lessen competition to the extent the government’s retrospective data indicated. Id. at 502.} The Seventh Circuit subsequently accepted a firm’s use of the General Dynamics defense, which is also referred to as the “flailing company defense,”\footnote{This term is used in light of the well-established failing company defense discussed infra text accompanying notes 75–77. See William J. Kolasky & Andrew R. Dick, The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers, 71 Antitrust L.J. 207, 214 (2003), available at http://www.justice.gov/atr/hmerger/11254.pdf.} when a firm’s inability to readily obtain capital and its lack of financial resources proved that it was not “as
strong a competitor as the bald statistical projections indicate.\textsuperscript{58} Although a firm has the opportunity to rebut the persuasiveness of the government’s calculations of future anticompetitive consequences with nonstatistical alternatives,\textsuperscript{59} the defense is particularly difficult to establish, as evidenced by the courts’ repeated rejection of attempts to assert it.\textsuperscript{60}

While calculations of market concentration alone provide insight into the potential anticompetitive effects of a merger, as demonstrated by the rebuttable presumption of illegality, the determination of market concentration also influences the analysis of other potential anticompetitive effects from mergers: unilateral and coordinated effects.\textsuperscript{61}

\textbf{a. Unilateral Effects}

The unilateral effects of a merger, acquisition, or joint venture arise due to the internalization of the competition between the two firms.\textsuperscript{62} Thus, the anticompetitive potential of these effects depends on the level of competition between the firms and the degree to which the firms’ products are close substitutes; that is, “a significant fraction of the customers purchasing [one firm’s] product view products formerly sold by the other merging firm as their next-best choice.”\textsuperscript{63} Upon elimination of this competition by consummation of a merger, a single entity can raise prices or manipulate prices to the detriment of the consumer.\textsuperscript{64} In addition to adverse price effects, a merger that has an anticompetitive effect on market concentration may also di-

\textsuperscript{58} United States v. Int’l Harvester Co., 564 F.2d 769, 773 (7th Cir. 1977); see also J. Bruce McDonald, Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, ANTITRUST AIRLINES 8 (Nov. 3, 2005), available at http://www.justice.gov/atr/public/speeches/286981.pdf (“[T]he poor condition of a firm that is not to the point of failing may be a sign that the firm is not going to be as much of a competitive [factor] in the future as in the past, and our mergers analysis will take that into account.”).

\textsuperscript{59} Such alternatives include “(1) ease of entry into the market; (2) the trend of the market toward or away from concentration; (3) the continuation of active price competition; [and] (4) unique economic circumstances that undermine the predictive value of governmental statistics.” C. PAUL ROGERS ET AL., ANTITRUST LAW: POLICY AND PRACTICE 553 (4th ed. 2008) (citations omitted).

\textsuperscript{60} See id. at 555 (citing Olin Corp. v. FTC, 986 F.2d 1295 (9th Cir. 1993); United States v. Healthco, Inc., 387 F. Supp. 258 (S.D.N.Y 1975)).

\textsuperscript{61} See HORIZONTAL MERGER GUIDELINES, supra note 35, at 18.

\textsuperscript{62} Id. at 20.

\textsuperscript{63} Id. at 20–21, 22.

\textsuperscript{64} Id. at 21.
minish product variety and innovation.65 Thus, unilateral effects of increased market concentration may provide evidence of anticompetitive consequences of a merger that would violate Section 7.

b. Coordinated Effects

In addition to examining unilateral effects, the DOJ and the FTC analyze the potential impact of a merger on how the firms in the market interact.66 "Coordinated interaction involves conduct by multiple firms that is profitable for each of them only as a result of the accommodating reactions of the others."67 Some coordinated interaction may itself violate antitrust laws,68 but "[p]arallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is individually rational . . . but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms."69

3. Mitigating Factors

The enforcement agencies also understand that specific factors in the market may mitigate the anticompetitive impact of the merger. For example, the presence of "powerful buyers may constrain the ability of the merging parties to raise prices,"70 and the potential of new entry into the relevant market "will alleviate concerns about adverse competitive effects . . . if such entry will deter or counteract any competitive effects of concern so the merger will not substantially harm customers."71

Furthermore, the DOJ and the FTC analyze the potential of procompetitive consequences of the merger by examining the magnitude of merger-specific efficiencies and the degree to which these efficiencies are passed through to consumers.72 However, the merging firms carry the burden of proof in establishing the likelihood and magnitude of mitigating efficien-

65 Id. at 23.
66 Id. at 24 ("A merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers.").
67 Id.
70 Id. at 27.
71 Id. at 28.
72 Id. at 29–31.
cies. The Merger Guidelines specifically state that "efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great" because the enforcement agencies do not merely balance the magnitude of the anticompetitive harm against that of the procompetitive efficiencies.

A final mitigating factor that is even more difficult for the merging firms to establish is the failing company defense. The Supreme Court has recognized that the acquisition of a firm "with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" does not violate Section 7 because competition is not harmed if the failing firm would otherwise leave the market. The Merger Guidelines specify three strict requirements in order to invoke this doctrine, so it remains extremely difficult to assert the defense.

In conclusion, the Merger Guidelines play a significant role in the development of antitrust jurisprudence, their value and influence is widely accepted, and they continue to evolve. Furthermore, changing political ideologies may influence the enforcement agencies. For example, the current Antitrust Division has expressed its concern for consumers "and its focus on safeguarding competition in industries that directly affect day-to-day lives, including health care, telecommunications and

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73 Rachel Brandenburger, Special Advisor, U.S. Dep't of Justice, Recent Developments in Merger Control: Views from the U.S. Department of Justice's Antitrust Division 6-7 (Sept. 14, 2012), available at http://www.justice.gov/atr/public/speeches/286981.pdf ("[I]t is 'incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.").

74 Horizontal Merger Guidelines, supra note 35, at 31.

75 Id. at 32.

76 Int'l Shoe Co. v. FTC, 280 U.S. 291, 302 (1930).

77 Horizontal Merger Guidelines, supra note 35, at 32 (requiring that the firm (1) cannot "meet its financial obligations in the near future"; (2) cannot "reorganize successfully under Chapter 11 of the Bankruptcy Act"; and (3) "has made unsuccessful good-faith efforts to elicit reasonable alternative offers").

78 See, e.g., supra notes 37, 40.

79 For example, globalization will likely continue to impact antitrust jurisprudence because this advancement "reshape[s] the face of many modern markets." U.S. Dep't of Justice, Antitrust Division Policy Guide to Merger Remedies 1 (June 2011), available at http://www.justice.gov/atr/public/guidelines/272350.pdf.
technology, transportation, office supplies, and other consumer products.\(^{80}\)

Despite factors that implicate the past and future development of merger enforcement, the traditional aspects of the analysis, which include discussions of market definition, market concentration, potential anticompetitive effects, and mitigating factors, remain as the foundation of antitrust jurisprudence.\(^{81}\)

III. US AIRWAYS AND AMERICAN AIRLINES MERGER

The Antitrust Division of the DOJ and eight attorneys general\(^{82}\) filed a civil lawsuit that challenged the then-proposed merger between US Airways and American Airlines’ parent company, AMR Corporation.\(^{83}\) According to the DOJ, the merger would create the world’s largest airline and would be anticompetitive because it would eliminate the competition between the two airlines and significantly increase the level of concentration in the market.\(^{84}\)

On August 13, 2013, Assistant Attorney General Bill Baer announced the DOJ’s challenge to the proposed merger\(^{85}\) and provided specific examples of the benefits of the head-to-head competition on certain routes that he predicted would no longer exist upon consummation of the merger.\(^{86}\) Thus, the An-


81 See supra text accompanying notes 19–23.


86 For example, purchasing an Advantage Fare for a round-trip from Miami to Cincinnati saves $269, and US Airways’ one-stop fare for a round trip from New
titrust Division expressed its commitment to consumers and to protecting competition.\footnote{Id. at 3 ("The lawsuit we filed today to block this deal gives consumers the best possible chance for continued competition in an important industry that they have come to rely upon.").}

A. THE ANTITRUST CLAIMS

The Amended Complaint alleged that the merger of the two firms constituted a violation of Section 7 of the Clayton Act\footnote{15 U.S.C. § 18 (2012).} because it "would likely substantially lessen competition, and tend to create a monopoly."\footnote{Amended Complaint, \textit{supra} note 83, at 7 (citing 15 U.S.C. § 18).} The Antitrust Division reported that the airlines were able to "succeed on a standalone basis," so the merger should be enjoined in the interest of competition.\footnote{DOJ Lawsuit Press Release, \textit{supra} note 84, at 1–2 (noting that even small increases in airline fares or ancillary fees would cause "hundreds of millions of dollars of harm").}

I. Market Definition

For the proposed merger, the DOJ alleged that the relevant product market was domestic scheduled air passenger service,\footnote{Amended Complaint, \textit{supra} note 83, at 10 (using the hypothetical monopolist test to determine the relevant product market for the airline industry).} and each city pair\footnote{A ‘city pair’ is comprised of a flight’s departure and arrival cities. \textit{See id.} For example, the city pair of Charlotte, North Carolina and Dallas, Texas includes flights from Charlotte to Dallas and from Dallas to Charlotte. \textit{Id.} at 44. Economists support the use of city pairs, which include flights to all airports in and around the relevant cities, rather than the use of airport pairs because the broader approach better accounts for competition by low-cost carriers at the adjacent airports. \textit{See, e.g.}, Jan K. Brueckner et al., \textit{City-Pairs Versus Airport-Pairs: A Market Definition Methodology for the Airline Industry}, 44 REV. INDUS. ORG. 1, 21 (Feb. 2014), available at http://link.springer.com/article/10.1007%2Fs11151-012-9371-7.} provided the relevant geographic market.\footnote{Amended Complaint, \textit{supra} note 83, at 11.} In addition, slots at Reagan National Airport, which are extremely valuable and required for service at that airport,\footnote{Id. at 12 ("Slots are expensive (often valued at over $2 million per slot), difficult to obtain, and only rarely change hands between airlines. There are no alternatives to slots for airlines seeking to enter or expand their service at Reagan National.").} provided a second relevant product and geographic market implicated by the merger.\footnote{Id.}
2. Market Concentration

In general, the airline industry is highly concentrated.\textsuperscript{96} Prior to the merger, “four network or ‘legacy’ airlines remain[ed] in the United States: American, US Airways, United, and Delta.”\textsuperscript{97} A fifth major domestic airline, Southwest Airlines, which does not have the “hub-and-spoke” service of the legacy airlines, offers some competition on the routes it flies; however, it—and other low-cost carriers—cannot compete as effectively because their domestic and international route networks are much less extensive.\textsuperscript{98} Furthermore, legacy airline executives themselves admitted that low-cost carriers are not strong enough competitors to deter legacy airlines from continuing ancillary fee programs,\textsuperscript{99} providing insight into the true level of concentration in the relevant market.

Significant consolidation created the high level of concentration currently in the industry: “The consolidation ‘wave’ started with the 2005 merger between US Airways and America West, creating today’s US Airways. In 2008, Delta and Northwest Airlines merged; in 2010, United and Continental merged; and in 2011, Southwest Airlines and AirTran merged.”\textsuperscript{100} Because of the high concentration within the market, the Amended Complaint included a thirteen-page appendix of city pairs with the calculated HHI and the change attributed to the merger, showing that the merger was presumed to be anticompetitive.\textsuperscript{101} Furthermore, the DOJ asserted the merger would cause the market-concentration calculation for the slots at Reagan National to increase by more than seven times the threshold that implicates the presumption of illegality.\textsuperscript{102}

\textsuperscript{96} Id. at 3.
\textsuperscript{97} Id. at 12.
\textsuperscript{98} Id. at 4, 12.
\textsuperscript{99} See id. at 17–18 (“Our employees know full well that the real competition for us is [the other legacy airlines]. Yes we compete with Southwest and JetBlue, but the product is different and the customer base is also different.”).
\textsuperscript{100} Id. at 13.
\textsuperscript{101} Id. at 15. Appendix A lists the post-merger HHI and the change in HHI attributable to the merger for 1,007 city pairs that face the presumption of illegality. See id. at 45–57. The HHIs were calculated using airline ticket revenue data for 2012 from the Department of Transportation’s Airline Origin and Destination Survey. Id. at 44. For the city pairs listed, the average post-merger HHI is 4,754 and the average change in HHI is 868 points. Recall that the presumption arises for 2,500 and 200 points, respectively. See Horizontal Merger Guidelines, supra note 35, at 19.
\textsuperscript{102} Amended Complaint, supra note 83, at 15 (“In the market for slots at Reagan National, the merger would result in a highly concentrated market, with a
a. Unilateral Effects

The DOJ also argued that the proposed merger would result in multiple unilateral anticompetitive effects, including both price and non-price consequences adverse to consumers. The elimination of head-to-head competition would create adverse price effects both for fares and for ancillary fees. For example, US Airways’ Advantage Fare program would no longer be economically rational since the company admitted that the majority of the value of this program exists “on routes where American is the legacy airline offering nonstop service.”

In addition to the price effects of unilateral behavior, increased consolidation would allow the airline to participate in “capacity discipline,” which means the airline restrains growth or reduces its established service to increase revenue. Even an elementary understanding of the impact of supply and demand on price corroborates a US Airways executive’s statement that decreased capacity is “inextricably linked” to higher fares.

Thus, the DOJ argued that the proposed merger would likely end American Airlines’ plans for expansion. In the past few years, the airline “placed the largest order for new aircraft in the industry’s history” and included significant standalone expansion in both domestic and international flights in its restructuring plan. However, the DOJ alleged that US Airways proposed a merger with American Airlines to exercise control over and

post-merger HHI of 4,959 . . . [and would] increase concentration by 1,493 points.”

108 See id. at 15–32.
104 Id. at 29–31 (“American and US Airways engage in head-to-head competition with nonstop service on 17 domestic routes representing about $2 billion in annual industry-wide revenues [and] compete directly on more than a thousand routes where one or both offer connecting service, representing billions of dollars in annual revenue.”). With respect to ancillary fees, such as those associated with rescheduling flights or checking bags, the merged entity could gain $280 million in additional annual revenue through a “fee harmonization” process by raising fees to match the higher level charged by US Airways. Id. at 29.
105 The program “offer[s] connecting service that is up to 40% cheaper than other airlines’ nonstop service.” Id. at 18.
106 Id. at 22.
107 Id. at 23 (“Each significant legacy airline merger in recent years has been followed by substantial reductions in service and capacity.”).
108 Id.
109 Id. at 26.
110 Id.
limit this growth, instead of focusing on its own expansion and ability to compete.¹¹¹

b. Coordinated Effects

The high concentration and current structure of the airline industry provide the opportunity and economic rationale for coordinated behavior because “[f]ew large players dominate the industry; each transaction is small; and most pricing is readily transparent.”¹¹² Thus, price signaling and price-leading are already prevalent in the industry, and increased consolidation creates increased incentive for parallel pricing behavior.¹¹³ US Airways acknowledged that the coordinated benefits it experiences as a result of past consolidation when it noted that “fewer and larger competitors ha[ve] allowed the industry to reap the benefits [of] capacity reductions and new ancillary revenues like bag fees.”¹¹⁴

Coordinated behavior also enables other legacy airlines to participate in the reduction of their own Advantage Fare programs and in capacity discipline.¹¹⁵ Thus, the DOJ alleged that the merger not only would increase market concentration to levels that were presumptively illegal for thousands of city pairs¹¹⁶ but also would have significant anticompetitive effects after consideration of the statements and behavior of the merging firms and trends in the airline industry.¹¹⁷

3. Mitigating Factors

The Amended Complaint asserted that the proposed merger lacked countervailing factors that would suggest possible procompetitive effects of the merger.¹¹⁸ Understandably, the air-

¹¹¹ Id.
¹¹² Id. at 15.
¹¹³ Id. at 15–16.
¹¹⁴ Id. at 14 (internal quotation marks omitted); see also id. at 28 (“Wow—[Delta’s] $100 [fee] is a lot for [a] second bag. I would think there’s a big passenger gag reflex associated with that, but if we can get it, we should charge it.”).
¹¹⁵ See id. at 20; see also id. at 25 (quoting an email from the US Airways CEO who predicted that the analyst testifying before Congress that the United/Continental merger would not impact service at the Cleveland hub was “just saying what they need to . . . to get this approved”).
¹¹⁶ See supra note 101.
¹¹⁷ Cf. supra text accompanying notes 20–22.
¹¹⁸ Amended Complaint, supra note 83, at 32–33.
line industry has extremely high barriers to entry. Although the benefits of efficiencies gained through consolidation have been understood and recognized, the DOJ argued that these efficiencies were not sufficient or cognizable in this case, so it was unlikely that consumers would receive benefits sufficient to rebut the presumption of anticompetitive effects.

Therefore, the Antitrust Division of the DOJ presented its argument—in a manner consistent with current antitrust jurisprudence—that the proposed merger between US Airways and American Airlines’ parent company violated the Clayton Act and should be permanently enjoined.

B. AIRLINES’ RESPONSE

Defendants US Airways and AMR Corporation answered the Amended Complaint on September 10, 2013. Unsurprisingly, the firms argued that the proposed merger was not anticompetitive and should be permitted in light of the “intensely competitive” nature of the current airline industry.

Furthermore, the airlines denied the enforcement agency’s claim that there was no evidence of mitigating factors in the

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119 Such barriers include “difficulty in obtaining access to slots and gate facilities; the effects of corporate discount programs offered by dominant incumbents; loyalty to existing frequent flyer programs; an unknown brand; and the risk of aggressive response to new entry by the dominant incumbent carrier.” Id.


121 Amended Complaint, supra note 83, at 33.

122 Recall that the enforcement agencies do not merely weigh the magnitudes of the detriment against the benefit, and the creation of even substantial efficiencies may be unable to rescue a merger with significant anticompetitive effects. See supra text accompanying note 74.

123 See generally supra Part II.

124 Amended Complaint, supra note 83, at 7. This action is in accordance with the enforcement agency’s focus on industries that affect the day-to-day lives of consumers. See supra text accompanying note 80; see also DOJ Lawsuit Press Release, supra note 84 (“Airline travel is vital to millions of American consumers who fly regularly for either business or pleasure. . . Today’s action proves our determination to fight for the best interests of consumers by ensuring robust competition in the marketplace.”).


126 Id. at 1 (“US Airways and American [are] seeking to position themselves to be more effective long-term competitors in that environment . . . fully capable of competing with the two that exist today (Delta and United, themselves created by mergers permitted by Plaintiffs).”).
transaction,\textsuperscript{127} arguing that the merged airline “would generate enormous direct consumer benefit, most significantly by creating a unified network affording a vastly expanded array of flight options for travelers—taking more passengers where they want to go when they want to go there.”\textsuperscript{128} In addition, the firms argued that the merger would reduce costs by $150 million annually.\textsuperscript{129}

The Answer appeared to invoke a \textit{General Dynamics} defense\textsuperscript{130} by describing the “central facts and economic realities of today’s airline industry” to rebut the appropriateness of the calculations used in the Amended Complaint.\textsuperscript{131} Specifically, the airlines argued that the industry has suffered in the thirty-five years since deregulation\textsuperscript{132} and is characterized by intense competition due to the emergence, expansion, and “demonstrable success of low-cost carriers”\textsuperscript{133} and the consolidation of the other legacy airlines.\textsuperscript{134} According to the airlines, the merger was the “only extant plan” for American Airlines’ emergence from bankruptcy, and enjoining it would “prolong this cycle of crisis.”\textsuperscript{135}

\textsuperscript{127} \textit{Id.} at 2, 14.
\textsuperscript{128} The airlines reminded the DOJ of its own comments regarding this unified network; the merger of Delta and Northwest created consumer benefits by “combining under single ownership the complementary aspects of the airlines’ networks.” \textit{Id.} at 2 (internal quotation marks omitted).
\textsuperscript{129} \textit{Id.} (valuing the benefits passed to consumers as a result of these efficiencies at $500,000,000 annually, net of any fare effects). This figure was the net of “improved pay and benefits and welcome job stability for many thousands of airline employees who have been among the victims of this industry’s tumultuous past.” This tumult referred to the profitability issues that characterize the industry: “US Airways has undergone two bankruptcies in recent years, and American has undergone one, from which it has not yet emerged.” \textit{Id.}
\textsuperscript{130} \textit{See generally supra} Part II.B.2.
\textsuperscript{131} \textit{See AMR Corp.’s Answer to Amended Complaint, supra} note 125, at 2 (“Together, the two airlines lost almost $14 billion in the last twelve years, and the uncertainty and shocks that have prevailed in today’s airline industry, make the need for their combination all the more important to consumers.”).
\textsuperscript{132} US Airways Group’s Answer to Amended Complaint at 2, United States v. US Airways Group, No. 13-CV-1236 (CKK) (D.D.C. Sept. 10, 2013), ECF No. 79 (“The post-deregulation history of legacy carriers is one of staggering financial loss, dozens of bankruptcies, hundreds of thousands of lost jobs, dramatic reductions in employee pay and benefits, and painful restructuring.”).
\textsuperscript{133} \textit{Id.}
\textsuperscript{134} \textit{Id.} at 3 (noting that the 2008 merger of Delta and Northwest and the 2010 merger of United and Continental “created airlines with much larger and more comprehensive networks than either American or US Airways, leaving both American and US Airways at a competitive disadvantage which cannot be overcome on a standalone basis”).
\textsuperscript{135} \textit{Id.} at 4.
In addition, the airlines alleged that the city pair HHI calculations did not accurately reflect the current competitive environment because those listed were merely "a fraction" of the current routes, and most of these one-stop routes would continue to be competitive. They noted that the two airlines directly competed on only seventeen of the 623 domestic nonstop routes, most of which are also served by low-cost carriers that provided "vigorous" competition.

Thus, US Airways and American Airlines' parent company attempted to rebut the persuasiveness of the predicted anticompetitive effects by explaining the history and trends of the industry, the weakness of American Airlines' current financial state, and the inappropriateness of the HHI calculations, all of which suggested that the DOJ's statistics did not accurately reflect the individual firm's future ability to compete.

C. SETTLEMENT

After three months of litigation, the DOJ published a press release announcing a proposed settlement that would require the merged airline to divest slots and gates at "key airports" across the country, which would provide low-cost carriers the opportunity and incentive to enter or to increase capacity in these markets. The settlement did not address all of the antitrust concerns alleged by the enforcement agency, as it did not require the merged entity to continue with American Airlines' expansion plans or to "create Advantage Fares where they might otherwise be eliminated." However, the DOJ believed that growth and lower fare options would still arise due to the oppor-

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136 AMR Corp.'s Answer to Amended Complaint, supra note 125, at 2 ("The remaining routes in DOJ's list are 994 one-stop connecting overlaps, a fraction of the more than 13,000 that American and US Airways serve.").

137 This competition would remain because (1) either American or US Airways "flies less than 10% of the passengers" on nearly half of the routes; (2) at least three airlines would remain for almost 90% of the routes; and (3) low-cost carriers would continue to serve 85% of these routes' passengers. Id. at 3.

138 Id. at 2.


140 See generally Amended Complaint, supra note 83.

opportunities for new competition created by the transfer in ownership of the divested assets from legacy to non-network airlines.\textsuperscript{142}

\textbf{I. Required Divestitures}

Under the proposed settlement, the DOJ would appoint a monitoring trustee to oversee compliance with the required divestitures and to ensure that the combined airline does not reacquire ownership of the divested assets during the term of the settlement.\textsuperscript{143} The settlement suggested that the divestitures at Boston Logan International, Chicago O’Hare International, Dallas Love Field, Los Angeles International, Miami International, New York LaGuardia International, and Ronald Reagan Washington National would facilitate competition by providing non-legacy airlines the ability “to compete more extensively nationwide[, which] will enhance meaningful competition in the industry and benefit airline travelers.”\textsuperscript{144} Specifically, the merged airline must divest 104 slots at Reagan National, thirty-four slots at LaGuardia, and two gates and ground facilities at the remaining five airports.\textsuperscript{145}

According to the DOJ, this agreement involved the largest ever divestitures in an airline merger, allowed more direct and connecting domestic flights by low-cost carriers,\textsuperscript{146} and was a “game changer” that “has the potential to shift the landscape of the airline industry.”\textsuperscript{147} The Antitrust Division provided historical evidence to support this claim: when JetBlue began flying out of Reagan National, the prices of flights to Boston decreased 30\%, so consumers saved $50 million annually from just sixteen slots that were subleased from American Airlines.\textsuperscript{148} However, the settlement required American Airlines to divest not only

\textsuperscript{142} Thus, the settlement would “impede the industry’s evolution toward a tighter oligopoly by requiring the divestiture of critical facilities to carriers that will likely use them to fly more people to more places at more competitive fares.” \textit{Id.}

\textsuperscript{143} DOJ Settlement Press Release, \textit{supra} note 139, at 2–3.

\textsuperscript{144} \textit{Id.} at 1.

\textsuperscript{145} \textit{Id.} at 1.

\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.} at 2.
those slots, but also eighty-eight more at Reagan National.149 Similarly, Southwest acquired thirty-six slots at Newark Liberty International that were divested during the United–Continental merger, and fares subsequently dropped 10%, while passenger traffic increased by 36% for certain routes.150

2. Opinion of the Department of Justice

Spokespersons for the DOJ, and for the Antitrust Division in particular, were pleased with the settlement151 and with its implications for the future of the airline industry and low-cost carriers.152 The DOJ believed that because the divestitures would provide low-cost carriers greater access to these major airports, competition would increase for both non-stop and connecting flights around the country.153 Because of the opportunities for competition by low-cost carrier airlines that result from these divested slots and gates, the DOJ asserted that the settlement provided an outcome “better than a full stop injunction.”154 It believed that the settlement addressed multiple antitrust concerns, those arising from the disappearance of head-to-head competition between the two merging legacy airlines and those focusing on the inability of non-network airlines to compete adequately in many geographic markets throughout the country.155 The settlement purported to alleviate these issues by lowering barriers to enter and compete at these airports so that low-cost carriers could expand and strengthen their networks.156 For example, low-cost carriers gained access to slots previously owned by legacy airlines at Reagan National, whereas the proposed merger would have given the combined airline control over 69% of the take-off and landing slots.157

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149 Id.
150 Id.
151 Id. ("I’m proud of our team, proud of our collaboration with the Attorneys General of the seven states who joined in this settlement and proud of what we have accomplished for U.S. consumers.").
152 Id. at 1–2 (“This settlement . . . will disrupt [the] cozy relationships among the incumbent legacy carriers and provide consumers with more choices and more competitive airfares.").
153 Id. at 1.
154 Id.
155 See generally supra Part III.A.
156 DOJ Settlement Remarks, supra note 145, at 2.
Thus, the Antitrust Division projected that the stipulations within the proposed settlement, particularly the procompetitive effects of the divestitures, would increase competition in the airline industry so that “consumers all across the country . . . will benefit from more choices and more competitive airfares.”

3. Opinion of the Airlines Executives

Similarly, executives at American Airlines and US Airways expressed their satisfaction and optimism for the future. Tom Horton, the chairman, president, and CEO of AMR Corporation, echoed the thoughts previously expressed by the airlines when he said, “There is much more work ahead of us[,] but we’re energized by the challenge and look forward to competing vigorously in the ever-changing global marketplace.”

In addition, the airlines provided specific information regarding the impact of the settlement. Complying with the required divestitures would affect only 112 of the combined airline’s 6,700 daily flights. Despite divesting slots at Reagan National and LaGuardia, the airline would provide 57.05% and 28.30% of airport departures, respectively. For the remaining five airports, the airline would occupy 55.74% of gates at Miami, 44.59% at O’Hare, 29.55% at Boston Logan, 21.30% at Los Angeles, and 0.00% at Dallas Love Field.

Thus, the litigation ended with a settlement that both parties appeared to support: the enforcement agency claimed that the deal satisfied its antitrust concerns, and the airlines reminded consumers and investors that the settlement impacted its operations only minimally. However, the true impact of this merger should not be confined to the opinions of the parties involved.

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158 Id.
160 See supra text accompanying notes 130–35 to recall the airlines’ General Dynamics defense.
161 Settlement Statement, supra note 159.
163 Id.
164 Id.
165 See generally supra Part III.C.2–3.
IV. ANALYSIS

The US Airways and American Airlines merger demands analysis because of its significance in the creation of the world’s largest airline and because of the magnitude of the industry and its impact on the everyday lives of American consumers.\textsuperscript{166} It is significant also for the future of airline consolidation and of merger enforcement generally.

A. THE EFFECTS OF THE SETTLEMENT

While some observers agreed with the positive outlook on the future level of competition\textsuperscript{167} as expressed by the parties involved,\textsuperscript{168} others criticized the settlement by doubting the claims that the deal would benefit consumers by increasing competition in the airline industry.\textsuperscript{169}

Furthermore, economic studies and theories provide varied evidence, some of which support the settlement and some of which confirm the fears of its opponents.\textsuperscript{170} However, a searching critique of these conflicting theories supports the position that the US Airways and American Airlines merger represents the failure of the DOJ to adequately protect competition and consumers.

1. Diminished Competition

According to the DOJ, the settlement is beneficial to competition because it strengthens the ability of low-cost carriers to compete with the legacy airlines.\textsuperscript{171} This procompetitive outcome, however, is uncertain both in result and degree. For example, the American Antitrust Institute, which initially praised the DOJ for pursuing the lawsuit,\textsuperscript{172} vehemently opposed the settlement and questioned the impact and likelihood of the increased com-

\begin{footnotesize}
\textsuperscript{166} See, e.g., DOJ Lawsuit Remarks, supra note 85, at 3.
\textsuperscript{168} See generally supra Part III.C.2–3.
\textsuperscript{170} See generally infra Part IV.A.1–2.
\textsuperscript{171} See supra Part III.C.2.
\end{footnotesize}
petition, alleging that the government “has traded off one independent national hub-and-spoke carrier for the possibility that two point-to-point carriers will be enabled to grow into the equivalent of a replacement competitor.” It asserted that currently the networks of the low-cost carriers are not strong enough to rival the competition of a fellow legacy airline. Therefore, it concluded that the supposed increase in competition from the divestitures is hypothetical, whereas the competition that existed prior to the merger was observable. The results of several econometric studies support this conclusion that the merger will lead to an overall decrease in competition, which will have anticompetitive effects on the price and quality of air travel.

a. Impact on Price

A look at recent mergers and their impact on airline fares provides some insight into predicting the overall price effect of this merger. On October 29, 2008, the DOJ determined that the merger of Delta and Northwest would “drive down costs for consumers without dampening competition in the industry” because of the “minimum overlap” of the two airlines’ routes. Then, in August 2010, the DOJ approved the merger of United and Continental upon the condition that the merged airline lease slots at Newark Liberty International to Southwest for eighteen flights. Each of these mergers successively formed what was then the world’s largest carrier.

Regression analysis of airfares after the Delta merger reveals that the effect of a merger on fares “can be judged from the impact of changes in competition among carriers not involved in mergers;” that is, the prices depend not only on the size of the competitor, but also on the type of the competitor. Specif-
ically, regression analysis predicts that, for nonstop markets, prices decrease 3% when a legacy airline enters the market and 21.8% when a low-cost carrier provides the additional nonstop competition. When the new entrants offer a connecting flight, the nonstop fare decreases 3.3% after low-cost carrier entry, but any price change after a legacy airline provides additional connecting competition is statistically insignificant. In connecting markets, an additional legacy competitor decreases fares by 2.8%, and entry by a low-cost carrier decreases fares by 6%. These findings seem to support the DOJ’s claim that increasing the strength of the low-cost carriers will have a significant procompetitive effect on the airline industry, but this conclusion is premature.

The regression coefficient predicts a 2.3% increase in fares in connecting markets, but the actual fare change was close to zero, which suggests that the loss of direct competition prompted entry into those connecting markets. However, for nonstop routes over which the merging airlines previously competed, the regression coefficient is statistically insignificant, but the actual fares increased by 5.1%. The majority of this price increase appears to be attributable to the merger causing the low-cost carriers to exit those nonstop markets. Furthermore, instead of the 21.8% price decrease after additional low-cost carrier competition, the price effect was only 12% after consummation of the merger, due to the entity’s increased market power.

Thus, comparing the regression results to actual prices after the Delta merger suggests that the increase in market power outweighs possible mitigating factors, such as new entry or efficiency gains, so that fares rise. Although competition from low-cost carriers can have greater impact on prices than that

180 Id. at 35.
181 Id. at 37.
182 Id. at 38.
183 Id.
184 Id. at 45.
185 Id.
186 supra text accompanying note 180.
188 Id. at 40. But see Jan K. Brueckner et al., Airline Competition and Domestic U.S. Airfares: A Comprehensive Reappraisal, 2 ECON. TRANSP. 1, 14 (Mar. 2013) (“The projected potential aggregate fare increases from most legacy mergers are thus relatively small, and they are presumably far overshadowed by the potential efficiency gains from such mergers.”).
from legacy airlines, \footnote{See generally Luo, supra note 176.} low-cost carrier entry is unlikely, \footnote{See, e.g., infra text accompanying notes 198–199; C. Lanier Benkard et al., Simulating the Dynamic Effects of Horizontal Mergers: U.S. Airlines, CENTRE FOR ECON. POL’Y REs. (May 2010), at 32–33, available at http://dev3.cepr.org/meets/wkcn/6/6684/papers/BenkardFinal.pdf (finding that when legacy airlines merge, entry by other legacy airlines is more likely than entry by low-cost carriers).} and the magnitude of its effect on prices decreases as market concentration increases. \footnote{Luo, supra note 176, at 40.}

Furthermore, an economic study of the effects of the US Airways and America West Airlines merger supports the conclusion that additional low-cost carrier competition is unlikely by finding that mergers do not have a significant positive effect on entry behavior. \footnote{See generally Patrice Bougette et al., Do Horizontal Mergers Induce Entry? Evidence from the US Airline Industry, 21 APPLIED ECON. LETTERS 31 (2014).} It theoretically concludes that a profitable merger that does not generate significant efficiencies "inevitably decreases consumer welfare irrespective of entry conditions." \footnote{Id. at 32.} This conclusion depends on the assumptions that the airline industry is comparable to a Cournot oligopoly \footnote{The Cournot model involves a concentrated industry in which firms compete based on output because there is no product differentiation. See id. at 32.} and that firms decide to merge to increase profits, either by generating efficiencies or by utilizing barriers to entry to charge supracOMPETITIVE prices. \footnote{Id. at 31–32.} Regression analysis empirically supports this conclusion by revealing that the merger did not have significant entry-inducing effect on the behavior of competitors. \footnote{Id. This study used airport pairs, instead of city pairs, as the relevant market, which may underestimate the impact of low-cost carriers operating in adjacent markets; however, not all airports within a city are proper substitutes. See Brueckner et al., City-Pairs Versus Airport-Pairs, supra note 92.} Historical calculations of the impact of additional competition greatly exceed those measured using current data. \footnote{Brueckner et al., supra note 188, at 2 ("When the analysis is repeated using data from 2000, the results show a much larger fare impact from a second non-stop legacy carrier as well as fare reductions from legacy competition at adjacent airports.").} This general trend provides additional support for the conclusion that as consolidation continues, the potential for and magnitude of additional competition decreases. \footnote{Supra text accompanying note 191.} Specifically, even when potential entrants are present at both airports for a given route,
regression analysis reveals that even these airlines may not be effective "competitive threats" in that geographic market.  

Thus, synthesis of these econometric results suggests that possible procompetitive price effects from increased competition through new entry are unlikely, when considering the reality of the behavior of the airlines and the impact of the merged entity's market dominance on that behavior. Specifically with respect to the US Airways and American Airlines merger, the supposed increase in competition from low-cost carriers is doubtful especially because the effect of the divestitures is minimal or already realized. For example, divesting the two gates at Love Field will have an insignificant effect on competition because, although American Airlines owned the gates, it leased them to Delta "because a few miles to the northwest of Love Field is Dallas/Ft. Worth International (DFW), which is American's largest and most important hub." In fact, low-cost carriers do not operate in the relevant markets because of factors that are driven by strategic business considerations, not necessarily because of a lack of access to the relevant airports. Even if other airlines, such as Delta, JetBlue, and Southwest, are interested in acquiring the slots, the divestitures will have a minimal impact: less than 7% of the merged entity's daily departures from LaGuardia and about 15% from Reagan National.

Considering that this analysis reveals a more accurate prediction of the price effect of the settlement, the DOJ should have blocked the merger or, alternatively, should have required divestitures substantial enough to have a significant positive effect on new entry. A recent study of agency action in merger enforcement used regression analysis to show that alternative remedies, such as divestitures, "are not generally adequate to the task of preserving competition."  

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201 Id. ("Pretty much any airline that wants to fly into these big airports can do so, meaning that this concession won't really help the competitive environment.").


203 Sanati, *supra* note 200 (arguing that these low percentages are "hardly earth-shattering" considering the size of the merged airline).

right opposition or structural remedies instead of conduct/conditions approaches—may be warranted in more cases than they are at present applied."

b. Impact on Quality

The decreased competition attributable to the US Airways and American Airlines merger will affect not only airfares but also non-price factors, such as route networks, reliability, and service quality. Although the DOJ argued that fears of capacity discipline would be alleviated by expansion of low-cost carriers, these non-network airlines historically do not serve small and rural communities and arguably do not have the network capacity to enter those markets. The significance of this concern motivated bipartisan legislators to question the settlement and its non-price impact on their constituents. Delta, a legacy airline, reportedly “sees itself as the best airline suited to provide nonstop service between [Reagan National] and the small- and mid-sized cities,” which puts into question the rationale that the settlement divestitures will promote expansion of low-cost carriers.

Those who believe that the “complimentary nature of the American Airlines and US Airways’ networks” suggests that there is no expectation for a significant decrease in domestic capacity fail to consider the economic reality of the current market and the incentives that drive this consolidation. Theoretically, the firms agreed to merge because they predicted that combination would be profitable, and historical evidence reveals that exercising capacity discipline provides a source of that profit.

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205 Id.
206 See supra text accompanying note 142.
208 Id. (arguing that the merged entity’s compliance with the deal and divestiture of assets “may further compound an already problematic situation for small communities” because the low-cost carriers “generally provide service only to larger markets”).
209 Russell & Majcher, supra note 167.
210 Id.
211 See supra text accompanying note 195.
212 See supra note 107 and accompanying text.
In addition, the reliability and service quality of air travel decreases with consolidation.\textsuperscript{213} Regression analysis reveals "that routes that experienced a relative increase (decrease) in concentration experienced a relative increase (decrease) in delays."\textsuperscript{214} Specifically, the data estimates that the consummation of the originally planned merger between US Airways and American Airlines would increase arrival delay that "would impose costs of $70 to $105 million on passengers."\textsuperscript{215}

2. Continued Consolidation

As previously discussed, the airline industry has undergone massive consolidation since deregulation in 1978.\textsuperscript{216} Over the past thirty-six years, "32 carriers merged and re-merged" such that only three legacy airlines—United, American, and Delta—remain, with Southwest and other regional carriers attempting to compete in the industry.\textsuperscript{217} Although some believe that this consolidation creates efficiencies that enable stability and profitability, mergers have historically resulted in adverse price and non-price effects for consumers.\textsuperscript{218} Past DOJ inaction or insufficient action should not provide an excuse for the present and for future failure.\textsuperscript{219} The consummation of the US Airways and American Airlines merger not only continues the trend of consolidation but also promotes and encourages future mergers.

An empirical study of past airline mergers reveals the endogenous nature of airline mergers; that is, current mergers tend to make subsequent mergers more profitable.\textsuperscript{220} For example, only 21\% of the simulated mergers between US Airways and American Airlines were profitable prior to the Delta merger, but 40\%

\textsuperscript{214} Id.
\textsuperscript{215} Id.
\textsuperscript{216} See supra text accompanying note 100; see also Figure 1 infra Part VI; Susan Carey et al., \textit{More Stable Airlines Fly Out of Mergers}, WALL ST. J. BUS. (Feb. 11, 2013, 7:23 PM), http://online.wsj.com/news/articles/SB10001424127887324880504578298443582454684.
\textsuperscript{218} Id. ("Consolidation has been accompanied by higher prices, fewer flights in many markets, and a generally lousier flying experience.").
\textsuperscript{219} See infra Part IV.A.3.
were profitable after it. Thus, 19.2% of the simulated mergers became profitable after the Delta merger, but 0.2% (one out of 526) became unprofitable. This study further suggests the potential domino effect of industry consolidation.

3. Increased Agency Power

The shift in authority over merger enforcement should not result in giving these political enforcement agencies the power and discretion to ignore Section 7 and to allow anticompetitive mergers if they believe it will strengthen the industry. A history of consolidation and profitability issues in the industry should not provide a reason for government inaction, as protection of an individual competitor at the expense of overall competition conflicts with the purpose of antitrust law. It may appear that agency discretion would support consumer welfare due to the importance of the airline industry, but it is likely that the anticompetitive effects of the merger outweigh possible consumer benefit from avoiding bankruptcy restructuring loss. In fact, it is most probable that the investors of the relevant entities are those who benefit most from agency discretion, for they understand industry risks and likely demand a proportional return.

The DOJ may have believed that allowing the merger was necessary to prevent a total collapse of the legacy airlines and strengthen domestic carriers to compete with foreign ones. While this argument supports the settlement, it does not consider the magnitude of the anticompetitive effects of the merger. Mitigating factors, including the failing or flailing defenses, usually cannot rescue a merger if the anticompetitive ef-

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221 Id. at 29-30.
222 Id. at 30.
223 See generally supra Part II.A.
224 Recall that the requirements of the failing company defense are not met for a firm merely restructuring in bankruptcy. Supra note 77 (citing HORIZONTAL MERGER GUIDELINES, supra note 35, at 32); see Paul Stinson, Bankruptcy Judge Approves AMR Merger; New Entity Shares Expected to Trade Dec. 9, 105 Antitrust & Trade Reg. Rep. (BNA) No. 741 (Dec. 3, 2013).
225 See supra notes 7, 10 and accompanying text.
226 See generally supra Part IV.A.
227 See Sanati, supra note 200 (quoting the airline analyst at J.P. Morgan who stated, “Why mince words? ‘A win for the airlines’ is how we view the negotiated settlement . . . .”).
228 See generally supra Part IV.A.
fects are significant. Furthermore, the fact that the companies are individually flailing merely rebuts the presumption of market power; it should not support the rationale that the agencies should bolster specific entities using their own discretion in merger enforcement.

As previously discussed, the DOJ allowed the creations of successive largest airlines with little or no action. Commencing the action to block the US Airways and American Airlines merger after its prior laissez-faire attitude toward airline consolidation confused not only the parties involved but also others who believed that the DOJ's "sudden change of heart was . . . hypocritical, reducing its credibility on this issue." Arguing that prior antitrust inaction supports continued and future inaction fails to recognize the importance of competition and favors certainty over consumer welfare. Although consistent antitrust enforcement would provide more clarity, it is not a proper excuse for failing to act when necessary.

Furthermore, others have argued that the entire case, from filing the lawsuit to settlement, was politically motivated and "decided on exogenous grounds." The argument is that the lawsuit "had nothing to do with Clayton Act § 7 and everything to do with the number of slots held by the merging airlines at an airport frequented by members of Congress." The lack of judicial review and transparency of this settlement provides more room for increased agency control over the airline industry and a further reduction of public trust.

230 Supra text accompanying note 57.
231 See, e.g., supra text accompanying notes 176–78.
232 See AMR Corp.'s Answer to Amended Complaint, supra note 125, at 1.
233 Sanati, supra note 200 (arguing that the case was "shaky" from the beginning because "the DOJ allowed consolidation in the airline industry to go on for years with little to no opposition").
234 See Milone, supra note 9 (stating that the current system in which "the ultimate decision-maker is a political figure . . . produces some 'inconsistent' results, but by and large it is better than any alternative advanced so far"); see also supra note 7 and accompanying text.
235 See id. (noting that a former FTC Commissioner believed the resolution of the case was a "travesty.").
236 Id. Although the DOJ provided 1,007 city pairs with average increases in HHI of 868 points to an average post-merger HHI of 4,754, see supra note 101, the most significant required divestiture occurred at Reagan National, ignoring the thousands of other cities involved in these presumptively illegal markets. See generally supra Part III.C.1.
Therefore, it is apparent that the settlement that allowed US Airways and American Airlines to merge will have an overall decrease in competition because it is unlikely that the other airlines, particularly the low-cost carriers, can appropriately expand to compete with the world's largest airline. In addition, this merger strengthens the trends of consolidation in the industry and of increasing agency power, both of which can negatively impact the consumer. The enforcement agencies must remedy this failure with stronger merger enforcement in the future and in other industries as well.

B. CURRENT APPLICATION IN ANOTHER INDUSTRY

The US Airways and American Airlines merger will influence other industries. For example, Comcast Corporation recently announced its agreement to acquire Time Warner Cable Inc. to create the country's largest cable provider.237 The response was immediate, varied, and vehement.238

Although Comcast and Time Warner do not operate in the same areas, the elimination of head-to-head competition is not the primary antitrust concern in these type mergers.239 Rather, opponents worry about the merged entity's control over content due to increased bargaining power with media companies.240 This increase in leverage raises antitrust concerns because "the interplay between different providers as they separately bargain with distributors is a form of competition."241 Furthermore, be-

237 David Farber, Comcast Set To Buy Time Warner Cable in All-Stock Deal, CNBC (Feb. 12, 2014, 10:02 PM), http://www.cnbc.com/id/101412815.


240 Id. ("An all-powerful cable company, for example, would be able to influence and control what Americans could watch or read by refusing to carry channels or certain Internet services, or it could favor its own content.").

cause of Comcast’s vertical integration, the merger will eliminate the competition that currently exists between programmers and Time Warner.

The argument that the cable companies do not directly compete recalls similar claims made by AT&T Corporation in support of its attempt to acquire T-Mobile USA, to no avail. The DOJ has continually reaffirmed its action in blocking that proposed merger. After abandoning the AT&T deal, which would have increased the HHI by 700 points to a post-merger HHI of 3,100, T-Mobile has grown organically through “aggressive investment in its network and new pricing plans,” so it now provides valuable competition in the national mobile wireless telecommunications services market.

Finally, the lack of competition in the Comcast merger would remove the incentive for the merged entity, which would control “19 of the 20 largest metropolitan areas in the country,” to improve to fiber-optic networks. This potential for diminished investment illustrates a non-price effect of consolidation, the impact of which is substantial in this industry. For example, a recent Canadian study revealed technical advancements, and not “scale economies,” were the most significant contributor of total productivity growth in the telecommunications sector.

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243 Id.


245 See, e.g., Edward Wyatt, Wireless Mergers Will Draw Scrutiny, Antitrust Chief Says, N.Y. TIMES, Jan. 30, 2014, at B3, available at http://dealbook.nytimes.com/2014/01/30/wireless-mergers-will-draw-scrutiny-antitrust-chief-says (“We’ve seen the benefits over the last two and a half years of four-firm competition. Experience teaches us that the market is thriving and consumers are benefiting from the current competitive dynamic.”).


247 Wyatt, supra note 245.

248 See Crawford, supra note 238.

Thus, antitrust action is necessary to similarly preserve and protect competition with respect to the cable merger. Like the airline industry, the cable industry has struggled with profitability and has undergone massive consolidation. However, the success of T-Mobile suggests that restructuring and focusing on organic growth can strengthen companies individually, without having to resort to a merger. Thus, the enforcement agencies should seek to block the Comcast and Time Warner merger to promote organic growth and competition and investment in technology. Alternatively, Comcast can divest its programming business, at a minimum, to increase vertical competition, and the Federal Communications Commission can promulgate regulations to spur technological growth.

V. CONCLUSION

Despite the varied nature of the opinions and theories surrounding merger enforcement generally and in the airline industry, a critical analysis of the impact of the US Airways and American Airlines merger reveals the failure of the Antitrust Division of the DOJ to protect present and future competition by allowing the creation of the world's largest airline.

Because of the shift in the development and interpretation of merger enforcement from the judiciary to the enforcement agencies, the enforcement agencies should be more vigilant in protecting competition and should restrict future consolidation of airlines. They should also learn from the US Airways and American Airlines merger in considering proposed mergers in other industries, such as the cable industry.

In conclusion, although a particular policy rationale may support the merger of competitors, antitrust law exists to protect competition for the benefit of consumers—not to protect individual competitors—and the enforcement agencies must act consistently with this purpose.

See supra note 238 (noting that "both companies are limping along, victims of big changes in the television industry that may make them irrelevant within a decade").

See infra Part VI (comparing the consolidation of the airline industry in Figure 1 with that of the cable industry in Figure 2). Compare Susan Carey et al., More Stable Airlines Fly Out of Mergers, WALL ST. J. (Feb. 11, 2013, 7:23 PM), http://online.wsj.com/news/articles/SB10001424127887324880504578298443582454684, with Rani Molla, Two Decades of Cable TV Consolidation, WALL ST. J. (Feb. 13, 2014, 10:48 AM), http://blogs.wsj.com/corporate-intelligence/2014/02/13/chart-two-decades-of-cable-tv-consolidation.
VI. APPENDIX

Figure 1

**Flight Paths** | Some major U.S. airline mergers since the industry was deregulated in 1978

- TWA
- AMERICAN AIRLINES
- US AIRWAYS
- AMERICA WEST
- CONTINENTAL AIRLINES
- UNITED AIRLINES
- NORTWEST AIRLINES
- DELTA AIR LINES
- WESTERN AIRLINES
- SOUTHWEST AIRLINES

Sources: the companies; Airlines for America
The Wall Street Journal
Figure 2

Cable-Company Consolidation
Major acquisitions and mergers by the top 4 U.S. cable-TV providers

Comcast Subscribers: 21.6 million; Revenue: $64.6 billion

Time Warner Cable Subscribers: 11.4 million; Revenue: $22.1 billion

Charter Subscribers: 4.3 million; Revenue: $8.29 billion

Cox Subscribers: Under 6 million; Revenue: N/A

Comcast and Time Warner Cable agree to $45 billion deal

Source: Wall Street Journal reporting, the companies; data from latest reported quarter

Rani Molla/The Wall Street Journal
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