Assault on the Airline Industry: Private Antitrust Litigation and the Problem of Settlement

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I. INTRODUCTION

AMERICAN ECONOMIC theory has as two of its basic premises the following, sometimes conflicting, propositions: one, that there should be a free market economy, and two, that a monopoly or concentration of market power in an industry should be avoided. Nowhere is this conflict more evident than in the airline industry. As demonstrated by the movement towards deregulation, consumers and policy makers once believed that the airline industry, if left alone, would provide free competition and competitive pricing. Now, some fifteen years after the Airline Deregulation Act, even the casual observer would contest that conclusion. After an initial period of heavy entry into the market, the number of airlines has significantly decreased due primarily to merger

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2 Opponents of airline deregulation argued that the industry would have enough competitors to ensure a healthy market. Further, the proponents of deregulation based their argument on contestability. These proponents, most notably former Chairman of the Civil Aeronautics Board, Alfred Kahn, did not deny that air transportation had significant economies of scale, scope, or density. Instead, the contestability theory rested on the notion that the natural monopolist would be forced to price at cost by the threat of potential entry. PAUL S. DEMPSEY, FLYING BLIND: THE FAILURE OF AIRLINE DEREGULATION 7 (1990).

3 Airline Deregulation Act, supra note 1.
or bankruptcy.\textsuperscript{4}

Preserving a free market and preventing unfair competition requires enforcement measures. Instead of regulating entry into the market, policing the airline industry has now fallen to the Antitrust Division of the Department of Justice\textsuperscript{5} and lawsuits brought by private individuals under various antitrust laws.\textsuperscript{6} This comment will focus on one of those enforcement mechanisms, the private action, and will investigate whether it is an effective enforcement mechanism. Most of the factual context of this article revolves around the recent settlement of \textit{In re Domestic Air Transportation Antitrust Litigation}.\textsuperscript{7} The case was brought by a class of plaintiffs who charged nine major airlines with price fixing.\textsuperscript{8} The alleged scheme was accomplished through codes transmitted via a computer system.\textsuperscript{9} Anyone who travelled on a commercial airline between 1988 and 1992 was a member of the class.\textsuperscript{10} This comment will discuss whether such litigation is an appropriate use of

\textsuperscript{4} Since deregulation, more than 200 airlines have gone bankrupt or been acquired in mergers, and only 74 carriers remain. \textit{Dempsey, supra} note 2, at 11. Among the casualties were Air Florida, Skytrain, and People Express. Furthermore, Eastern Airlines, Inc., Continental Airlines, Inc., Pan American World Airways, Inc., and Midway Airlines, Inc. have all gone into bankruptcy. Since 1979, more than twenty carriers have left the industry. \textit{House Passes Bill to Increase Competition in Airline Industry}, 63 Antitrust & Trade Reg. Rep. (BNA) 225 (Aug. 20, 1992).

\textsuperscript{5} The Airline Deregulation Act, \textit{supra} note 1, terminated the Civil Aeronautics Board's regulatory jurisdiction over the airlines on January 1, 1985. \textit{Air Carrier Economic Regulation}, 2 Av. L. Rep. (CCH) 9005 (1989). The Department of Transportation took over antitrust authority in 1985; however, the Department's transferred authority, involving cooperative working arrangements, antitrust exemptions, and mergers and interlocking relationships between carriers, terminated on January 1, 1989. \textit{Id.} Jurisdiction over those issues passed to the domain of the Department of Justice and the Federal Trade Commission, thus subjecting the air carrier industry to standard antitrust precepts. \textit{Id.}


\textsuperscript{8} \textit{In re Domestic Air Transp. Antitrust Litig.}, Second Amended Consolidated Class Action Complaint ¶ 35.

\textsuperscript{9} \textit{Id.} ¶ 26(c).

\textsuperscript{10} Notice of Pendency of Class Action, Proposed Settlements with Certain Defendants, and Hearing, ¶ II.
public and private resources and the available alternatives to private litigation.

II. THE ANTITRUST LAWS: AN OVERVIEW

A. THE SHERMAN ACT

Section 1 of the Sherman Act makes monopolies that unreasonably restrain trade illegal. Although there has been substantial Sherman Act litigation, reported airline industry litigation under the Act is limited. In *Illinois Corporate Travel, Inc. v. American Airlines, Inc.* an agreement whereby an airline had its own reservation and ticketing service that not only sold air travel but also made hotel and rental car reservations in competition with its agents, was held not to be illegal per se under the antitrust laws. Instead, the court held that illegality depended on whether the agreement reduced supply from the consumers' perspective. The court argued that only an agreement among air carriers could accomplish that; therefore, the service did not violate the law. Conversely, in *International Travel Arrangers, Inc. v. Western Airlines, Inc.* an airline's campaign to prevent travel group charters from becoming a competitive threat to its regularly scheduled air service was held to be a violation of section 1 of the

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11 Section 1 of the Sherman Act specifically provides:
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

12 889 F.2d 751, 753 (7th Cir. 1989), cert. denied, 495 U.S. 919 (1990).
13 Id.
Sherman Act. The airline used false, misleading, and deceptive advertising directed at consumers and travel agents.

B. THE CLAYTON ACT

Congress passed the Clayton Act in 1914 in order to supplement the provisions of the Sherman Act.\(^\text{15}\) While section 2 embodies what is commonly known as the Robinson-Patman Act,\(^\text{16}\) section 3 prohibits tying arrangements,\(^\text{17}\) section 7 prohibits certain types of mergers,\(^\text{18}\) and section 8 prohibits certain types of corporate interlocks.\(^\text{19}\) Section 4 of the Clayton Act\(^\text{20}\) provides for a private cause of action in federal court.\(^\text{21}\) In addition,

\(^\text{15}\) Vakérics, supra note 11, § 1.02[2].
\(^\text{18}\) Id. § 18.
\(^\text{19}\) Id. § 19.
\(^\text{20}\) Id. § 15.
\(^\text{21}\) Section 4(a) sets forth the amount of damages as follows:

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy. See Vakérics, supra note 11, § 1.02[3].

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

1. whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
2. whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
section 16 of the Clayton Act provides for injunctive relief.\footnote{22}{Section 16 of the Clayton Act provides:}

\begin{footnotesize}
Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.
\end{footnotesize}

\footnote{23}{DEMPSEY, supra note 2, at 4.}

\footnote{24}{Id.}

\footnote{25}{Id.}

\footnote{26}{Id.}

C. The Market for Air Transportation and Antitrust Theories

Prior to the comprehensive governmental regulation that deregulation sought to eliminate, the air transportation industry operated on a laissez faire economic basis.\footnote{23}{Section 16 of the Clayton Act provides:} Regulation was sought because of "destructive competition,"\footnote{24}{Id.} which drove down prices and caused bankruptcies and mergers. The result was the emergence of monopolies or oligopolies.\footnote{25}{Id.} Regulation was seen as a way to avoid the "potential threats to safety, service and investment . . . on the one hand, and the price-gouging and price discrimination associated with market power in a consolidated industry, on the other."\footnote{26}{Id.}
sponded with the Civil Aeronautics Act of 1938 and the following forty years of regulation.

During the 1960s and 1970s economists began to extol the virtues of optimal allocation of market resources through an economy free of government regulation.\footnote{Id. at 5; see Robert M. Hardaway, Transportation Deregulation (1976-1984): Turning the Tide, 14 Transp. L.J. 101, 106 n.17 (1985); see also William A. Jordan, Airline Regulation in America: Effects and Imperfections (1970); Richard E. Caves, Air Transport and Its Regulators: An Industry Study (1967); Lucile Sheppard Keyes, Federal Control of Entry into Air Transportation (1951).} Regulation was seen as inflating airline costs and deflating airline profits.\footnote{Dempsey, supra note 2, at 5.} Alfred Kahn, former Chairman of the Civil Aeronautics Board (CAB), argued persuasively against regulation of the airline industry. Kahn concluded that CAB regulation:

(a) caused air fares to be considerably higher than they otherwise would be; (b) resulted in a serious misallocation of resources; (c) encouraged carrier inefficiency; (d) denied consumers the range of price/service options they would prefer, and; (e) created a chronic tendency toward excess capacity in the industry.\footnote{Id. See generally Alfred E. Kahn, The Theory and Application of Regulation, 55 Antitrust L.J. 177, 178 (1986); Alfred E. Kahn, Transportation Deregulation . . . and All That, Econ. Dev. Q. 91, 92 (1987).}

The movement towards deregulation\footnote{"Destructive competition" was not seen as a threat to the deregulated air transportation industry (despite pre-regulation conditions):

A justification sometimes offered for regulation is that in the absence of regulation competition would be "destructive." In other words, without regulation, an industry might operate at a loss for long periods . . . . When there is excess capacity in a competitive industry . . . prices can fall far below average cost. This is because individual producers minimize their losses by continuing to produce so long as their variable (avoidable) costs are covered, since they would incur their fixed (overhead) costs whether they produced or not.

What is "destructive" about large and long-lasting losses? Some economists have suggested that they would result in long periods of inadequate investment and slow technical progress which in turn might lead to poor service and periodic shortages . . . .

Another scenario that has sometimes been suggested is that periods of large losses will result in wholesale bankruptcies and the}
Airline Deregulation Act of 1978. Proponents of deregulation thought the airlines would benefit because the industry lacked significant economies of scale. Proponents argued that, absent significant advantages from being a large firm rather than a small firm, there would be no motive to merge. Thus, there would be enough competitors to "satisfy the traditional notion of workable competition."

Even those who argued that economies of scale existed were confronted with the theory that the air transportation market was contestable — that is, the threat of entry shakeout of many small producers with the result that the industry in question becomes highly concentrated in a few large firms. A third and related notion is the possibility that powerful firms might engage in predation. "Destructive competition" seems unlikely in the cases of airlines and trucks.


Alfred Kahn, in his testimony before the House Subcommittee on Aviation said "I do not honestly believe that the big airlines are going to be able to wipe out the smaller airlines, if only because every study we have ever made seems to show that there are not economies of scale." Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation, 95th Cong., 1st Sess. 1137 (1977). Dempsey explains the concept of economies of scale as follows:

Economies of scale are realized when increases in total production simultaneously decrease unit costs. As the scale of production grows, the enterprise becomes more efficient. The classic example of the phenomenon of economies of scale is the enormous cost savings experienced from producing automobiles on an assembly line rather than one car at a time. The cost savings resulting from economies of scale can be attributed to: (1) indivisibilities — a large capital-intensive piece of equipment operates most efficiently at full capacity; and (2) division and specialization of labor — highly specialized labor is more productive labor.

Dempsey, supra note 2, at 7. See generally, ROBERT L. HEILBRONER, ECONOMICS EXPLAINED (1982); WILLIAM G. SHEPARD, THE ECONOMICS OF INDUSTRIAL ORGANIZATION (1979); JOE S. BAIN, BARRIERS TO NEW COMPETITION (1956).
would keep market participants’ prices low.\textsuperscript{36} Because the market was contestable, destructive competition would not result from deregulation.\textsuperscript{37} Those who argued contestability did not deny that the air transportation industry had significant economies of scale, but rather that the natural monopolist would be forced to price at cost because of the threat of potential entry.\textsuperscript{38} In order for contestability to be viable in a particular market, the following three conditions must be satisfied: (1) the potential entrant must have access to the same technology as the incumbent; (2) entry into and exit from a particular market must be without cost; and (3) consumers must respond to a price reduction on the entrant’s part more quickly than the incumbents can respond with a matching price cut.\textsuperscript{39} Finally, Alfred Kahn argued that price wars were not likely to result:

First the assumption that you are going to get really intense, severe, cut throat competition just seems to me unrealistic when you are talking about a relatively small number of carriers who meet one another in one market after another. We don’t find in American industry generally when you have a few relatively large carriers competing with one another that they engage in bitter and extended price wars.\textsuperscript{40}

Experience in post-deregulation air transportation industry does not, unfortunately, bear out the optimistic predictions of Alfred Kahn and others. First, there has been national concentration of airlines. Between 1979

\textsuperscript{36} Id. at 7-10. Melvin Brenner has noted that failure of these researchers to find economies of scale may be because they were analyzing the industry as it existed in its regulated environment. Hub and spoking to capture economies of scale was a post-deregulation phenomenon as was the use of frequent flier programs to capture customer loyalty. Melvin A. Brenner, Airline Deregulation — A Case Study in Public Policy Failure, 16 TRANSP. L.J. 179, 186-88 (1988).

\textsuperscript{37} See generally, William J. Baumol et al., Contestable Markets and the Theory of Industry Structure (1982).

\textsuperscript{38} Dempsey, supra note 2, at 7.

\textsuperscript{39} Id. at 8.

\textsuperscript{40} Aviation Regulatory Reform: Hearings Before the Subcomm. on Aviation of the Comm. on Public Works and Transportation, 95th Cong., 2d Sess. 178-79 (1978).
and 1988, there were fifty-one airline mergers and acquisitions. While the Department of Transportation, after December 31, 1984, was charged with insuring against "unfair, deceptive, predatory, or anticompetitive practices" and avoiding "unreasonable industry concentration, excessive market domination" that would enable the carriers to "unreasonably . . . increase prices, reduce services or exclude competition," it approved every merger submitted to it. Because of these mergers, the airlines are carrying a staggering amount of long-term debt.

Furthermore, competition with airlines under the protection of bankruptcy has forced healthy airlines to price below cost just to be competitive. In 1992, the airlines endured a third straight year of heavy losses. Although now showing modest profits, American Airlines' net 1992 loss alone was $935 million, and the airline began to consider restricting the regions in which it operates.

A second significant result of deregulation has been the emergence of the hub and spoke system. A hub is an airport dominated by a single airline. Airlines have constructed a "hub and spoke" system by "funneling their arrivals and departures into and out of hub airports where they dominate the arrivals, departures, and infrastructure." The hub and spoke system hurts the consumer
because the airlines have left the competitive smaller markets in favor of servicing the larger hub markets.\textsuperscript{51} Additionally, fares have increased for those passengers traveling to and from hub cities because of concentration.\textsuperscript{52} Also, routes are longer because many airlines travel out of the way merely to accommodate the hub.\textsuperscript{53}

Finally, the contestability theory has proven not to prevent monopolistic behavior of market participants.\textsuperscript{54} The premise of contestability was the threat of entry; the current environment demonstrates that such threat is unlikely. First, in most major airports, there are no available landing slots.\textsuperscript{55} Even if an incumbent were willing to lease a landing slot, that incumbent could extract monopoly rents.\textsuperscript{56} A second contributor to the debunking of the contestability theory is the ownership of computer reservation systems (CRSs).\textsuperscript{57} United Airlines and American Airlines own CRSs from which almost ninety percent of the tickets are sold.\textsuperscript{58} In order to gain access to the valuable reservation systems, many smaller airlines have affiliated with the major carriers.\textsuperscript{59} A third reason that entry into the air transportation market is subject to significant barriers is the frequent-flyer programs instituted by the

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 18; see also William Stockton, \textit{When Eight Carriers Call the Shots}, N.Y. Times, Nov. 20, 1988, at 3-1; Thomas Hamburger, \textit{Fares Rose With NWA's Dominance}, Minneapolis Star Trib., Dec. 1988, at 1A. \textit{See generally, General Accounting Office, Air Fares and Service at Concentrated Airports (1989); General Accounting Office, Airline Competition (1988).}

\textsuperscript{53} Dempsey, \textit{supra} note 2, at 30-31.
\textsuperscript{54} Id. at 21-25.
\textsuperscript{55} Hardaway, \textit{supra} note 27, at 107.
\textsuperscript{56} Dempsey, \textit{supra} note 2, at 21. For example, in Detroit, Northwest subleases a landing slot to Southwest Airlines for 18 times the amount what Northwest itself pays. Id.

\textsuperscript{57} See generally, \textit{General Accounting Office, Airline Competition: Impact of Computerized Reservations Systems} (1986). Indeed, the focus of congressional action has been on the CRSs. \textit{See infra} part V.B.1. For an interesting article challenging the notion that CRSs reduce competition, see Andrew N. Kleit, \textit{Computer Reservations Systems: Competition Misunderstood}, 1992 Antitrust Bull. 833, 860-61.

\textsuperscript{58} Dempsey, \textit{supra} note 2, at 22.

\textsuperscript{59} Id. Small carriers affiliating themselves with the megacarriers include those which have been renamed as United Express, Continental Express and American Eagle. Id.
megacarriers that create consumer loyalty. As noted by one commentator:

Once committed to a carrier's frequent flyer program and having some investment in accumulated mileage, business travelers often prefer that carrier over its rivals even when the rivals' flights are cheaper, especially since most business travel is not paid for by the individual flying, but by his or her firm.

Other barriers to entry exist that make contestability unlikely. These barriers include high costs of labor for new entrants and price matching by the incumbents.

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60 Id.
61 Id. Not only do frequent flyer programs create passenger loyalty, but because of bonuses paid to agents who generate a target revenue level, loyalty is also created among travel agents. Id.
62 According to Dempsey:

[Although new entrants enjoyed significantly lower labor costs in the inaugural years of deregulation, the squeeze on carrier profits unleashed by deregulation has forced management to exact serious concessions in terms of labor wages and work rules. Some, like Continental, Eastern, and TWA, have effectively crushed their unions. Others, like United, American, and Delta, established two-tier pay scales, with B grade pay for newly hired employees. Thus, the margin of labor cost and productivity between a new entrant and an established airline has been significantly narrowed.]

Dempsey, supra note 2, at 23.
63 Dempsey offers the following illustration:

For example, suppose our new carrier, Air Omaha, does some calculations and finds that if it offers a $49 fare between Omaha and Minneapolis, it will fill about 70 percent of its seats, because the incumbent, Northwest, offers no fare so low. Because of lower labor costs and the use of leased, relatively old equipment, let us assume Air Omaha's break-even load factor is a modest 55 percent. So, Air Omaha begins operations and rolls in a healthy profit, right?

Wrong. Northwest matches the $49 fare, and Air Omaha's load factors drop to, say 35 percent, well below its break even load factor. Not only can Northwest withstand the loss because of its deeper pocket, but the discount fare actually costs it little, because it is only offered to passengers traveling between the two points (origin and destination traffic). Remember, Northwest has a major hub in Minneapolis, and most of its passengers are traveling from or to points beyond — in industry jargon, they constitute "beyond-segment feed"; they are not offered the bargain fare. Thus, only a portion of Northwest's passengers are enjoying the discount. Moreover, many of the business travelers in the city-pair market will be willing to pay more than $49 because they are addicted to Northwest's frequent flyer program. Air Omaha must eventually exit the market, for ordi-
III. *IN RE DOMESTIC AIR TRANSPORTATION ANTITRUST LITIGATION*

A. FACTS

In 1990 a class action lawsuit, *In re Domestic Air Transportation Antitrust Litigation*,\(^6\) was instituted against the Airline Tariff Publishing Company, Inc. (ATPC), American Airlines, Inc. (American), Continental Airlines, Inc. (Continental), Delta Airlines, Inc. (Delta), Midway Airlines, Inc. (Midway), Northwest Airlines, Inc. (Northwest), Pan

\(^6\) The class action originated from about 40 separate suits in federal courts around the country. In November, 1990, the federal Judicial Panel on Multidistrict Litigation consolidated the suits into *In re Domestic Air Transportation Antitrust Litigation* and transferred it to Atlanta. The following are decisions resulting from the litigation: *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297 (N.D. Ga. 1993) (approving settlement and award of attorneys fees); *In re Domestic Air Transp. Antitrust Litig.*, No. 1:90-CV-2485-MHS, 1992 WL 357,433 (N.D. Ga. Nov. 2, 1992) (granting injunction precluding Advanced Telecom Services and Spot Communications from advertising or using "1-900" calls to provide information and claim forms to class members); *In re Domestic Air Transp. Antitrust Litig.*, 144 F.R.D. 421, 424 (N.D. Ga. 1992) (denying objectors' motion to intervene on the basis that representation was adequate and that "[c]lass members who object to a settlement do not have an absolute right to conduct discovery and presentation of evidence"); *In re Domestic Air Transp. Antitrust Litig.*, 142 F.R.D. 354 (N.D. Ga. 1992) (holding plaintiffs entitled to transcripts of civil investigative demand depositions taken by Department of Justice of employees and ex-employees over whom defendants had control); *In re Domestic Air Transp. Antitrust Litig.*, No. 1:90-CV-2485-MHS, 1992 WL 120,351 (N.D. Ga. Apr. 8, 1992) (denying defendants' motion to compel plaintiffs to respond to contention interrogatories); *In re Domestic Air Transp. Antitrust Litig.*, No. 1:90-CV-2485-MHS, 1992 WL 114,423 (N.D. Ga. Mar. 11, 1992) (requiring deposition of defendant Delta Air Lines Senior Pricing Analyst ordered to continue in "orderly and cooperative manner"); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 556 (N.D. Ga. 1992) (ruling that plaintiffs were entitled to discover copies of civil investigative demands and airlines' answers, and were permitted to contact defendants' former employees ex parte, and that defendants were permitted to produce only official comments as well as nonprivileged documents to Department of Justice, Department of Transportation and United States Congress relating to fares, computer systems, and airline hubs); *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534 (N.D. Ga. 1992) (approving the method and content of notification to class members); *In re Domestic Air Transp. Antitrust Litig.*, 137 F.R.D. 677 (N.D. Ga. 1991) (certifying nationwide class of airline ticket passengers); *In re Domestic Air Transp. Antitrust Litig.*, No. 1:90-CV-2485-MHS, 1990 WL 358,009 (N.D. Ga. Dec. 21, 1990) (approving pre-trial order for organization and conduct of litigation).
American World Airways, Inc. (Pan Am), Trans World Airlines, Inc. (TWA), United Airlines, Inc. (United), and USAir, Inc. (USAir).65 The plaintiffs66 charged that the

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65 American, Continental, Delta, Midway, Northwest, Pan Am, TWA, United, and USAir will be referred to collectively as “defendant airlines.”

The suit was initiated, in part, in response to a government investigation instigated in 1989 to determine whether the airlines conspired to fix prices by signaling each other about fare plans through ATPC. On December 21, 1992, the Department of Justice filed a civil antitrust suit against ATPC, Alaska Airlines, Inc., American, Continental, Delta, Northwest, TWA, United, and USAir. As in In re Domestic Air Transportation Antitrust Litigation, the suit alleged “that the airlines are operating a computerized fare exchange system in a manner that unreasonably restrains price competition . . . .” United States v. Airline Tariff Publishing Co., 7 Trade Reg. Rep. (CCH) 45,092 (D.D.C. Dec. 21, 1992). The Government has asked for an injunction to stop airline efforts to fix prices for the next ten years. See Betsy Wade, Decision Seen in Airline Suit, N.Y. TIMES, Jan. 3, 1993, at E3.

Under a proposed consent decree between the government, USAir, and United, the following conduct would be prohibited:

(A) agreeing with any other airline to fix, establish, raise, stabilize, or maintain any fare;
(B) disseminating any first ticket dates, last ticket dates, or any other information concerning the defendant’s planned or contemplated fares or changes to fares;
(C) making visible or disseminating its own tags or any other similar designating mechanism to any other airline;
(D) making visible or disseminating to any other airline any fare that is intended solely to communicate a defendant’s planned or contemplated fares or changes to fares;
(E) making visible or disseminating two or more footnote designators that identify footnotes that contain identical information, or making visible or disseminating any footnote designator that identifies a footnote that contains no information; and
(F) using fare codes that convey information other than fare class or terms and conditions of sale or travel.

United States v. Airline Tariff Publishing Co. [Proposed Final Judgment], 7 Trade Reg. Rep. (CCH) 50,742, at 51,538 (D.D.C. Dec. 29, 1992). On March 17, 1994, the Department of Justice settled with the six remaining airlines on essentially the same terms as the USAir and United settlement. See infra text accompanying notes 141-143.

66 On August 7, 1991, the plaintiffs’ class was certified. In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677 (N.D. Ga. 1991). The court certified the class despite recognized difficulties in identifying all class members. Instead, the court recognized that if the class could not be certified, the action most likely would not be brought due to the de minimis nature of individual plaintiff’s claims. Id. at 694. The August 7, 1991 order was amended on July 13, 1992 defining the class as:

All persons in the United States who, during the period January 1, 1988 to June 30, 1992, were the purchasers of domestic airline passenger tickets from American Airlines, Inc., Continental Airlines, Inc., Delta Airlines, Inc., Midway Airlines, Inc., Northwest Airlines,
defendants violated the antitrust laws by engaging in an unlawful conspiracy to fix prices for domestic air transportation. The plaintiffs alleged that the defendant airlines used the ATPC computer system to exchange current and future price information, to signal price changes, and to solicit agreement as to price changes. Plaintiffs also alleged that the airlines allocated certain airline markets. As a result of this activity, plaintiffs argued that prices for airline tickets for such flights were higher than they otherwise would have been. Furthermore, plaintiffs also alleged that because of this conspiratorial activity, competition in the passenger air transportation industry had been restrained. The class sought injunctive relief as well as monetary relief, including treble damages, costs of suit, and reasonable attorneys' fees.

B. Legal Theories

Plaintiffs brought suit under sections 4 and 16 of the Clayton Act. Section 4 governs suits by persons injured by "reason of anything forbidden in the antitrust laws." The law provides a private cause of action with jurisdiction in federal court. Furthermore, a successful claim-
ant may recover treble damages, interest, costs of suit, and reasonable attorneys’ fees.\textsuperscript{76} Section 16 of the Clayton Act permits the party suing for antitrust violations to ask for and receive injunctive relief.\textsuperscript{77}

Plaintiffs also alleged that ATPC and the defendant airlines violated section 1 of the Sherman Act.\textsuperscript{78} Section 1 provides that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”\textsuperscript{79}

\section*{C. Settlement}

In July 1992, the defendants agreed to a settlement that was approved in March 1993. The settling defendants were American, Continental, Delta, Northwest, TWA, United, USAir, and ATPC.\textsuperscript{80} Although the defendant airlines denied any wrongdoing, the total settlement in the case was $458 million.\textsuperscript{81} Of that amount, $408 million

\begin{table}[h]
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\begin{tabular}{|l|l|l|l|l|}
\hline
Certificate & Round Trip & Certificate & Round Trip \\
Amount ($) & Price ($) & Amount ($) & Price ($) \\
\hline
10 & 50 or over & 25 & 100-200 \\
25 & 250 or over & 50 & 201-300 \\
50 & 500 or over & 75 & 301-400 \\
75 & 750 or over & 100 & 401-500 \\
100 & 1000 or over & 125 & 501-750 \\
125 & 1250 or over & 150 & 751-1000 \\
150 & 1500 or over & 200 & 1000+ \\
\hline
\end{tabular}
\caption{Certificate Round Trip Certificate Round Trip}
\end{table}

\textsuperscript{80} Notice of Pendency of Class Action, Proposed Settlements with Certain Defendants, and Hearing § III.

\textsuperscript{81} Id. at 1. Despite the seemingly generous settlement, the certificates are subject to significant limitations. Most notably, the maximum amount of certificates issued that may be used as a credit against a single round trip ticket is determined according to the following chart:

\begin{table}[h]
\centering
\begin{tabular}{|l|l|l|l|l|}
\hline
Certificate & Round Trip & Certificate & Round Trip \\
Amount ($) & Price ($) & Amount ($) & Price ($) \\
\hline
10 & 50 or over & 25 & 100-200 \\
25 & 250 or over & 50 & 201-300 \\
50 & 500 or over & 75 & 301-400 \\
75 & 750 or over & 100 & 401-500 \\
100 & 1000 or over & 125 & 501-750 \\
125 & 1250 or over & 150 & 751-1000 \\
150 & 1500 or over & 200 & 1000+ \\
\hline
\end{tabular}
\caption{Certificate Round Trip Certificate Round Trip}
\end{table}

Id. § IV. To put this in perspective, if a ticket on American costs $600 and the purchaser has certificates worth $600, that purchaser may only use $75 to offset the price of the trip. Furthermore, the settlement agreement provides that “[c]ertificates may not be used with any other certificates, bonuses, award certificates, or frequent flier awards . . . .” Id. In addition, class members who receive certificates of more than $100 in face value “will receive certificates for $100 that
was to be in the form of certificates, and $50 million in the form of cash. Northwest and TWA denied any wrongdoing or liability but agreed to certain covenants relating to fares for a period of five years after the entry of a final judgment approving the settlements. Also included in the settlement documentation was an agreement by the defendants to "establish and/or maintain a formal antitrust compliance program to be administered with, and approved by, legal counsel." Pursuant to the agreement and subject to court approval, no amount of the fund could be refunded to the airlines. A Settlement Administration Committee, comprised of four persons recommended by counsel for plaintiffs and four persons recommended by the counsel for carriers, would be responsible for administration of the various settlements. The court would retain jurisdiction over the implementation and enforcement of the settlement agreement.

Despite the seemingly generous settlement offer, a number of objections have been made. Critics argue that the airlines, instead of being subjected to punitive or compensatory measures, will actually benefit from the settlement. First, critics charge that the discount coupons offered as part of the settlement are in reality a marketing tool that would boost off-peak travel because the coupons are valid as of the date of mailing, and to the extent practicable, the additional certificates will be evenly split between certificates immediately effective and certificates that become effective one year after the date of distribution." Id. Certificates issued by American, Continental, Delta, TWA, United and USAir must be redeemed within three years while certificates issued by Northwest must be redeemed within two. Certificates are redeemable only when used to purchase tickets directly from the airlines; they will not be redeemable by travel agents. Id. Finally, the certificates are subject to blackout period limitations around the New Year, Thanksgiving, and Christmas holidays. Id.

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82 Id. § III.
83 Id.
84 Id.
85 Agreement of Settlement ¶ 5(g), Domestic Air Transp. (No. 1:90-CV-2485-MHS & MDL No. 861).
86 Id. ¶ 8.
87 Id. ¶ 17.
are subject to black-out periods. Furthermore, the coupons may be used for no more than ten percent of a ticket's purchase price, thus requiring a holder of $100 worth of coupons to purchase $1,000 worth of tickets. The $408 million of coupons issued in the settlement will translate into four billion dollars for the airlines if every coupon is used. Skeptics of the settlement are quick to point out that Judge Shoob, the judge presiding over the matter, has expressed doubt about the merits of the suit. Thus, while the defendants would likely succeed in a motion to dismiss or a summary judgment motion, they have more to gain from a settlement that generates revenue. Furthermore, some airlines believe that the cost of litigating the suit would exceed the cost of settlement. Indeed, Delta Air Lines has termed the suit "legal extortion."

The settlement has also been criticized as being overly complex. Three types of claim forms exist and those who purchased over $2,500 worth of tickets over the four year period covering June 1988 to June 1992 must "[prepare and retain] a summary compilation of each ticket for which claim is made showing at least the date, airline, itinerary, and price paid." Preparing that summary will be necessary for frequent travelers, but may also pose diffi-

89 Id. Black-out holidays include Thanksgiving, Christmas and the New Year.
90 Id.
91 Id.
92 Id. In that same article, Judge Shoob has been quoted as saying that "the chances of plaintiffs recovering [are] not good" and that the case "would have a hard time surviving a motion for summary judgment." Id.
93 Id. "Beverly Moore, editor of Class Action Reports, a newsletter that has followed such cases for 20 years, said discount coupons are typically discarded by consumers. She said that, at most, 15 percent of the coupons would be redeemed, or about $61.2 million worth." Id.
94 Id.
95 Id. Following approval of the settlement, it was reported that while the airlines denied using the computerized system to raise ticket prices, they agreed to settle in order to "avoid a lengthy, costly trial." Julie Schmit, Fliers' Rebates in Holding Pattern, U.S.A. TODAY, June 11, 1993, at 2B.
96 The Antitrust Mess; Airline Price-Fixing Suit, TRAVEL WKLY, Nov. 5, 1992, at 20.
97 Notice of Pendency of Class Action, Proposed Settlements with Certain Defendants, and Hearing, Airlines Antitrust Long Claim Form C.
culties. Beyond the basic difficulty of researching each ticket purchased during the past four years, if airlines are asked for copies of old tickets, most will not be able to provide those beyond a year. Moreover, tickets that can be provided will be subject to a $10 or $15 charge per ticket copied.\(^9\)

Finally, there has been extensive criticism, as well as legal battles, over the attorneys' fees.\(^9\) The plaintiffs' fees asked by the lawyers break out as follows:

<table>
<thead>
<tr>
<th>Firm</th>
<th>Total Hours</th>
<th>Lodestar*</th>
<th>High Rate</th>
<th>Low Rate</th>
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<td>CO-LEAD COUNSEL</td>
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<td>Kohn, Nast &amp; Graf (Philadelphia)</td>
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</tr>
<tr>
<td>Carr, Tabb &amp; Pope (Atlanta)</td>
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</tbody>
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lawyers are asking for 5.24% of the $458 million settlement value, or $24 million. Objectors argue that while members of the plaintiff class are being compensated with highly restrictive coupons, the lawyers are asking for fees based on the total settlement value. Furthermore, the fees will be deducted from the cash portion of the $458 million settlement. In approving the settlement, Judge Shoob held that the attorneys were to receive only 5.25% of $305 million, "the median value in the range of values of the settlement determined by the Court.""  

As a final indication that even an attempt to avoid lengthy litigation may not cut short this complex matter, the settlement is being appealed to the Eleventh Circuit. Appellants claim that class members should be paid in cash rather than in vouchers and argue that the settlement, instead of compensating injured class members, is actually a marketing tool.

IV. PRIVATE ANTITRUST LITIGATION IN A DEREGULATED ENVIRONMENT

A. SUMMARY JUDGMENT IN ANTITRUST LITIGATION

Private litigation is exceedingly expensive, time consuming, and subject to many procedural and substantive hurdles. This statement is even more true for antitrust litigation. In Matsushita Electric Industrial Co. v. Zenith Radio

Freedman, Boyd, Daniels, Peifer, Hollander, Guttman & Goldberg
(Albuquerque, NM) 2,347 $364,674 $225 $100
Keller Rohrback
(Seattle) 1,843 $244,407 $205 $120

*Lodestar represents actual costs. Plaintiffs' lawyers are asking that the lodestar be tripled to reflect the complexity and contingency of the case. Okrasinski, Lawyers Ask $24 Million, supra note 99, at 21.

100 Okrasinski, Lawyers Ask $24 Million, supra note 99, at 21.
101 McMenamin, supra note 98, at 272.
103 Schmit, supra note 95, at 2B.
104 Id.
after years of litigation, the Court held that summary judgment in favor of the defendants was appropriate. In 1974, American consumer electronic products (CEPs) manufacturers Zenith and National Union Electric Corporation (NUE) filed suit against twenty-one Japanese manufacturers of CEPs. Zenith and NUE alleged that the Japanese manufacturers illegally conspired to drive the American firms from the American CEP market. After several years of discovery, the Japanese manufacturers moved for summary judgment on all claims against them. The district court granted the defendants’ motion, but the court of appeals reversed, finding that “a reasonable factfinder could find a conspiracy to depress prices in the American market in order to drive out American competitors....” \(^{106}\) In a detailed examination of the appropriate standards of summary judgment, the Supreme Court reversed the court of appeals and reinstated the summary judgment against Zenith and NUE.\(^ {107}\)

In examining what is necessary for a plaintiff in an antitrust suit to overcome a motion for summary judgment, the Court held that respondents must show that there was a genuine issue of material fact.\(^ {108}\) There are two components that make up this standard:

First, respondents must show more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct. . . . Second, the issue of fact must be “genuine.” When the moving party has carried its burden under [Federal Rules of Civil Procedure] 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.\(^ {109}\)

The Court then found that if claims made by the respondents did not raise a material issue of fact, then the

\(^{105}\) 475 U.S. 574 (1986).

\(^{106}\) Id. at 581.

\(^{107}\) Id. at 598.

\(^{108}\) Id. at 585.

\(^{109}\) Id. at 586 (citations omitted).
respondents were required to provide "more persuasive evidence to support their claim than would otherwise be necessary." Further, with respect to an antitrust claim, the Court noted that while in a summary judgment motion the evidence is to be viewed in a light most favorable to the non-moving party, under antitrust laws the range is limited as to the possible inferences from ambiguous evidence. Finally, the Court held that in a summary judgment or directed verdict motion, the respondents must show that "the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents."

Notably, in analyzing whether respondents had adduced sufficient evidence to survive the summary judgment motion, the Court considered whether the petitioners had a motive to engage in the predatory pricing scheme. The Court held that "[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."

The Court held that on remand the court of appeals was free to consider whether

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10 Id. at 587.
11 Id. at 588.
12 Note that the parallel to directed verdict is a departure from previous summary judgment principles. Summary judgment, by definition, is a motion made prior to trial. Evidence available includes what has been obtained through discovery — interrogatories, affidavits, depositions, and requests for documents. A directed verdict motion, on the other hand, occurs after the non-moving party has had a chance to present evidence in trial. Because the two scenarios are substantively different, the parallel drawn by the court has the practical effect of increasing the burden on the non-moving party to respond to the summary judgment motion. Jane L. Dolkart, Summary Judgment in the Federal Courts After the Supreme Court Trilogy, 18 Barrister 48-52 (1991).
13 Matsushita, 475 U.S. at 588.
14 Id. at 595.
15 Id. at 596-97. Note that the Court, as a matter of law, is making the determination that lack of motive does not give rise to an inference of conspiracy.
there is other evidence that is sufficiently unambiguous to permit a trier of fact to find that petitioners conspired to price predatorily for two decades despite the absence of any apparent motive to do so. The evidence must 'tend[d] to exclude the possibility' that petitioners underpriced respondents to compete for business rather than to implement an economically senseless conspiracy.\textsuperscript{116}

\textit{Matsushita} was further clarified in \textit{Eastman Kodak Co. v. Image Technical Services, Inc.}\textsuperscript{117} There the Court held that there was no "special burden on plaintiffs facing summary judgment in antitrust cases."\textsuperscript{118} Instead, the reasonable inference standard was applicable in all summary judgment motions. In \textit{Kodak} the allegations stated that Kodak had unlawfully tied the sale of service for its copying and micrographic equipment to the sale of parts in violation of section 1 of the Sherman Act. Plaintiffs also alleged that Kodak unlawfully monopolized the sale of service and parts for such equipment in violation of section 2 of the Sherman Act. The Court held that Kodak was required to show that "despite evidence of increased prices and excluded competition, an inference of market power [was] unreasonable."\textsuperscript{119} Accordingly, the Court held that Kodak was not entitled to summary judgment.

In order for a plaintiff to survive a defendant's motion for summary judgment in antitrust litigation, the plaintiff, as the non-moving party, must provide evidence sufficient to create a genuine issue of material fact.\textsuperscript{120} Further, the non-moving party must provide sufficient evidence such that when the court \textit{weighs} it, as provided by \textit{Matsushita}, the court will find a genuine issue of material fact.\textsuperscript{121} Making the plaintiff's burden even more difficult in airline

\textsuperscript{116} \textit{Id.} at 597-98.
\textsuperscript{118} \textit{Id.} at 2083.
\textsuperscript{119} \textit{Id.}
\textsuperscript{120} \textit{Matsushita}, 475 U.S. at 585-86.
\textsuperscript{121} \textit{Id.} at 600 (White, J., dissenting) (noting that the majority's opinion "suggests that a judge hearing a defendant' motion for summary judgment in an antitrust case should go beyond the traditional summary judgment inquiry and decide for himself whether the weight of the evidence favors the plaintiff.").
cases will be industry executives' argument that while accusations of antitrust activity may be leveled against the industry, the airlines' overall dismal performances tend to call into doubt whether antitrust activity existed.\textsuperscript{122}

Also important to consider is whether any plaintiff will be willing to make the financial investment necessary to pursue the litigation.\textsuperscript{123} \textit{Matsushita} made it clear that the non-moving party must provide evidence in response to a summary judgment motion.\textsuperscript{124} Although the requirement may have been softened somewhat by \textit{Kodak}, it still may be difficult to assemble this evidence in time to respond to a motion for summary judgment made shortly after the pleadings have been filed. Also, with limited discovery available,\textsuperscript{125} the plaintiff may not be able to assemble sufficient evidence to ward off the summary judgment motion.

\textbf{B. Effect of Settlement on Antitrust Activities}

Settlement, while reducing the costs of pursuing litigation and providing timely compensation to injured parties, has its disadvantages. First, there is no court-ordered injunctive relief; the only equivalent is a negotiated forbearance. While the settlement in \textit{In re Domestic Air Transportation Antitrust Litigation} includes provisions for implementation of antitrust compliance programs, who will insure that the compliance programs are carried out? Further, one of the settlement's terms is that the airlines admit no wrongdoing. In this respect, it may be difficult

\textsuperscript{122} This argument may lose some of its effectiveness if a distinction is made between poor performance and monopolistic activities. For instance, the airlines may be acting in a monopolistic fashion (e.g. price fixing, etc.) and also be expanding their markets beyond consumer demand. See Byron Acohido, \textit{Official Says Airlines' Growth Outpaced Demand}, \textit{Seattle Times}, Feb. 17, 1993, at C8 (Patrick Murphy, Acting Assistant Transportation Secretary, said that "the nation's airlines — apparently with good intentions — contributed to their own financial problems by expanding too much").


\textsuperscript{124} \textit{Matsushita}, 475 U.S. at 597.

\textsuperscript{125} See \textit{Fed. R. Civ. P.} 56.
to implement an antitrust compliance program that effects any sort of change if airline management believe they did nothing wrong.

Owen M. Fiss, in his article Against Settlement, argued that settlement was inappropriate in four types of cases:

[T]hose cases in which there are significant distributional inequalities; those in which it is difficult to generate authoritative consent because organizations or social groups are parties or because the power to settle is vested in autonomous agents; those in which the court must continue to supervise the parties after judgment; and those in which justice needs to be done, or to put it more modestly, where there is a genuine social need for an authoritative interpretation of law.

Notably, In re Domestic Air Transportation Antitrust Litigation fits neatly within the third category — those cases which the court must continue to supervise. The fact that the airlines may have engaged in antitrust activities implies the need for injunctive relief, and compliance with an injunction is necessary to achieve the goal of the litigation.

Arguably, there is merit to encouraging settlement in complex litigation. Obviously, the costs of litigation decrease whenever trial is avoided. Others have also argued that settlement is preferable to full litigation on the merits because settlement “rests on the consent of both parties and avoids the cost of a lengthy trial.” There are dangers in the settlement procedure, however. For example, consent to a settlement agreement is often coerced by a party with superior bargaining power. In addition, the absence of trial and judgment renders subsequent judicial involvement troublesome. Finally, settlement agreements may not be vigorously enforced because the courts generally decline to use their contempt power to do so.

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127 Id. at 1087.
128 Id. at 1075.
129 Id. at 1084.
Fiss argues that "[c]ourts do not see a mere bargain between the parties as a sufficient foundation for the exercise of their coercive powers." Thus, while an injunction may provide a court with what it sees as an adequate basis from which to act, a settlement which provides for antitrust compliance programs may not. Violation of an injunction may produce significantly different results than violation of a settlement agreement.

Settlement also threatens the value of a judicial resolution. Professor Michelman identified four litigation values:

*Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. *Participation values* reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their wills "counted," in societal decisions they care about. *Deterrence values* recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

In addition to the above values which focus on protection of individual rights, there is an institutional demand for the development of a body of precedent. Excessive settlement of antitrust litigation may threaten the ability of courts and companies to discover how a law applies to limit or encourage specific actions.

**C. Other Detriments of Private Antitrust Litigation**

*In re Domestic Air Transportation Antitrust Litigation* demonstrates how the use of private litigation can be inefficient, duplicative, and costly. The settlement in this case did

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130 Id.

not require the defendants to admit liability; therefore, there is little hope that they will not repeat the same conduct. In addition, efforts of private litigants are often duplicated by the government. Moreover, settlement incurs costs that seem to benefit the lawyers and even the defendants more than the injured plaintiffs.

Further, as evidenced by Matsushita, antitrust litigation can be extremely time-consuming. The Matsushita lawsuit was commenced in 1974 and it was not until 1986 that the Supreme Court decided that summary judgment was proper unless additional unambiguous evidence could be provided. Given this time frame, it is not surprising that the rational course of action would be early settlement.

In In re Domestic Air Transportation Antitrust Litigation, although only a few years have passed, Pan Am and Midway are defunct, and Continental is struggling to emerge from bankruptcy. Aside from the near impossibility of obtaining compensation from these companies, the effect of any injunctive relief on the remaining market participants will be negligible if the competitive environment has contracted too much.

132 See United States v. Airline Tariff Publishing Co., 6 Trade Reg. Rep. (CCH) ¶ 45,092, at 44,618 (D.D.C. Dec. 21, 1992). This case alleges the same violations as alleged in In re Domestic Air Transportation Antitrust Litigation. Indeed, the class action based its allegation on the government investigation. See also infra notes 138-154 and accompanying text.

133 McMenamin, supra note 98, at 272.

134 According to one study, multi-district litigation cases averaged 5.7 years in duration and 968 docket entries per consolidated case. Steven C. Salop & Lawrence J. White, Economic Analysis of Private Antitrust Litigation, 74 Geo. L.J. 1001, 1009 (1986). The In re Domestic Air Transportation Antitrust Litigation case was a result of consolidation by the Panel on Multidistrict Litigation.


136 Even with settlement, litigation can be time consuming and costly. The In re Domestic Air Transportation Antitrust Litigation was filed in 1990 and settled in 1993. However, an appeal of Judge Shoob’s approval of the settlement has been filed and it may be years before class members receive their vouchers. See Schmit, supra note 95.

137 Noted airline analyst Morten Beyer wrote an open letter to President Clinton entitled “Return to Reason” in which he stated:

If prosperity is to return, it will require some control of rates and routes to succeed. It is not enough to rely on the ex post facto pro-
V. ALTERNATIVES TO PRIVATE LITIGATION

A. DEPARTMENT OF JUSTICE/DEPARTMENT OF TRANSPORTATION

Currently, individuals are bringing private actions which rarely, if ever, result in complete judicial adjudication. The Department of Justice (DOJ), by way of the Antitrust Division, is also charged with investigating antitrust activities in the airline industry.

On December 21, 1992, the DOJ filed suit against the Airline Tariff Publishing Co. (ATPC), Alaska Airlines, American, Continental, Delta, Northwest, TWA, United, and USAir. The lawsuit, of which In re Domestic Air Transportation Antitrust Litigation was a partial result, charged that the airlines were using ATPC's computerized fare network to exchange information regarding price increases, thereby conspiring to unreasonably restrain price competition. The lawsuit filed by the DOJ was the result of a three year investigation into activities of the airlines. On March 17, 1994, the DOJ announced that six remaining airlines had agreed to a settlement whereby any new fares must be made available for sale when filed into the ATPC system, and the only time an airline can indicate the beginning and end of a fare sale is when the promotion has been widely advertised in newspapers or other media. Notably absent from the settle-

visions of the anti-trust laws — new airlines will be long dead before lawyers, courts and government authorities get through with their end of the process.


140 Id.

141 See supra note 139.

ment were monetary penalties of any kind. Moreover, the airlines did not admit guilt and instead credited settlement to the desire to avoid mounting legal costs.  

Whether the DOJ effort in this case was sufficient to vindicate antitrust policies is questionable. Certainly, the consent decree included the important injunctive relief component; however, without monetary penalties, the deterrent effect of the lawsuit may be minimal.

Another way to determine whether efforts to enforce antitrust laws through the Department of Transportation (DOT) and the DOJ are effective is to compare those efforts with efforts made in other deregulated industries. Despite antitrust laws, under deregulation, the railroad, airline, bus, and motor carrier industries have become more highly concentrated than at any other time in their history. Mergers in these industries have been particularly prevalent in light of the competitive environment of economic deregulation and the anemia created by traffic dilution. Given a choice between merger and bankruptcy, most companies choose the former.

Although almost no airline mergers have been given antitrust immunity under section 414 of the Federal Aviation Act, there has been no private antitrust action in

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144 The government, in deciding not to impose monetary penalties, may have felt that the settlement exacted in the civil suit provided sufficient deterrence. This hypothesis is weakened somewhat if the civil suit settlement is viewed as compensating plaintiffs for injuries rather than deterring unlawful conduct. Moreover, any deterrent effect that the civil suit settlement may provide could be wholly outweighed by the increase in airline travel encouraged by issuance of certificates. See supra text accompanying note 89.

145 Dempsey, supra note 2, at 47.

146 Id.

147 Id.

148 Id. at 48. During the final days of the Bush Administration, blanket antitrust immunity was granted to a Commercial Cooperation and Integration Agreement between KLM Royal Dutch Airlines and Northwest Airlines. In the matter of The Acquisition of Northwest Airlines by Wings Holdings, Inc., 2 Aviation L. Rep. (CCH) ¶ 22,876 (Dept. of Transp., Order No. 93-1-11, Jan. 11, 1993; as amended Jan. 12, 1993). Section 414 of the Federal Aviation Act gives the DOT discretion to grant antitrust immunity for an agreement approved under section 412 to the
opposition to the mergers.\textsuperscript{149} Also, since the DOT assumed jurisdiction over airline mergers, acquisitions, and consolidations on December 31, 1984, it has approved every airline merger submitted to it.\textsuperscript{150}

Another factor contributing to the relatively ineffective use of the antitrust laws in the airline and other transportation industries is the lack of political pressure imposed on the agencies to vigorously enforce the laws.\textsuperscript{151} The twelve-year Republican hold on the nation's policies resulted in a hands-off approach to the regulation (or lack thereof) of business in the United States.\textsuperscript{152}

\textsuperscript{149} But see supra part IV (arguing that private antitrust action is not a realistic option).

\textsuperscript{150} DEMPSEY, supra note 2, at 13. Dempsey notes the following:

[The DOT] approved Texas Air's (i.e. Continental and New York Air) acquisition of both People Express (which included Frontier), and Eastern Airlines (which included Braniff's Latin American Routes); United's acquisition of Pan Am's transpacific routes; American's acquisition of AirCal; Delta's acquisition of Western; Northwest's acquisition of Republic (itself a product of the mergers of North Central, Southern and Hughes Airwest); TWA's acquisition of Ozark; and USAir's acquisition of PSA and Piedmont.


\textsuperscript{152} Id. With the election of a Democratic president, the public may see a change in philosophy and an increase in antitrust enforcement. See, e.g., Byron Acohido, Official Says Airlines' Growth Outpaced Demand, SEATTLE TIMES, Feb. 17, 1993, at C8; James Ott, U.S. Airlines Await Clinton Directions, AVIATION WK. & SPACE TECH., Jan. 25, 1993, at 94.
B. REREGULATION

1. Recent Efforts — Airline Competition Enhancement Act of 1992 and the Clinton Proposals

On August 12, 1992, the House passed the Airline Competition Enhancement Act of 1992. \(^{153}\) The purpose of the bill is to increase competition in the airline industry. \(^{154}\) The bill focuses on computer reservation systems (CRSs) owned by the airlines. These systems, developed over a number of years, provide advantages to their owners by displaying their schedules first, charging higher booking fees to competing airlines, and entering into contracts with travel agents which make it difficult for the travel agent to replace the CRS with that of a competitor. \(^{155}\) In summary, "[c]ritics charge that the inability of travel agents to change easily to other systems continues to give United and American significant advantages over competitors." \(^{156}\)

The bill provides that by September 30, 1994, each CRS would have to provide "functional equality." \(^{157}\) Practices which would be barred immediately include:

- Display bias in the listing of airline schedules or other information;
- Actions that prohibit agents from obtaining or using another CRS;
- Requirements that the term for existing services be extended as a condition for providing additional CRS services. \(^{158}\)

The bill would also provide that contracts between CRSs and travel agents have terms not to exceed three years,


\(^{154}\) Id. But see Kleit, supra note 57, at 861 (arguing that "the two most important antitrust charges, that of market power and display preference, appear theoretically incorrect and derived from important misunderstandings about how competition works in the CRS industry").

\(^{155}\) Competition, supra note 153, at 225.

\(^{156}\) Id.

\(^{157}\) Id.

\(^{158}\) Id.
and it would prohibit clauses that act to restrict the ability of agents to terminate contracts or use other CRSs.\textsuperscript{159}

Consistent with the breadth of application that the title of the bill suggests, it would also

- Prohibit airports from imposing passenger facility charges on persons traveling on frequent flyer and other free tickets;
- Limit the ability of carriers to discontinue service to Essential Air Service (EAS) communities while they retain their use of EAS slots at high-density airports; and
- Require the Federal Aviation Administration to initiate a proceeding to determine whether to reduce from 50\% the percentage of airline industry employees that must be randomly tested for illegal drug use.\textsuperscript{160}

Despite success in the House, the bill never passed the Senate. Even in the House, many were opposed to penalizing an airline for taking the risk to develop the CRS in the first place.\textsuperscript{161}

The Clinton administration has evidenced a willingness to address the current crisis in the airline industry.\textsuperscript{162} In May 1993, Transportation Secretary Frederico Pena convened a National Airline Commission. In August, 1993, the Commission issued its report which made over sixty recommendations intended to relieve some of the difficulties faced by the airline industry. Some of the recommendations included:

- Exempting airlines from the 4.3 cent per gallon fuel tax for two years;
- Revising bankruptcy laws to impose a one-year limit

\textsuperscript{159} Id.
\textsuperscript{160} Id. at 225-26.
\textsuperscript{161} Representative William Lipinski (D-Ill.), a House Public Works and Transportation Committee member, has argued that the bill would “simply penalize the airlines that excelled in the competitive environment.” Id. at 225. Representative James Inhofe (R-Okla.) also shares Lipinski’s reservations arguing that the bill only “punish[es] success.” Id.
\textsuperscript{162} See, e.g., Acohido, supra note 152, at C8; Antitrust: Clinton, Congress May Spark Legislation, Daily Rep. for Executives (BNA) 14 (Jan. 25, 1993); Ott, supra note 152, at 34.
for bankrupt carriers to file transportation plans under Chapter 11;
— Cutting existing ticket and cargo taxes;
— Forming a special committee to assess carriers’ financial health;
— Setting up an independent entity within the DOT to manage all FAA air traffic control activities and to assure stable funding;
— Reforming the alternative minimum tax;
— Increasing of the limit on foreign investment in U.S. airlines to forty-nine percent;
— Requiring that airlines advise the DOT of plans to protect workers when purchasing substantial assets or routes of other airlines.\textsuperscript{163}

In January 1994 Secretary Pena issued the Clinton administration’s proposal for overhauling the airline industry.\textsuperscript{164} The proposal adopted forty-nine of the sixty-one recommendations made by the National Airline Commission.\textsuperscript{165} Because of deficit concerns and the airline’s recent gains in profitability, none of the commission’s tax reduction proposals were adopted.\textsuperscript{166} The Clinton plan strongly advocates the creation of a quasi-private corporation that would take over air traffic control from the FAA.\textsuperscript{167} However, because both the industry and the economy are showing signs of gradual improvement, it is unlikely that sweeping changes in regulation of the airline industry will result within the next few years.


\textsuperscript{165} Plan to Aid Airlines is Announced; Clinton Proposals Aim at Reviving Industry, \textit{DALLAS MORNING NEWS}, Jan. 7, 1994, at 1A.


\textsuperscript{167} Id.
2. **Comprehensive Reregulation**

Of those who favored deregulation, many have now come to believe that a number of its premises were unwarranted. First, the expectation that the airline industry would lack economies of scale which would insure a large number of competitors has not materialized. In an era of competition for gates at the major hubs, the cost of entering the industry is indeed high. Furthermore, threat of entry — i.e. the contestability theory — has not proven to be a deterrent to market concentration. The threat of entry due to low barriers to entry and an absence of sunk entry costs has not kept prices low.

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168 Regarding the notion that the air transportation industry posed no barriers to entry, one commentator has noted that:

> [E]ntry into the industry by new carriers seems more remote, and entry onto new routes is far more difficult than many envisioned it would be with deregulation. Many airline observers thought that the 1978 deregulation of pricing and entry would make airline markets "contestable." That is, airlines could engage in "hit-and-run" entry into each other's markets in response to profit opportunities — simply by shifting a plane from one route to another. Instead the evidence compiled in the USAir-Piedmont record, as well as a large body of solid research by economic and legal scholars in the past three years, demonstrates that incumbent airlines are frequently able to charge higher prices on routes where other carriers face barriers to entry.


Alfred Kahn, former Chairman of the Civil Aeronautics Board and a proponent of deregulation also admitted the failure of true contestability to hinder "destructive competition:"

> Certainly one of the assumptions behind airline deregulation was that entry would be relatively easy . . . . We believed that while entry should be legally free and would be relatively easy, we never thought that would provide adequate protection in markets that are naturally monopolistic or oligopolistic — that just won't support more than one or two carriers. But what happened was that the ideologues began simplistically to parrot the word "contestability" as though it were a substitute for looking at the realities, even if the realities were manifestly changing, even if survival of the new entrants was becoming more and more questionable, as more and more of them were going out of business, and even as it became clear that domination of hubs was increasingly unchallengeable by new entrants.

*Interview with Alfred E. Kahn, Antitrust*, Fall 1988, at 7.

169 **DEMPSEY**, *supra* note 2, at 46.

170 *Id.*
Despite the failure of deregulation to achieve its stated purpose, few, if any, would advocate a return to an era of heavy handed regulation. The Civil Aeronautics Board of the early 1970s tended to restrict pricing flexibility and prohibit route rationalization and new entry. Today, the focus of the debate seems to be on whether the antitrust laws (and perhaps stricter enforcement of those laws) will be sufficient to stabilize the airline industry, or whether limited economic regulation specific to the industry is called for.

3. Limited Reregulation

At least one commentator has argued vigorously for limited reregulation of the airline industry. Traditional antitrust remedies may not be desirable given the "significant real economies of size, scope and density." Furthermore, Dempsey argues that the transportation industry has a quasi-public utility nature which suggests the need for "enlightened regulation" in the public interest. Airline transportation facilitates commercial industry, transports public officials, and provides opportunities for individuals to travel beyond their own localities. Dempsey identified seven areas to be included in any examination of reregulation: entry, pricing, antitrust, small community access, safety, consumer protection, and regulatory reorganization. The rising deficit and improving economy, however, will likely preclude any efforts at lim-

171 See, e.g., id. at 47.
172 Id.
173 Id.
174 Id. at 48. Even industry leaders are beginning to predict the emergence of the reregulation issue. Robert Crandall, chairman of American Airlines said: "[W]ith the nation's air carriers losing money hand over wingflap, the issue [of reregulation] is sure to arise in 1993. . . . The public clearly does not want to see only two or three airlines remain." Crandall Foresees Debate on Re-regulating Airlines, DALLAS MORNING NEWS, Dec. 17, 1992, at 14D; see also Industry Consultant Asks Clinton to Establish Reasonable Controls, AIRLINE FIN. NEWS, Feb. 1, 1993, at 1 (industry analyst Mort Beyer proposed a review of U.S. aviation policy "in order to establish an environment in which airline competition can again emerge").
175 DEMPSEY, supra note 2, at 48.
176 Id.
C. PRIVATE ANTITRUST COMPLIANCE PROGRAMS

Private antitrust compliance programs mandated by statute provide an alternative that would help implement antitrust legislation. First, the cost to the public of an antitrust compliance program is extremely low. The program would be implemented by the particular company and thus paid for by that company. A second advantage is that antitrust compliance programs are proactive in their application. Ideally, they should prevent the antitrust activity. Litigation is a reactive tool which can only address a problem after it has occurred. Third, because the antitrust compliance program is proactive, the transaction costs associated with litigation are minimized.

Another way to increase the effectiveness of such a statute would be to require trade associations or joint venture companies to adopt such programs. This requirement would ensure that those organizations which present a particularly high risk for antitrust activity are keenly aware of their legal obligations.

An antitrust compliance program should encompass all of the activities of an antitrust lawyer, including counseling on a day-to-day basis, holding seminars, and providing other more formal instructional activities. In the narrow sense of the term, an antitrust compliance pro-

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177 See supra notes 153-167 and accompanying text.
179 It would be unrealistic to argue that transaction costs are avoided completely, because it is impossible to say that litigation will never be pursued on an antitrust claim no matter how vigilant a company may be in its compliance efforts. See Robert C. Weinbaum, Establishing and Running a Compliance Program, 57 Anti-Trust L.J. 195, 199 (1988).
180 Note that ATPC was originally part of a trade group that is now owned by approximately forty airlines. Patrick J. Maio, Major Airlines Settle Price-Fixing Lawsuit, INVESTOR'S BUS. DAILY, Mar. 18, 1994, p. 1. An antitrust compliance program which would apply broadly to these forty market participants would seem to be more effective than, or at least as desirable supplement to airline-specific compliance programs.
gram is limited to its formalized programs.182

Robert C. Weinbaum set forth four requirements for a successful antitrust compliance program.183 First, he urged that there must be management commitment at all levels of the company to insure compliance with the law, both in letter and spirit.184 This is achieved by pointing out both the necessity of compliance, and the penalties for noncompliance.185 Putting this in business terms, the lawyer needs to emphasize what effect compliance and, more importantly, noncompliance will have on the efficient running of the organization.186

The second element of a successful antitrust compliance program is making certain the client knows what the purpose of the law is.187 This element allows the client to transact business with a legal frame of reference.188 The third element is to make the antitrust lawyer part of the business team. This requires that the lawyer develop a good relationship with his or her client. This relationship facilitates easy communication regarding antitrust developments; the better the relationship, the more amenable the client will be to making time to listen and to digest antitrust information.189

Finally, compliance activities should be conducted at regular intervals.190 Weinbaum recognized that this would vary by industry and by requirements, but emphasized the importance of repetition in making sure the cli-

182 Weinbaum, supra note 179, at 195; see also Howard Adler, Jr. & Joseph P. Fisher, Corporate Counseling in the New Antitrust Environment, 6 No. 3 AM. CORP. COUNS. ASS'N DOCKET 8 (1988); William B. Lawrence, Protecting Against Problems — Corporate Compliance Programs, 57 ANTITRUST L.J. 601 (1988).

183 Weinbaum, supra note 179. Weinbaum's construct is used here only for illustration. There is a large volume of literature on antitrust compliance, and the elements mentioned in Weinbaum's program are common to all programs.

184 Weinbaum, supra note 181, at 196.

185 Id.

186 Id. Weinbaum aptly pointed out that the client would be particularly careful to avoid the treble damages provisions of section 15 of the Clayton Act. Id.

187 Id.

188 Id.

189 Id.

190 Id. at 196-97.
ent is aware of and complies with the antitrust laws.\textsuperscript{191} In addition, it is necessary to involve both senior and junior attorneys in conveying that message. Weinbaum emphasized importance of this due to the complex nature of antitrust laws.\textsuperscript{192}

Once an effective compliance program is in place, it is necessary to determine the medium by which to communicate the compliance message. This can include written materials, seminars, videos, and newsletters. Consistent with the fourth goal — frequent repetition of the message — Weinbaum encourages republication of the more important materials.\textsuperscript{193} Also important is customizing the materials to the particular audience.\textsuperscript{194} What is required may vary according to which department is to receive the materials — marketing, financial, purchasing, engineering, or research.\textsuperscript{195}

Finally, one of the most important tools is the antitrust audit.\textsuperscript{196} An antitrust audit is essential for an effective compliance program; however, it must be carefully performed in order to prevent exposing the corporation to additional risks.\textsuperscript{197} Antitrust audits also provide an opportunity for counsel and management to evaluate the effectiveness of the compliance program.\textsuperscript{198}

\textsuperscript{191} Id.
\textsuperscript{192} Id. at 197.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id. at 198.
\textsuperscript{197} Joseph E. Murphy, Surviving the Antitrust Compliance Audit, 59 Antitrust L.J. 953, 953 (1991). Murphy urges that the audit should be carefully conducted to ensure that information will fall under the attorney-client, work product, or self-evaluative privilege, and to avoid a situation whereby efforts to comply with the law turn into a tool by which violations of the law are exposed. \textit{Id.} It is clear from the case law, however, that no written audit report can be safe from adverse use. \textit{Id.} Murphy’s article also details eighteen tips for surviving a compliance audit. \textit{Id.} at 960. \textit{See also} Howard Adler, Jr. & Sharon J. Devine, \textit{How to Avoid Antitrust Death by Document}, 10 Am. Corp. Couns. Ass’n Docket 30 (1992).
\textsuperscript{198} Murphy, \textit{supra} note 197.
VI. CONCLUSION

Today's airline industry is plagued with uncertainty, de-
structive competition, and increased concentration of
market power. Efforts by private citizens to respond to
this chaos through antitrust litigation is by no means the
most effective means to address the problem. As evi-
denced by In re Domestic Air Transportation Antitrust Litiga-
tion, the settlements which are reached often provide,
upon close examination, limited remedies and doubtful
monitoring of the future competitive behavior of the few
airlines left in the industry. Proposals to reregulate on a
somewhat lesser scale than that which was in place prior
to deregulation are theoretically appealing. In a business
environment that is naturally hostile to governmental in-
terference and with a spending crisis accompanied by an
ever increasing national debt, however, it is unlikely that
even light-handed regulation will be attempted. To put it
simply, it would cost too much.

On the other hand, a statute mandating the implement-
tation of private in-house antitrust compliance programs
including minimum standards would be more feasible.
For one, the cost of these programs would be borne by
the companies themselves rather than the taxpayer. Two,
most companies more than likely already have some sort
of compliance program in place. This type of answer
caters to those who would like to see the airline industry
held accountable, as well as to proponents of free market
competition. In addition, such programs reduce the
amount of government resources required for regulation.
Another advantage to requiring antitrust compliance pro-
grams is that such programs provide a proactive approach
to the problem, rather than reactive approach. Litigation
is reactive, and as has been demonstrated through the il-
lustration of In re Domestic Air Transportation Antitrust Litiga-

199 A company is likely to have a compliance program if it was involved in the In
re Domestic Air Transportation Antitrust Litigation, which required each of the
settling defendants to “establish and/or maintain” an antitrust compliance
program.
tion, litigation is sometimes a “too little, too late” measure.