THE MAVERICK THEORY: CREATING TURBULENCE FOR MERGERS

INTRODUCTION

The Supreme Court has described federal antitrust law as "the Magna Carta of free enterprise" and "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."[1] The Court noted that "the freedom guaranteed [to] each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."[2] Often, a firm that takes advantage of this freedom to compete is a maverick firm.[3] A maverick firm is a firm that deviates from its rivals and disrupts the market, benefitting customers.[4] By sparing a maverick firm from elimination, the government can fulfill its role in antitrust enforcement by blocking anticompetitive mergers and maintaining competitive markets.[5]

However, the Department of Justice's recent use of the federal antitrust laws effectively alienated American Airlines and US Airways, leaving these airlines feeling singled out, like the ugly ducklings of the airline industry.[6] The Department of Justice (DOJ) allowed American Airlines to purchase TWA in 2001.[7] American West Airlines freely combined with US Airways in 2005.[8]

1. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972); *see also* Daniel E. Lazaroff, *Antitrust Symposium—Introduction: So What Else Is New?*, 45 LOY. L.A. L. REV. 1023, 1023–24 (2012).

2. *Topco Assocs., Inc*., 405 U.S. at 610.

3. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

4. *Id.*

5. J. Bruce McDonald, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Antitrust for Airlines, Remarks Before the Regional Airline Association President's Council Meeting 2 (Nov. 3, 2005) (transcript available at http://www.justice.gov/atr/public/speeches/217987.pdf).

6. *See* David Koenig, *Proposed US Airways, American Airlines Merger Challenged by Justice Department, States*, HUFFINGTON POST (Aug. 13, 2013, 8:17 PM), http://www.huffingtonpost.com/2013/08/13/us-airways-american-airlines-merger_n_3748865.html.

7. Kevin Diaz, *NWA-Delta Merger Seen Likely to Pass U.S. Scrutiny*, STAR TRIB. (Jan. 20, 2008, 9:17 AM), http://www.startribune.com/business/13905096.html.

8. *Id.*

Nobody complained when Delta successfully merged with Northwest in 2008.[9] And where was the DOJ when United merged with Continental in 2010?[10] In fact, the DOJ had not levied opposition to an airline merger since 2001.[11] With so many successful combinations, American Airlines and US Airways had expected to cruise toward the completion of a merger that would create the world's biggest airline.[12] With their confidence high, American Airlines and US Airways had even named executives for the newly merged company.[13]

Unfortunately, the parties were left stunned when the federal government along with six states challenged the merger, alleging that the merger would "hurt competition and cost consumers hundreds of millions of dollars a year in higher fares and extra fees."[14] Even airline analysts were "stunned" by the government's decision to oppose the merger, causing many to predict that the deal would eventually succeed.[15] Unmoved, American Airlines and US Airways levied staunch opposition to the suit, even petitioning for an order requiring the DOJ to turn over documents about the previous successful airline mergers.[16] Along with the companies, labor groups also argued that the DOJ should drop the suit[17] because it had not interfered in other recent airline combinations.[18]

9. Elaine Glusac, *The Blocked-For-Now Airline Merger: What Travelers Can Expect*, ENTREPRENEUR (Sept. 6, 2013), http://www.entrepreneur.com/article/228201.

10. *Id.*

11. Koenig, *supra* note 6.

12. *Id.*

13. *Id.*

14. *Id.*

15. Marilyn Geewax, *DOJ Suit Seen Delaying, Not Killing Big Airline Merger*, NPR (Aug. 13, 2013, 5:25 PM), http://www.npr.org/2013/08/13/211729307/doj-suit-seen-delaying-not-killing-big-airline-merger ("'Given that other airline mergers were approved, this was a surprise,' University of Richmond transportation economist George Hoffer said. Other carriers already have been allowed to combine forces, so 'it's illogical to oppose this merger. This move comes a day late and a dollar short.'").

16. David McLaughlin, *Airline Merger Records 'Irrelevant' in AMR Case, U.S. Says*, BLOOMBERG NEWS (Sept. 26, 2013), http://www.businessweek.com/news/2013-09-26/airline-merger-records-irrelevant-in-amr-case-u-dot-s-dot-says-1. The DOJ opposed this request for documents, arguing the information was protected from disclosure and that the decision to not challenge previous airline mergers was irrelevant to the present case over the current merger. *Id.* The DOJ stated, "Every merger must be evaluated on its own terms in light of current industry conditions." *Id.*

17. Keith Laing, *Labor Groups to DOJ: Back Off US Air-American Merger*, THE HILL (Aug. 20, 2013, 7:18 PM), http://thehill.com/blogs/transportation-report/aviation/317907-labor-groups-to-justice-dept-back-off-airline-merger.

18. *Id.* As TDD President Ed Wytkind noted, "The DOJ's inaction when Northwest and Delta merged or when United and Continental combined is what led US Airways and American to seek a merger . . . . By combining forces, these airlines are just trying to remain viable competitors in a shrinking competitive landscape that the DOJ allowed to exist." *Id.* (internal quotation marks omitted).

Regardless of the uproar over the DOJ's action, this suit was actually quite predictable, given the Obama administration's promise to aggressively pursue merger enforcement, coupled with the 2010 changes to the Merger Guidelines and the particular structure of the American Airlines/US Airways merger.[19] Despite the past successful airline combinations and US Airways being a smaller airline, the DOJ identified many viable issues with this merger, such as the connecting route overlaps and the industry concentration with only a few major airlines in the market.[20] However, one major principle that the government has relied upon in opposing the American Airlines/US Airways merger is the "maverick theory."[21]

This Comment will discuss the Obama administration's fulfillment of a campaign promise to revive merger enforcement after the lax merger policies under the Bush administration and the utilization of the maverick theory to walk a fine doctrinal line in order to aggressively enforce antitrust laws. Specifically, this Comment will compare and contrast the use of the maverick theory under different administrations, focusing on the Obama administration's use of the maverick theory to protect consumers' interests in the recent American Airlines/US Airways merger challenge. Lastly, this Comment will argue that the maverick theory will be utilized unpredictably by future administrations, creating uncertainty in the field for businesses seeking to merge.

I. OBAMA ADMINISTRATION PROMISES TO REROUTE ANTITRUST ENFORCEMENT

In 2007, during his campaign, then-candidate President Obama declared that, if elected, he would "direct [his] administration to reinvigorate antitrust enforcement" and that, under his watch, the antitrust agencies would "step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not."[22] Thus, during President Obama's first term, merger enforcement,

19. *See infra* Parts I, VI.

20. *See* Susan Carey et al., *U.S. Moves to Block US Airways-American Airlines Merger*, WALL ST. J. (Aug. 13, 2013, 7:57 PM), http://online.wsj.com/news/articles/SB10001424127887324769704579010612415800106.

21. *See id.*; Donald L. Martin, *Parsing the Case Against 'New American Airlines,'* LAW 360 (Oct. 2, 2013, 5:22 PM), http://www.law360.com/articles/477222/parsing-the-case-against-new-american-airlines. *See also* Mark J. Botti & Anthony W. Swisher, *DOJ's ABI/Modelo Challenge: Seeds of More Aggressive Merger Review & Enforcement*, LEGAL BACKGROUNDER (Wash. Legal Found., Washington D.C.), May 3, 2013, at 1, 2–4 (discussing the Obama administration's use of the maverick theory to oppose previous mergers).

22. Renata B. Hesse, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, IP, Antitrust and Looking Back on the Last Four Years, Remarks before the Global Competition Review 2nd Annual Antitrust Law Leaders Forum 2 (Feb. 8, 2013), *in* CORP. COUNS. Q., Apr. 2013.

as the DOJ's antitrust activity is called,[23] was predicted to be comparatively aggressive.[24] In 2009, not long after President Obama took office, the downturn in the global economy affected merger and acquisition transactions, causing that year to be an extremely slow year in both global and domestic merger and acquisition activity.[25] Despite a declining number of mergers and acquisitions in the marketplace overall, the DOJ under the Obama administration has steadily challenged anywhere from twelve to twenty merger transactions every fiscal year since Obama took office.[26] Comparatively, the DOJ under President Obama's predecessor, President George W. Bush, challenged forty-eight mergers in his first year but in another year declined to a low of challenging only four merger transactions.[27] The DOJ and FTC

23. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, §1.

24. Botti & Swisher, *supra* note 21, at 1.

25. Jeffrey McCracken & Dana Cimilluca, *Global M&A May Have Hit Bottom*, WALL ST. J. (Jan. 4, 2010, 12:01 AM), http://online.wsj.com/news/articles/SB10001424052748704876804574628450435655062 ("Global mergers-and-acquisition activity for 2009 was $2.3 trillion, down 22% from $2.94 trillion in 2008 . . . . the lowest dollar value since $1.98 trillion in deals in 2004. The drop would have been slightly greater in 2009 were it not for extraordinary government interventions across the world . . . .").

26. Botti & Swisher, *supra* note 21, at 1; FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2012, at 9–20 (2013), *available at* http://www.ftc.gov/os/2013/04/130430hsrreport.pdf (providing data on FTC and DOJ enforcement actions in 2012); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2011, at 10–20 (2012), *available at* http://www.ftc.gov/os/2012/06/2011hsrreport.pdf (providing data on FTC and DOJ enforcement actions in 2011); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2010, at 8–17 (2011), *available at* http://www.ftc.gov/os/2011/02/1101hsrreport.pdf (providing data on FTC and DOJ enforcement actions in 2010); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2009, at 7–15 (2010), *available at* http://www.ftc.gov/os/2010/10/101001hsrreport.pdf (providing data on FTC and DOJ enforcement actions in 2009).

27. FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2008, at 7–18 (2009), *available at* http://www.ftc.gov/sites/default/files/documents/reports_annual/31st-report-fy-2008/hsrreport_0.pdf (providing data on FTC and DOJ enforcement actions in 2008); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2007, at 10–21 (2008), *available at* http://www.ftc.gov/os/2008/11/hsrreportfy2007.pdf (providing data on FTC and DOJ enforcement actions in 2007); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2006, at 10–19 (2007) *available at* http://www.ftc.gov/os/2007/07/P110014hsrreport.pdf (providing data on FTC and DOJ enforcement actions in 2006); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2005, at 11–17 (2006) *available at* http://www.ftc.gov/reports/hsr05/P989316twentyeighthannualhsrreport.pdf (providing data on FTC and DOJ enforcement actions in 2005); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2004, at 8–17 (2005), *available at* http://www.ftc.gov/reports/hsr05/050810hsrrpt.pdf (providing data on FTC and DOJ enforcement actions in 2004); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2003, at 8–17 (2004), *available at* http://www.ftc.gov/

indiscriminately took on cases, both large and small, such as challenging Tyson's $3 million plant sale, a relatively small transaction, to blocking AT&T's attempted acquisition of T-Mobile.[28] Additionally, opposition from the merging parties did not sway the agencies, as the DOJ successfully tried its first merger in nine years, preventing H&R Block from acquiring TaxACT.[29] Meanwhile, the Federal Trade Commission (FTC) successfully blocked its first non-profit hospital merger in federal court and challenged another hospital combination in the U.S. Supreme Court,[30] obtaining a decision limiting the ability of hospitals to claim immunity from federal antitrust laws.[31]

However, taken at face value, these cases do not reflect any groundbreaking legal theories since they involve essentially conventional horizontal merger challenges.[32] For example, AT&T/T-Mobile was a "conventional challenge to a 'four to three' merger (a merger between two firms in a market with four firms) between the second- and fourth-largest firms in a concentrated industry with high barriers to entry."[33] Similarly, other horizontal merger challenges, such as H&R Block/TaxACT, NASDAQ/NYSE, and Blue Cross/Blue Shield/Physicians Health, could have had the same result under any administration.[34]

In 2010, the Obama administration implemented policy changes to the merger enforcement standards.[35] Previously, the litigated cases seemed to lack any apparent doctrinal change, but the policies implemented in 2010, which are discussed in detail below, reflect "seeds for something more."[36] In the second

os/2004/09/040903hsrrpt03.pdf (providing data on FTC and DOJ enforcement actions in 2003); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2002, at 8–18 (2003) *available at* http://www.ftc.gov/os/2003/08/hsrannualreport.pdf (providing data on FTC and DOJ enforcement actions in 2002); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2001, at 14–28 (2002), *available at* http://www.ftc.gov/os/2002/09/hsrarfy2001.pdf (providing data on FTC and DOJ enforcement actions in 2001); FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2000, at 8–31 (2001), *available at* http://www.ftc.gov/os/2001/04/annualreport2000.pdf (providing data on FTC and DOJ enforcement actions in 2000).

28. Botti & Swisher, *supra* note 21, at 1.

29. *Id.*

30. *Id.*

31. Andrew Pollack, *Supreme Court Gives F.T.C. a Win on Hospital Mergers*, N.Y. TIMES (Feb. 19, 2013), http://www.nytimes.com/2013/02/20/business/justices-back-ftc-on-blocking-hospital-mergers.html?_r=0.

32. Botti & Swisher, *supra* note 21, at 1.

33. Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13, 16 (2012), *available at* http://www.stanfordlawreview.org/sites/default/files/online/articles/65_Stan._L._Rev._Online_13.pdf.

34. *Id.* at 16–17.

35. Botti & Swisher, *supra* note 21, at 1.

36. *Id.*

term of the Obama administration, the seeds of new merger enforcement policies have blossomed, as indicated by cases such as the challenge to the Anheuser-Busch/InBev (ABI) acquisition of Grupo Modelo of Mexico (Modelo) and, most recently, the challenge to the American Airlines/US Airways merger.[37] In the ABI/Modelo transaction, as in the American Airlines/US Airways merger, the DOJ walked a "fine doctrinal line" in concluding the challenge was warranted.[38] Additionally, in both cases, the government thought the transaction was viable enough not to insist on abandonment of the transaction altogether because of its concerns.[39] At the same time, the DOJ was willing to take the risk in pursuing the challenge.[40] In September 2012, in reinforcing the DOJ's staunch position, Acting Assistant Attorney General Joseph Wayland noted, "People have to understand that we are willing to litigate cases. People shouldn't think that going up against DOJ trial lawyers is [a cakewalk]."[41] As discussed further below in the context of the American Airlines/US Airways merger, the DOJ's willingness to pursue merger enforcement, despite being required to walk a "fine doctrinal line" to do so, is evidence of the Obama administration's aggressive stance on merger enforcement, which will likely impact the development of future merger enforcement policy.[42]

II. MAVERICK FIRM DEFINED

One of the tools that the Obama administration has utilized in re-energizing antitrust enforcement is the maverick theory.[43] However, using the term "maverick" evokes two specific questions. First, who actually engages in antitrust enforcement in order to utilize the maverick theory? Second, what does the term maverick actually mean?

The DOJ Antitrust Division and FTC are the agencies responsible for enforcing federal antitrust laws by reviewing mergers to determine if they may lessen competition.[44] However, the agencies do not have a merger policy specific to any particular industry, including the airline industry.[45] Instead, the

37. *See id.*

38. *See id.*

39. *Id. See also infra* Part VI.

40. Botti & Swisher, *supra* note 21, at 1.

41. Peter Guryan & Richard Jamgochian, *Antitrust Merger Activity: Notable Recent Developments and Takeaways for 2013*, CPI ANTITRUST CHRON., Jan. 2013, at 1, 2.

42. *See* Botti & Swisher, *supra* note 21, at 1, 4 (discussing the Obama administration's aggressive stance on merger enforcement in the context of the ABI/Modelo transaction).

43. *See id.* at 1, 2.

44. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 1; McDonald, *supra* note 5.

45. McDonald, *supra* note 5.

organizing principle is competition;[46] so, like other merger analyses, the airline industry merger analysis is focused on the potential for lessening competition.[47] The government's role in antitrust law is to preserve competition within industries by seeking to challenge, and ultimately block, anticompetitive mergers in court.[48] The DOJ and FTC release Horizontal Merger Guidelines, which provide the agencies' policies regarding mergers and acquisitions involving competitors under federal antitrust laws.[49] The statutory provisions that the guidelines adhere to include: "Section 7 of the Clayton Act, 15 U.S.C. § 18, Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45."[50] In particular, Section 7 of the Clayton Act blocks mergers if "in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[51]

With regards to what a maverick is, the Horizontal Merger Guidelines provide guidance. According to the Horizontal Merger Guidelines, a maverick firm is a firm having "a greater economic incentive to deviate from the terms of coordination than do most of [its] rivals."[52] In engaging in coordinated interaction to diminish competition, firms will reach terms of competition that are profitable to the firms involved and detect and punish deviations from those terms in order to avoid undermining the coordination.[53] The incentive to deviate from the terms of coordination might be due to a number of different factors, such as being the proprietor of a new technology or business model, having the ability to expand production rapidly, or having a niche as a cost-effective firm in the market.[54] Moreover, being a maverick firm is not just a label on a company in a marketplace; rather, it is more of a functional place in the market.[55] Both federal agencies in charge of antitrust enforcement—the DOJ and the FTC—apply the maverick label when referring to "firms that play a special competitive role in their industries and thus require protection under

46. *Id.*

47. Martin, *supra* note 21.

48. McDonald, *supra* note 5.

49. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 1.

50. *Id.*

51. *Id.* (internal quotation marks omitted).

52. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.12 (1992), *available at* http://www.justice.gov/atr/public/guidelines/hmg.pdf.

53. *Id.* § 2.1.

54. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 2.1.5.

55. *See* Taylor M. Owings, Note, *Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor*, 66 VAND. L. REV. 323, 325 (2013).

antitrust law."[56] The 2010 Horizontal Merger Guidelines define the maverick as a firm that "plays a disruptive role in the market to the benefit of customers."[57] A maverick firm generally "constrains prices when industry coordination is incomplete."[58] Normally, a maverick would work to undermine the possibility that other firms will be able to "reach a mutually satisfactory outcome at a higher-than-competitive price."[59] Thus, having a maverick present in the marketplace may prevent or limit coordination among other firms in the marketplace.[60]

The identification of a maverick that constrains more effective coordination may be instrumental in explaining which mergers are troublesome.[61] First, the maverick theory could be utilized as a sword, exposing those mergers that would result in higher prices.[62] Second, the maverick theory could be utilized as a shield, helping to identify when a combination will not effect the maverick's business environment or inhibit competition but instead will increase efficiencies.[63] Generally in analyzing mergers, as the number of firms decreases, the probability that the remaining firms will agree to operate at anticompetitive prices increases.[64] Therefore, when a horizontal merger reduces the number of competitors in an industry from ten to nine, it usually causes less concern over anticompetitive behavior than a merger that reduces the number of firms from four to three.[65] However, no hard and fast level of market concentration has been identified, common across industries, that triggers anti-competition concerns.[66] Additionally, a smaller number of firms also make it more unlikely that one of the remaining firms will operate as a maverick.[67] Thus, when the DOJ or the FTC has

56. *Id.* For example, the court in *United States v. H&R Block, Inc.*, stated that the persuasiveness of the maverick theory depended upon identifying the specific firms whose independence is truly essential for healthy competition. 833 F. Supp. 2d 36, 79–80 (D.D.C. 2011). Otherwise, calling a firm a maverick "amounts to little more than a game of semantic gotcha." *Id.* at 79.

57. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 2.1.5.

58. Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 135 (2002).

59. *Id.* at 152.

60. Paul T. Denis, *The Give and Take of the Commentary on the Horizontal Merger Guidelines*, ANTITRUST, Summer 2006, at 51, 53.

61. *Id.*

62. Baker, *supra* note 58, at 189.

63. *Id.*

64. *Id.* at 152.

65. *Id.*

66. *Id.* at 154. Additionally, there are other factors that are considered—market concentration is not the only factor relevant to the assessment of whether a merger will cause anticompetitive behavior. *Id.*

67. Baker, *supra* note 58, at 152.

identified a potential maverick firm in a highly concentrated industry and a merger will eliminate this maverick firm, problems arise due to the concentration of the market as well as the removal of the maverick's influence from the marketplace.[68]

Since the 2010 revision to the Horizontal Merger Guidelines, the elimination of a maverick firm exhibits direct evidence of an anticompetitive merger.[69] This is a change from previous versions of the guidelines that had utilized a maverick status only in a totality-of-the-circumstances approach.[70] The 2010 guidelines provide that in addressing the question of "whether a merger may substantially lessen competition," the agencies may consider any "reasonably available and reliable evidence."[71] The guidelines provide a list of categories and sources of evidence that has been predictive of the competitive effects of mergers in the past, including the following: 1) actual effects observed in consummated mergers, 2) direct comparisons based on experience, 3) market shares and concentration in a relevant market, 4) substantial head-to-head competition, and 5) disruptive role of a merging party (i.e. a maverick firm).[72] To identify a maverick firm, the 2010 guidelines offer four examples of maverick behavior: if a firm 1) "threatens to disrupt market conditions with a new technology or business model," 2) has an "incentive to take the lead in price cutting," 3) has "the ability and incentive to expand production rapidly using available capacity," or 4) "has often resisted otherwise prevailing industry norms to cooperate on price setting or other terms of competition," then it may be a maverick firm.[73] In essence, a merger analysis focused on the role of a maverick would ask whether the transaction affects the maverick's incentives or ability to constrain system-wide price increases.[74] Since it is now clear what the maverick theory is, it is important to discuss the role of the maverick theory in antitrust enforcement.

68. *Id.*

69. Owings, *supra* note 55, at 328.

70. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 52; *see* Owings, *supra* note 55, at 328 ("Prior versions discussed the maverick status of a target firm as one piece of evidence in a totality-of-the-circumstances approach to predicting whether a postmerger group of firms would be able to overcome the difficulties inherent in coordination.").

71. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 2.

72. *Id.* § 2.1.

73. *Id.* § 2.1.5; *see also* Owings, *supra* note 55, at 343 (stating that there is a list of traits that one might find, including: offering consistently low prices, having an innovative offering or business model, and having the ability to rapidly expand production).

74. *See* Baker, *supra* note 58, at 200.

III. THE MAVERICK THEORY SOARS: FROM AFTERTHOUGHT TO DIRECT EVIDENCE

The maverick theory has had an evolving role in antitrust enforcement, from an afterthought to direct evidence of anticompetitive mergers. Although the maverick theory has appeared in previous guideline versions, in contemporary antitrust practice, mavericks are generally identified to supplement other evidence of anticompetitive behavior.[75] Traditionally, a merger review begins with identifying the relevant geographic and product markets, which, in the airline context, is defined as the scheduled air transport between city pairs.[76] In the past, the predominant view among industry experts and academia was that when few firms competed in an industry, they would easily learn to collaborate, to control the industry, and to raise prices.[77] Moreover, in the past, harm to competition from the loss of a rival was presumed without analysis.[78]

In prior versions of the guidelines, the maverick status of a target firm was considered "one piece of evidence in a totality-of-the-circumstances approach to predicting whether a postmerger group of firms would be able to overcome the difficulties inherent in coordination."[79] The totality-of-the-circumstances approach was consistent with the view that, instead of relying upon formalistic evidence, the agencies should examine economic effects of a proposed merger on a case-by-case basis.[80] The 1982 Horizontal Merger Guidelines reflected this focus, stating that the government would "focus first" on examining the possible post-merger market, but then take into consideration a variety of other factors that would "create, enhance or facilitate the exercise of market power."[81]

In recent years, however, case law and economics literature have indicated eroding support for the traditional analysis, which assumed that the loss of a rival harmed competition.[82] Instead, emerging support is directed towards other possible ways of identifying an anticompetitive merger.[83] The revised 2010 Horizontal Merger Guidelines reflected this analytical change.[84] Rather than

75. Owings, *supra* note 55, at 328.

76. Martin, *supra* note 21. The reason that the city pair is used, according to the DOJ, is that most passengers' travel destinations are predetermined, and, thus, passengers would not be willing to substitute for a different destination when the ticket price to the desired city was increased. *Id.*

77. Baker, *supra* note 58, at 138.

78. *Id.*

79. Owings, *supra* note 55, at 328.

80. *Id.*

81. *Id.* at 330.

82. Baker, *supra* note 58, at 136.

83. *Id.*

84. Owings, *supra* note 55, at 328.

placing emphasis on the market shares and market structures, like previous versions of the guidelines, the 2010 Merger Guidelines considered the existence of a maverick firm to be direct evidence of an anticompetitive merger and placed more emphasis on competitive effects.[85] The changed guidelines moved away from "wooden presumptions against mergers based on market share" and moved towards an analysis of post-merger market performance.[86] While the 2010 edition of the Merger Guidelines does not abandon the totality-of-the-circumstances approach,[87] there is a distinct move away from the traditional approach, as the maverick theory is provided as another possible way to identify an anticompetitive merger.[88]

IV. ANTITRUST AND THE MAVERICK THEORY GROUNDED DURING THE BUSH ADMINISTRATION

Antitrust enforcement under President George W. Bush's administration, prior to the 2010 update to the Merger Guidelines, provides a clear example of the minimal role that the maverick theory played in the past.[89] Under the Bush administration, antitrust enforcers either did not utilize or did not rely heavily on the maverick theory.[90] Moreover, under President Bush, antitrust enforcement declined significantly from previous administrations, causing the Bush administration to be called "more permissive on antitrust issues than any administration in modern times."[91] In fact, the *Wall Street Journal* opined that "[t]he federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish."[92]

85. Botti & Swisher, *supra* note 21, at 2. *See also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 2.

86. Botti & Swisher, *supra* note 21, at 2.

87. *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 2 ("The Agencies consider any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition.").

88. Owings, *supra* note 55, at 331.

89. *See* Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 235, 246 (Robert Pitofsky ed., 2008).

90. *See id.* at 244–46. *See also* Botti & Swisher, *supra* note 21, at 2; *Coordinated Effects Analysis: The Arch Coal Decision*, ANTITRUST SOURCE, Mar. 2005, at 1, 2–4; Michael P. Bodosky, *United States v. Arch Coal, Inc.: U.S. District Court Rejects Likelihood of Anticompetitive Post-Merger Coordinated Interaction Among Leading U.S. Coal Producers*, MONDAQ (Mar. 9, 2005), http://www.mondaq.com (enter article title into search bar; then follow hyperlink).

91. Baker & Shapiro, *supra* note 89, at 244 (internal quotation marks omitted).

92. *Id.* (internal quotation marks omitted).

A. Maverick Theory Does Not Leave the Runway

The perception of the Bush administration's lax merger policy was perpetuated by the failure to take any action when Whirlpool sought to acquire Maytag in 2006.[93] The DOJ investigated the proposed acquisition of Maytag and determined that, despite the dominant market share the merged companies would have, the deal was not likely to substantially reduce competition among home appliance manufacturers.[94] However, the merger created a dramatic increase in concentration, leaving Whirlpool with more than seventy percent of the market share for washers and dryers.[95] Additionally, the press reported that Maytag was a high-cost producer and that Whirlpool was a more efficient, low-cost producer.[96] Normally, a lower-cost firm would compete to gain share from the higher-cost firm, benefiting consumers and causing the higher-cost firm to become more efficient.[97] In failing to pursue an antitrust enforcement action, the DOJ did not explain why consumers would benefit if the lower-cost firm acquired the higher-cost firm.[98] Unlike the Obama administration, which has been willing to walk fine doctrinal lines to pursue antitrust enforcement through theories such as the maverick theory,[99] the Bush administration let the Maytag/Whirlpool transaction pass.[100] One practitioner dubbed the Maytag/Whirlpool transaction as a "close deal" that "would have had a hard time" getting through under other administrations.[101] Had the administration pursued a suit against the Maytag/Whirlpool transaction and identified Maytag as a maverick that would be compromised in the combination, there may have been a totally different outcome.[102]

B. The Maverick Theory: Flying but Low on Fuel

In cases that the Bush administration did challenge, the maverick theory appeared[103] but not as the foremost theory upon which the case relied.[104] For

93. *Id.* at 248.

94. Diana B. Henriques, *U.S. Antitrust Review Backs Whirlpool-Maytag Merger*, N.Y. TIMES, Mar. 30, 2006, at C3.

95. Baker & Shapiro, *supra* note 89, at 248.

96. *Id.* at 249–50.

97. *Id.* at 250.

98. *Id.*

99. Botti & Swisher, *supra* note 21, at 2–3.

100. Baker & Shapiro, *supra* note 89, at 248–50.

101. *Id.* at 250 (internal quotation marks omitted).

102. *See id.* at 249. The Bush administration could have challenged this transaction by relying on the maverick theory. The maverick theory was applicable since the transaction eliminated the higher-cost firm from the market, leaving Whirlpool with seventy percent market share and without a significant competitor to incentivize efficiency. *See id.*

103. *See* Botti & Swisher, *supra* note 21, at 2.

104. *See* Bodosky, *supra* note 90.

example, in the case of *Federal Trade Commission v. Arch Coal, Inc.*, the antitrust enforcement agency sustained a loss after the court found that Triton Coal, one of the two merging parties, was not a maverick.[105] There are fourteen mines in Wyoming's Southern Powder River Basin (SPRB) region, a region known for low sulphur content coal, and seven companies, including Arch Coal and Triton Coal, operate the mines.[106] Arch Coal proposed to purchase the assets of its rival, but the FTC challenged the purchase, seeking a federal court order blocking the $364 million deal.[107] The FTC claimed that the deal would hurt competition because it would leave the top three competitors controlling eighty-six percent of the coal production in the SPRB.[108] One of the theories that the FTC presented was that while other producers exercised production discipline to stabilize prices in the SPRB, Triton "rapidly expanded production at its North Rochelle mine."[109] The FTC claimed that Arch Coal, in acquiring Triton Coal, hoped to eliminate an "undisciplined" producer and more forcefully dominate production and demand.[110] Despite the FTC's arguments, the trial court found Triton's North Rochelle mine to be "one of the highest cost mines in the SPRB."[111] The court ultimately refused to enjoin the transaction, concluding that "the government failed to meet its burden . . . because the merger . . . did 'not reduce the number of competitors and only modestly increase[d] the concentration in what has been a very competitive market.'"[112]

The court, in considering whether Triton's actions in the SPRB indicated that they were a maverick firm, stated that to be a maverick firm in an auction market, a firm must "consistently compete aggressively when it bids, causing other firms to bid more aggressively when it is present."[113] Moreover, the court found that "Triton does not lead or even influence pricing in the market, does not compete aggressively, and does not have a history of bidding on contracts

105. *See* James F. Rill & Howard Rosenblatt, *Coordinated Interaction and Collective Dominance: A Remarkable Journey Towards Convergence*, *in* ON THE MERITS: CURRENT ISSUES IN COMPETITION LAW AND POLICY 127, 144–45 (Paul Lugard & Leigh Hancher eds., 2005). *See also* Bodosky, *supra* note 90.

106. Rill & Rosenblatt, *supra* note 105.

107. *Company News; F.T.C. Plans to Challenge Arch Coal's Purchase of Rival*, N.Y. TIMES (Apr. 1, 2004), http://www.nytimes.com/2004/04/01/business/company-news-ftc-plans-to-challenge-arch-coal-s-purchase-of-rival.html?ref=archcoalinc.

108. *Id.*

109. Bodosky, *supra* note 90.

110. *Id.*

111. *Id.* (internal quotation marks omitted).

112. Rill & Rosenblatt, *supra* note 105, at 145 (quoting Fed.Trade Comm'n v. Arch Coal, Inc., 329 F. Supp. 2d. 109, 115 (D.D.C. 2004)).

113. Bodosky, *supra* note 90 (internal quotation marks omitted) (quoting *Arch Coal, Inc.*, 329 F. Supp. 2d at 146).

consistent with the behavior of a maverick in the SPRB market."[114] The FTC utilized strong customer disapproval of the Arch/Triton combination to support its suit, even having some of the customers testify before the court and present economic studies in support of their opposition.[115] The court, however, disagreed with the FTC, rejecting each of the arguments due to inadequacy or inconclusiveness.[116] As a result of the FTC's inability to show how the merger would make coordination among the remaining firms more likely, the court had no legal basis to block the merger, despite the attempt to utilize the maverick theory.[117]

Thus, as demonstrated, the Bush administration took a much different stance on antitrust enforcement, both through the lack of enforcement in cases that usually would be opposed[118] and the weak use of the maverick theory in cases such as *Arch Coal*.[119]

V. THE MAVERICK THEORY TAKES OFF UNDER THE OBAMA ADMINISTRATION

Since the 2010 revision of the Merger Guidelines, the Obama administration's approach to antitrust enforcement has provided evidence that the totality-of-the-circumstances approach is eroding in favor of other ways to identify anticompetitive mergers, such as the maverick theory.[120] President Obama, as was promised in his campaign, has not only taken a more aggressive stance in the number of enforcement actions,[121] but also in the utilization of the maverick theory.[122] In recent years, marketplace mavericks have commonly appeared in merger enforcement actions.[123] Over the past five years (FY 2009-2013), the FTC and the DOJ have challenged 107 merger transactions.[124] Of these 107 merger enforcement actions, a number of cases indicated that one of the firms involved in the proposed merger played a maverick-type, disruptive role in the industry, including the cases of AT&T/T-

114. *Id.* (internal quotation marks omitted) (quoting *Arch Coal, Inc.*, 329 F. Supp. 2d at 147).

115. *Coordinated Effects Analysis: The Arch Coal Decision*, *supra* note 90, at 2.

116. *Id.* at 4.

117. *Id.* The court even went so far as to call the FTC's theory that the merger would facilitate output restriction "novel," indicating the theory was underdeveloped analytically and insufficiently supported by the evidence since the theories presented were not novel economics. *Id.*

118. *See, e.g.*, Baker & Shapiro, *supra* note 89, at 250.

119. *See Coordinated Effects Analysis: The Arch Coal Decision*, *supra* note 90, at 4; Bodosky, *supra* note 90.

120. Owings, *supra* note 55, at 330–31.

121. *See supra* notes 24–27 and accompanying text.

122. *See infra* notes 124–130 and accompanying text.

123. *See, e.g.*, United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011).

124. *Competition Enforcement Database*, FED. TRADE COMM'N, http://www.ftc.gov/competition-enforcement-database (last visited Sept. 18, 2014).

Mobile,[125] Ticketmaster/Live Nation,[126] Dean Foods/Foremost Farms,[127] LabCorp/Westcliff,[128] H&R Block/TaxACT,[129] and ABI/Modelo.[130] The case of ABI/Modelo is a particularly notable example in that it demonstrates the application of the maverick theory to a transaction after the 2010 revision of the Merger Guidelines.[131] Although the previous administration, under President George W. Bush, applied and endorsed the maverick theory,[132] the ABI/Modelo transaction is the DOJ's first significant application in a merger challenge of the revised Merger Guidelines that emphasize direct evidence of competitive effects.[133]

Prior to 2012, ABI owned half of Modelo, the producer of Corona beer.[134] In 2012, however, ABI sought to purchase the other half of Modelo, and in response, the U.S. government filed a lawsuit seeking to stop the transaction.[135] After a decade of consolidation by brewers around the world, the action by the DOJ to stop the ABI/Modelo deal was the "first major roadblock."[136] The government's move caused trepidation regarding the future of one of the biggest deals of 2012, signaling a more aggressive approach by antitrust officials.[137] In justifying their actions, U.S. authorities cited concerns that the proposed Modelo merger would give ABI more control of the U.S. beer market and the effect on customers would be higher prices and fewer choices.[138] At that time, Modelo was the third-largest beer company in the United States, following ABI as the largest and MillerCoors as the second-largest.[139] Modelo

125. Amended Complaint at 4, United States v. AT&T Inc., No. 11-01560 (D.D.C. Sept. 16, 2011), *available at* http://www.justice.gov/atr/cases/f275100/275128.pdf.

126. Complaint at 5–6, United States v. Ticketmaster Entm't, Inc., No. 1:10-CV-00139 (D.D.C. Jan. 25, 2010), *available at* http://www.justice.gov/atr/cases/f254500/254552.pdf.

127. Complaint at 2, United States v. Dean Foods Co., No. 10-C-0059 (E.D. Wis. Jan. 22, 2010), *available at* http://www.justice.gov/atr/cases/f254400/254455.pdf.

128. Complaint at 1–3, Lab. Corp. of Am., No. 9345 (F.T.C. Nov. 30, 2010), *available at* http://www.ftc.gov/sites/default/files/documents/cases/2010/12/101201lapcorpcmpt.pdf.

129. Complaint at 2, United States v. H&R Block, Inc., 833 F. Supp. 2d 36 (D.D.C. 2011) (No. 1:11-CV-00948), *available at* http://www.justice.gov/atr/cases/f271500/271579.pdf.

130. Complaint at 2–3, United States v. Anheuser-Busch InBev SA/NV, No. 13-127 (D.D.C. Jan. 31, 2013), 2013 WL 362891.

131. Botti & Swisher, *supra* note 21, at 2.

132. *See supra* Part IV.B.

133. Botti & Swisher, *supra* note 21, at 2.

134. Mark Scott, *Anheuser-Busch InBev Revises $20.1 Billion Takeover Plan*, N.Y. TIMES, Feb. 15, 2013, at B7. *See also* Diane Bartz & Martinne Geller, *U.S. Sues to Stop Beer Deal to Unite Bud and Corona*, REUTERS (Jan. 31, 2013, 5:38 PM), http://www.reuters.com/article/2013/01/31/us-modelo-abi-antitrust-idUSBRE90U0X620130131.

135. Bartz & Geller, *supra* note 134.

136. Scott, *supra* note 134.

137. Scott, *supra* note 134; Bartz & Geller, *supra* note 134.

138. Scott, *supra* note 134.

139. *Id.*

played a significant role in the marketplace by restricting the two market leaders from raising their prices despite having only seven percent of the national beer market.[140]

The underlying theory of the DOJ's case was that ABI hoped to remove Modelo's "maverick" presence from the marketplace due to Modelo's insubordination in following ABI-led price increases.[141] Given their control over the marketplace, ABI and MillerCoors could, in theory, raise prices without much resistance, but in actuality, when ABI and MillerCoors raised their prices, Modelo would keep its prices stable and gain market share, mainly due to its popular Corona beer.[142] To show that Modelo had undermined ABI's prices, the DOJ utilized documents and communication from within ABI.[143] The government alleged that Modelo resisted ABI-prompted price increases by implementing "The Momentum Plan," helping to close the "price gap" between ABI's cheaper domestic brands, including Bud and Bud Light, and Modelo's brands.[144] Because Modelo prices diverged from ABI's price increases, the variance exerted a downward pressure on the price of beer,[145] forcing ABI and MillerCoors to discourage their customers from "trad[ing] up" with price cuts and promotional markdowns.[146] The DOJ alleged that "[i]f ABI were to acquire . . . Modelo, this competitive constraint on ABI's and MillerCoors' ability to raise their prices would be eliminated."[147]

Furthermore, ABI's internal communications confirmed the DOJ's allegation regarding the pressure ABI experienced from Modelo's competitive prices, as ABI protested the results.[148] In the internal documents, ABI stated:

> "Recent price actions delivered expected Trade up from Sub-Premium, however it created additional share pressure from volume shifting to High End where we under-index;" "Consumers switching to High End accelerated by price gap compression;" "While relative Price to MC [MillerCoors] has remained stable the lack of Price increase in Corona is increasing pressure in Premium."[149]

140. Deborah L. Feinstein, *New Leadership at the Federal Antitrust Agencies: Change Matters*, ANTITRUST, Spring 2013, at 6, 7. ABI did take some actions to restrict the effect of the transaction on Modelo brand prices, and many believed that more actions could be taken to assure that there would be no anticompetitive effect. *Id.*

141. Botti & Swisher, *supra* note 21, at 2.

142. Bartz & Geller, *supra* note 134.

143. Scott, *supra* note 134.

144. Complaint, *supra* note 130, at 3.

145. Botti & Swisher, *supra* note 21, at 2.

146. Complaint, *supra* note 130, at 3.

147. *Id.*

148. *Id.* at 15.

149. *Id.*

In fact, in California, Modelo caused a price war due to ABI's anxiety over losing market share.[150] There, "ABI implemented 'aggressive price reductions . . . ' that were seen as 'specifically targeting Corona and Modelo.'"[151] According to the DOJ, "[t]hese aggressive discounts appear[ed] to have been taken in support of ABI's expressed desire to discipline Modelo's aggressive pricing with the ultimate goal of 'driv[ing] them to go up' in price."[152] In response, both MillerCoors and Modelo dropped their prices, and ABI reciprocated with an additional price decrease.[153] Similar battles occurred from 2010 to 2012 in Texas and New York City, where Modelo kept ABI from raising prices, forced it to lower prices, or caused it to lose market share.[154]

In essence, the DOJ used a traditional "coordinated effects" theory, claiming that Modelo operated as a maverick and would be eliminated if the merger succeeded.[155] Although the DOJ's theory was not groundbreaking in light of the Bush administration's use of the maverick theory, the DOJ's manner of applying the maverick theory is notable given the changed Merger Guidelines.[156] As previously noted, the revised Merger Guidelines focus less on market shares and market structures and more on direct evidence of the post-merger effects on competition.[157] The ABI/Modelo action exemplifies this analytical change, given that Modelo was only one of a number of other competitors, including at least one global brewer, had only a seven percent market share,[158] and was roughly fifty percent owned by ABI[159]—not the type of market participant that is likely to impact the actions of the market leaders like ABI and MillerCoors.[160] Instead of only examining these structural facts, the DOJ focused on the effect that eliminating Modelo would have on competition in the industry,[161] such as eliminating ABI's need to discourage consumers from trading up through decreased prices.[162] The DOJ stated that the parties' "combined national share actually *understates* the effect that eliminating Modelo would have on competition in the beer industry."[163] Thus, because Modelo's small share would generally be viewed as a real, economic

150. *Id.* at 16.
151. Complaint, *supra* note 130, at 16.
152. *Id.*
153. *Id.*
154. *Id.* at 16–17.
155. Botti & Swisher, *supra* note 21, at 2.
156. *Id.*
157. *Id.*
158. Feinstein, *supra* note 140.
159. Bartz & Geller, *supra* note 134.
160. Botti & Swisher, *supra* note 21, at 2.
161. *Id.*
162. Complaint, *supra* note 130, at 3.
163. Botti & Swisher, *supra* note 21, at 2 (internal quotation marks omitted).

indicator weakening or calling into question the potential anticompetitive effect, the DOJ walked a "fine doctrinal line" in opposing the transaction, relying heavily upon the maverick theory to do so.[164]

Moreover, rather than utilizing the judicial system to settle the fight, ABI and the DOJ settled the case.[165] In doing so, ABI chose to divest certain brands and agree to other remedies to appease the DOJ's concerns.[166] One of the changes to the restructured transaction required ABI to offer Constellation, a distributor of Modelo products, a brewery and a perpetual license.[167] Additionally, under the settlement, ABI was required to sell its domestic rights to certain Modelo brands including Corona, which eventually sold for $2.9 billion to Constellation Brands.[168] In deciding to sell rights to Corona, Corona Light, and Modelo Especial, ABI made an effort to satisfy the DOJ's concerns about the anticompetitive effect of the original takeover.[169] As of June 4, 2013, ABI had wrapped up its transaction with Modelo.[170]

In some ways, the remedy that the DOJ secured in this case seems to be a traditional merger remedy calling for divestiture of assets in the relevant market, but the DOJ explained the remedy as a "clean, structural remedy that eliminate[d] the anticompetitive effects of the acquisition."[171] In fact, Assistant Attorney General Bill Baer stated, "This is a win for the $80 billion U.S. beer market and consumers. If this settlement makes just a one percent difference in prices, U.S. consumers will save almost $1 billion a year."[172] Therefore, despite structural facts cutting against the challenge, such as Modelo being only one of a number of competitors and having only seven percent market share, the DOJ's willingness to bring this case exemplifies the Obama administration's aggressive merger enforcement through the use of the maverick theory.[173] Subsequently, while still wielding the sword of the maverick theory, the Obama administration chose to fight another antitrust battle, the American Airlines/US Airways merger transaction.[174]

164. *Id.* at 1–3.

165. U.S. Dep't of Justice: Office of Public Affairs, *Justice Department Reaches Settlement with Anheuser-Busch InBev and Grupo Modelo in Beer Case*, U.S. DEP'T OF JUSTICE (Apr. 19, 2013), http://www.justice.gov/opa/pr/2013/April/13-at-452.html.

166. Botti & Swisher, *supra* note 21, at 3.

167. Feinstein, *supra* note 140.

168. Scott, *supra* note 134.

169. *Id.*

170. Matthew Hibbard, *Anheuser-Busch InBev Completes Grupo Modelo Merger*, ST. LOUIS BUS. J. (June 4, 2013, 2:41 PM), http://www.bizjournals.com/stlouis/news/2013/06/04/anheuser-busch-inbev-completes-grupo.html.

171. Botti & Swisher, *supra* note 21, at 3 (internal quotation marks omitted).

172. U.S. Dep't of Justice: Office of Public Affairs, *supra* note 165 (internal quotation marks omitted).

173. Botti & Swisher, *supra* note 21, at 2–4.

174. Carey et al., *supra* note 20; Martin, *supra* note 21.

VI. TURBULENCE FOR AMERICAN AIRLINES/US AIRWAYS MERGER TRANSACTION

Unlike previous mergers in the airline industry, American Airlines/US Airways faced the DOJ's aggressive opposition using the revised Merger Guidelines and the maverick theory.[175] In 2005, there were nine major airlines flying inside the United States, and as of 2013, there were only five.[176] Antitrust regulators commented that instead of strengthening the case for the American Airlines/US Airways transaction, the many previous airline mergers had actually weakened its chances of approval.[177] Though the previous mergers had some positive effect, such as restoring profits and stability in the airline industry, they also had a negative effect, namely higher fares.[178] Additionally, the airline mergers often did not provide the services they promised, but instead used the market to raise fares and fees.[179] In fact, prices for some big-city routes increased forty to fifty percent or more after mergers reduced competition.[180] For example, between Houston and Chicago, the average fare in the third quarter was fifty-seven percent higher than the same period three years earlier, before United Airlines and Continental Airlines merged.[181]

The recent merger between American Airlines and US Airways brings the total major airlines flying domestically down to four and creates the largest airline worldwide.[182] In fact, the originally proposed American Airlines/US Airways deal would have allowed four airlines to control more than eighty percent of the U.S. market.[183] So, how is the present merger different than the many previous airline combinations that the DOJ allowed? One possible explanation, which the DOJ relied upon, is the existence of a maverick firm among the merging parties.[184] In the suit, the DOJ focused on US Airways' position in the marketplace.[185] US Airways was a much smaller airline than American, and it offered inexpensive, one-stop fares called "Advantage

175. *See* Carey et al., *supra* note 20; Martin, *supra* note 21.

176. Brad Plumer, *How the Big U.S. Airlines Try to Avoid Competing With Each Other*, WASH. POST (Aug. 14, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/14/heres-how-the-big-u-s-airlines-try-to-avoid-competing-with-each-other/.

177. Jad Mouawad, *U.S., Filing Suit, Moves to Block Airline Merger*, N.Y. TIMES (Aug. 13, 2013, 11:07 AM), http://dealbook.nytimes.com/2013/08/13/u-s-seeks-to-block-airline-merger/?_r=0.

178. *Id.*

179. Scott McCartney, *Past Airline Mergers Haven't Lived Up to Promises*, WALL ST. J. (Aug. 13, 2013, 1:34 PM), http://online.wsj.com/article/SB10001424127887324769704579010832802658974.html.

180. *Id.*

181. *Id.*

182. *See* Carey et al., *supra* note 20.

183. *Id.*

184. *See id.*

185. *Id.*

Fares."[186] According to the complaint, the Advantage Fares strategy undercut the prices of American, Delta, and United Airlines and "forced the other three airlines to drop prices more than they normally would."[187] Thus, the DOJ alleged that US Airways operated as a maverick firm in the marketplace, disrupting the industry with their "Advantage Fares."[188] If all else were equal, most passengers would prefer a nonstop flight over a one-stop flight, and so the significant discounts that US Airways offered on its one-stop flights captured a meaningful portion of the market on those routes.[189]

The novelty in US Airways' position is evident in the relationship that airlines have with their rival firms.[190] In the airline industry, there is an unwritten "respect" for competitors, whereby firms avoid subverting their competition's nonstop flights with less expensive one-stop flights.[191] One possible explanation for this so-called "respect" is that the "respect" would be more accurately classified as "fear."[192] Indeed, the concern for the undercutting airline is a fear of retaliation: "if I undercut my rival on routes where it offers nonstop service, the rival will undercut me on routes where I offer a nonstop service."[193] Therefore, the DOJ was concerned that without US Airways' presence in the market offering discounted airfares, it would be easier for Delta, United, and American, the three other major domestic airlines, to overcharge consumers.[194] The DOJ expected increased prices mainly in markets that American and US Airways control, such as Washington National.[195] The DOJ alleged that if US Airways and American merged, the new American Airlines "would likely abandon Advantage Fares, ending significant competition and causing consumers to pay hundreds of millions of dollars more."[196]

Moreover, the DOJ began settlement talks with the airlines, negotiating to drop the merger challenge if American and US Airways would divest some takeoff and landing slots.[197] These negotiations began three weeks before trial

186. *Id.*

187. Carey et al., *supra* note 20.

188. *See* Complaint at 4–5, 21, United States v. US Airways Group, Inc., No. 1:13-CV-01236 (D.D.C. Aug. 13, 2013), 2013 WL 4055128 ("Advantage Fares have proven highly disruptive to the industry's overall coordinated pricing dynamic.").

189. Martin, *supra* note 21.

190. *See* McCartney, *supra* note 179.

191. Martin, *supra* note 21.

192. *Id.*

193. *Id.*

194. McCartney, *supra* note 179.

195. Glusac, *supra* note 9.

196. Carey et al., *supra* note 20 (internal quotation marks omitted).

197. Jad Mouawad & Christopher Drew, *U.S. in Talks to Settle Suit Over American-US Airways Merger*, N.Y. TIMES (Nov. 4, 2013), http://www.nytimes.com/2013/11/05/business/us-in-talks-to-settle-suit-over-american-us-airways-merger.html?_r=0.

on the suit was scheduled to start in federal court in the District of Columbia and included a request for "divestitures of facilities at key constrained airports throughout the United States."[198] For example, at Reagan National Airport, near Washington, D.C., the two airlines control about two-thirds of the landing and takeoff slots; thus, the department requested that US Airways and American Airlines sell an unspecified number of slots.[199] Although hoping for settlement, the DOJ remained committed to resolving its concerns, stating, "We will not agree to something that does not fundamentally resolve the concerns that were expressed in the complaint."[200]

Despite earlier claims that the airline merger would lead to price increases and cost consumers millions, DOJ settled the suit, dropping its opposition to the American/US Airways merger.[201] The settlement, which required the merged airline to give up space at Reagan National Airport, sought to increase competition and decrease fare prices for flights to hub-cities.[202] One major problem with the merger in its original form was the control that the new airline would have had over National—sixty-nine percent of all flights—but in its amended form, the new airline, still known as American Airlines, will lose forty-four flights from National airport.[203] The agreement will open the door at National for low-cost carriers (LCCs) such as Southwest, JetBlue, and Virgin American.[204] Additionally, the settlement required the new American to relinquish spots at Boston Logan International, Chicago O'Hare International, Dallas Love Field, Los Angeles International, Miami International, and New York LaGuardia.[205] LCCs who acquire the relinquished slots and gates will be

198. *Id.* (internal quotation marks omitted).

199. *Id.*

200. *Id.* (internal quotation marks omitted).

201. Ashley Halsey III, *Justice Set to Approve Merger of American Airlines, US Airways*, WASH. POST (Nov. 12, 2013), http://www.washingtonpost.com/local/trafficandcommuting/justice-set-to-approve-merger-of-amr-us-airways/2013/11/12/2531b9f0-4bab-11e3-9890-a1e0997fb0c0_story.html.

202. *Id.*

203. *Id.* The DOJ required US Airways and American to divest slots to low cost carrier airlines (LCCs) in order to enhance system-wide competition in the airline industry. *See* U.S. Dep't of Justice: Office of Public Affairs, *Justice Department Requires US Airways and American Airlines to Divest Facilities at Seven Key Airports to Enhance System-wide Competition and Settle Merger Challenge*, U.S. DEP'T OF JUSTICE (Nov. 12, 2013), http://www.justice.gov/opa/pr/2013/November/13-at-1202.html. The proposed settlement increased the presence of the LCC's 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 by providing the LCCs with the incentive and ability to invest in new capacity and promoting more extensive competition. *Id.*

204. Halsey, *supra* note 201.

205. *Id.*

able to increase competition.[206] In fact, Assistant Attorney General Bill Baer stated:

> The extensive slot and gate divestitures at these key airports are groundbreaking and they will dramatically enhance the ability of LCCs to compete system-wide. . . . This settlement will disrupt the cozy relationships among the incumbent legacy carriers, increase access to key congested airports and provide consumers with more choices and more competitive airfares on flights all across the country.[207]

Thus, even in settling the case outside the judicial system, the DOJ achieved its goal of ensuring consumer protection and maintaining competitive markets[208] by opening once dominated airports to LCCs.[209]

However, the settlement would not be effective if other large airlines were allowed to bid on the opened slots and gates. If large competitors such as Delta and United Airlines were not barred from bidding on these slots, the settlement would only maintain the status quo and would fail to address the loss of competition from the American Airlines/US Airways merger.[210] Delta had expressed interest in bidding on slots, particularly at Dallas Love Field and Reagan National, but the DOJ found Delta ineligible for the slots at Love Field.[211] Originally, it was unclear whether Delta would ultimately win any slot given the DOJ's inclination toward budget carriers.[212] The divestiture process of the 104 Reagan National slots resulted in Southwest Airlines acquiring fifty-four slots, JetBlue picking up forty slots, and Virgin American buying eight, while two weekend slots remained unclaimed.[213] At LaGuardia, American divested thirty-four slots, with twenty-two going to Southwest and twelve

206. *Id.*

207. U.S. Dep't of Justice: Office of Public Affairs, *supra* note 203 (internal quotation marks omitted).

208. McDonald, *supra* note 5.

209. U.S. Dep't of Justice: Office of Public Affairs, *supra* note 203.

210. Chris Morran, *Impact of US Airways/American Airlines Merger Will Depend on Who Gets Leftovers from Wedding*, CONSUMERIST (Nov. 14, 2013), http://consumerist.com/2013/11/14/impact-of-us-airwaysamerican-airlines-merger-will-depend-on-who-gets-leftovers-from-wedding.

211. *Id.*; Terry Maxon, *DOJ Says Delta 'Not an Appropriate Divestiture Candidate' for Love Field Gates*, DALL. NEWS (Mar. 10, 2014, 10:34 AM), http://aviationblog.dallasnews.com/2014/03/doj-says-delta-not-an-appropriate-divestiture-candidate-for-love-field-gates.html.

212. *AAL Regan Slots Receive Bids*, ZACKS EQUITY RES. (Jan. 13, 2014), http://www.zacks.com/stock/news/119483/aal-regan-slots-receive-bids. The DOJ responded to Delta's request to acquire slots at Love Field, stating Delta Airlines was "not an appropriate divestiture candidate." Maxon, *supra* note 211.

213. Terry Maxon, *American Airlines Hopes to Win a Little Even as It Divests a Lot at Washington Airport*, DALL. NEWS (Mar. 26, 2014, 9:17 PM), http://www.dallasnews.com/business/airline-industry/20140326-american-airlines-hopes-to-win-a-little-even-as-it-divests-a-lot-at-washington-airport.ece.

going to Virgin America.[214] Moreover, it remains to be seen whether this opportunity will actually result in expanded presence for LCCs, but the opportunity has at least been presented. Regardless, thanks to the maverick theory, the DOJ levied a valid challenge to the American Airlines/US Airways merger, leaving the companies with little choice but to make concessions and appease the DOJ.

VII. FUTURE FOR MERGERS: EXPECT A BUMPY RIDE

The outcome in the American Airlines/US Airways merger should be examined in the context of recently emerging trends in merger enforcement. This case is much like the ABI/Modelo transaction, which provided insight into the current administration's aggressive enforcement as well as the effect of the changed weight of identifying a maverick firm amongst the merging parties.[215] In the ABI/Modelo transaction, the DOJ departed from traditional analysis, which applied great weight to structural facts such as market share in a totality-of-the-circumstances analysis.[216] Instead, the DOJ relied upon the identification of Modelo as maverick firm to predict the effect that eliminating Modelo would have on competition in the industry,[217] despite Modelo only capturing about seven percent of the national beer market.[218] Likewise, here, in the case of the new American Airlines, US Airways was a much smaller airline than American, with about 48.06 billion domestic revenue passenger miles from August 2012 to July 2013.[219] Contrastingly, during that same period, Delta, the largest airline, had about 93.3 billion, United had 89.97 billion, Southwest had 88.11 billion, and American had 73.18 billion.[220] US Airways' comparatively smaller size is a fact that would generally cut against the DOJ's argument that the merger is anticompetitive.[221] However, given that US Airways provided "Advantage Fares," the DOJ asserted that it operated as a maverick in the marketplace in "forc[ing] the other three airlines to drop prices more than they normally would."[222] Since the 2010 revisions of the Merger Guidelines placed greater weight on the identification of a maverick as direct

214. Terry Maxon, *American Airlines Sells New York, Washington Slots for More Than $425 Million*, DALL. NEWS (Mar. 10, 2014, 10:21 AM), http://aviationblog.dallasnews.com/2014/03/american-airlines-sells-new-york-washington-slots-for-more-than-425-million.html.

215. Botti & Swisher, *supra* note 21.

216. *Id.* at 2–3; Owings, *supra* note 55, at 328.

217. Botti & Swisher, *supra* note 21, at 2–3.

218. Feinstein, *supra* note 140.

219. *Research and Innovative Technology Administration Bureau of Transportation Statistics*, TRANSTATS, http://www.transtats.bts.gov (last visited Feb. 5, 2014).

220. *Id.*

221. Botti & Swisher, *supra* note 21, at 2.

222. Carey et al., *supra* note 20.

evidence,[223] the DOJ's suit focused less on structural concerns, which were still present, and more on the likelihood of anticompetitive behavior post-merger, utilizing the maverick theory in order to walk a "fine doctrinal line" and ease its concerns.[224]

Furthermore, the two cases are similar in their outcome: both settling outside of the judicial system and avoiding an extended court battle, yet also addressing the DOJ's concerns before agreeing to the transaction.[225] In ABI/Modelo, the DOJ settled with ABI, allowing the transaction to consummate but not without addressing its concerns by forcing ABI to both divest certain brands and offer a brewery and perpetual license to a distributor.[226] Similarly, in the American Airlines transaction, despite settling outside the judicial system, the decision to settle did in fact address the DOJ's concerns.[227] The agreement to allow the merger to proceed forced the two carriers to give up landing and takeoff slots as well as gates at key airports, which the government hopes will "increase access to the nation's busiest airports for low-cost airlines and . . . maintain flights to smaller cities."[228] For example, small airlines, such as Allegiant and Frontier airlines, have previously focused on serving smaller cities that have trouble attracting larger airlines, but open slots in New York and Washington allowed them the opportunity to bid on the openings.[229] Additionally, Virgin America has struggled with heavy debt and losses, but this merger might allow them to seek the open slots in order to take advantage of those markets.[230] The 104 slots in D.C. and thirty-four slots at LaGuardia International in New York will, hopefully, help in the long run to turn the mid-size players into genuine competitors.[231]

Moreover, deciding to settle outside the judicial system may seemingly indicate less aggressive merger enforcement; however, the DOJ walked a fine doctrinal line in order to address its concerns. Under other administrations, cases such as ABI/Modelo and American Airlines/US Airways may not have even been challenged due to structural facts, such as the market structure and market share, cutting against the challenge.[232] Contrastingly, given the Obama

223. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, *supra* note 3, § 2.1.5.

224. Botti & Swisher, *supra* note 21, at 2.

225. Halsey, *supra* note 201; Hibbard, *supra* note 170.

226. Feinstein, *supra* note 140; Scott, *supra* note 134.

227. U.S. Dep't of Justice: Office of Public Affairs, *supra* note 203.

228. Scott Mayerowitz, *How Will American-US Airways Deal Impact Competitors?*, USA TODAY (Nov. 13, 2013, 12:22 PM), http://www.usatoday.com/story/todayinthesky/2013/11/13/how-will-american-us-airways-deal-impact-competitors/3513873.

229. *Id.*

230. *Id.*

231. Morran, *supra* note 210.

232. *See* Botti & Swisher, *supra* note 21, at 2–3.

administration's aggressive enforcement, the DOJ chose to challenge both cases and procured concessions in both.[233] In both cases, the settlements indicate that there may be shades of aggressive enforcement, whereby the antitrust enforcers can achieve their goals without permanently blocking the merger. The shades of aggressive enforcement seem especially vivid in cases blotched with structural facts cutting against the challenge.[234] Two clear examples of such cases are the ABI/Modelo and American Airlines/US Airways merger transactions, where the DOJ began by challenging the transactions but ended with a settlement addressing its concerns.[235] A question that may arise is whether there is anything about these two particular industries, outside of the individual mergers, that caused the Obama administration to choose to challenge the transactions in the first place but then settle the cases. Perhaps there is a necessary appearance of regulation for the industries based upon the political party associated with the challenge. However, these questions are outside the scope of this Comment.

In the future, the potential for administrations to use the maverick theory unpredictably could create uncertainty for businesses. Throughout the rest of Obama's second term, the DOJ could continue to use the maverick theory to aggressively enforce antitrust laws, given the changed Merger Guidelines and the DOJ's recent strong use of the maverick theory.[236] However, the question arises as to how subsequent administrations will utilize the maverick theory in the future.[237] Since the maverick theory can operate as both a sword and a shield, the maverick theory could be utilized in a way that will most effectively achieve the goals of the administration in control.[238] For example, if President Obama's successor is more similar in views to the Bush administration, the maverick theory is less likely to be utilized, raised only as a shield of protection. When it is utilized, it may be on the back-burner, as it was in traditional merger analyses.[239] On the other hand, if the next administration is more similar to President Obama's administration, a likely outcome given recent political trends,[240] the maverick theory could be a "frequent-flyer," so to speak, of antitrust enforcement.[241] Furthermore, continued divergence from

233. *Id.*; U.S. Dep't of Justice: Office of Public Affairs, *supra* note 203.

234. *See* Botti & Swisher, *supra* note 21, at 2–3.

235. *Id.* at 3; U.S. Dep't of Justice: Office of Public Affairs, *supra* note 203.

236. Botti & Swisher, *supra* note 21, at 4.

237. *See* Baker, *supra* note 58, at 136.

238. *Id.* at 189.

239. *See* Botti & Swisher, *supra* note 21, at 2. *See also Coordinated Effect Analysis: The Arch Coal Decision*, *supra* note 90, at 4; Bodosky, *supra* note 90.

240. *See* Alan Greenblatt, *GOP Struggles to Sell Message in Big Cities*, NPR (Feb. 15, 2014, 1:02 PM), http://www.npr.org/blogs/itsallpolitics/2014/02/15/275939519/gop-struggles-to-sell-message-in-big-cities.

241. *See* Botti & Swisher, *supra* note 21, at 4.

traditional analyses is foreseeable, with a greater focus on post-merger marketplace than things such as concentration and market share.[242] Moreover, while parties on both sides of the political spectrum may not utilize the maverick theory consistently, it is clear that the maverick theory will play a key role in antitrust enforcement, either through dormancy or activity.

CONCLUSION

In conclusion, the DOJ's decision to challenge the American Airlines/US Airways merger serves as further evidence of the Obama administration's aggressive enforcement of antitrust policies in that it challenged the merger despite the history of allowing airlines to merge and the smaller size of US Airways. Such aggressive enforcement and use of the maverick theory was not surprising given the change in the Merger Guidelines. In 2010, the changed Merger Guidelines delineated the maverick theory as direct evidence of anticompetitive behavior. Thus, like in the ABI/Modelo transaction, the DOJ's utilization of the maverick theory in its complaint in the American Airlines/US Airways merger permitted it to challenge the merger as well as ease concerns of anticompetitive behavior. After comparing the use of the maverick theory under the Bush administration and under the Obama administration, there is a clear dichotomy between the two administrations, and it is evident that the maverick theory can be a viable weapon in challenging mergers depending on the way it is utilized. Moreover, due to the unpredictable use of the maverick theory in antitrust enforcement, those pursuing mergers in the future should expect the unexpected. If there is something specific about the beer and airline industries that influenced the DOJ's action in the ABI/Modelo and American Airlines/US Airways transactions, the future seems especially bumpy for mergers in those industries as well as industries similar in structure. Overall, in the future, prudent businesses will learn to examine the administration, comparing its antitrust policies to the Bush and Obama administrations in order to predict the strength of antitrust enforcement that the administration will pursue and the utilization of the maverick theory.

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242. *See* Baker, *supra* note 58, at 136.

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