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Politics in the American Airlines-U.S. Airways Merger and Antitrust Settlement

Michelle Chan*

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Abstract

American Airlines was one of the airline industry's darlings. A legacy airline, it was a household name, a massive entity, employed thousands, and commanded a fearsome presence among other industry players like unions and airport terminals. However, with ballooning costs and the red ocean airline industry's evolution, American Airlines' parent company, AMR, was forced into bankruptcy in November 2011. To emerge from Chapter 11, American Airlines and U.S. Airways announced plans to merge and come out a stronger, larger airline in February 2013. The Department of Justice Antitrust Division shortly thereafter filed a lawsuit opposing the merger, alleging it would have anticompetitive effects by decreasing the number of industry competitors and increasing prices. However, the lawsuit, despite having substantial reasons to move forward to trial, settled in November 2013. This Note will discuss the potential motivations behind this settlement, ultimately arguing that political considerations, which normally do not play a role in antitrust enforcement, were the driving factor.

KEYWORDS: Airline Industry, Aviation Law, Antitrust, Merger, Chapter 11, Bankruptcy, Anticompetitive

*J.D. Candidate, 2015, Fordham University School of Law; B.A. in Journalism & B.S. in International Business at the University of Maryland, College Park. I would like to thank my family and my friends for their support while writing this Note. In addition, I would like to thank Professor Richard Squire for his guidance and mentorship and the staff and Editorial Board of the Fordham Corporate & Financial Law Journal for their assistance

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ABSTRACT

American Airlines was one of the airline industry’s darlings. A legacy airline, it was a household name, a massive entity, employed thousands, and commanded a fearsome presence among other industry players like unions and airport terminals. However, with ballooning costs and the red ocean airline industry’s evolution, American Airlines’ parent company, AMR, was forced into bankruptcy in November 2011. To emerge from Chapter 11, American Airlines and U.S. Airways announced plans to merge and come out a stronger, larger airline in February 2013.

The Department of Justice Antitrust Division shortly thereafter filed a lawsuit opposing the merger, alleging it would have anticompetitive effects by decreasing the number of industry competitors and increasing prices. However, the lawsuit, despite having substantial reasons to move forward to trial, settled in November 2013. This Note will discuss the potential motivations behind this settlement, ultimately arguing that political considerations, which normally do not play a role in antitrust enforcement, were the driving factor.

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INTRODUCTION

The AMR bankruptcy, merger, and antitrust suit depict the story of a legacy airline seeking rescue from financial disaster by agreeing to merge with U.S. Airways, only to be surprised by the Department of Justice Antitrust Division's lawsuit. In November 2011, the parent company of American Airlines, AMR, filed for Chapter 11 bankruptcy.¹ AMR was one of the last of the legacy U.S. airline carriers to file for bankruptcy.² Legacy airlines include those that were founded earlier and traditionally known to provide better service (like free baggage and in-flight catering).³ AMR suffered overwhelming cumulative losses of \$10 billion since 2001,⁴ annual union costs of \$600 million more than those of its rivals,⁵ and fierce competition from consolidated legacy-airline sharks that swam in its increasingly red ocean⁶.

Miraculously, in February 2013, AMR found a haven from the uncertainty of Chapter 11 through the opportunity to merge with U.S. Airways, a slightly smaller provider of domestic flights.⁷ Doug Parker, U.S. Airways' CEO, stated that the opportunity for a merger developed two years earlier, when AMR filed for bankruptcy.⁸ He said it was a

1. Dominic Rushe, *American Airlines Files for Chapter 11 Bankruptcy Protection*, THE GUARDIAN (Nov. 29, 2011), <http://www.theguardian.com/business/2011/nov/29/american-airlines-chapter-11-bankruptcy>.

2. *Id.*

3. C.S., *Legacy vs Low-Cost Carriers: Spot the Difference*, THE ECONOMIST, March 26, 2013, <http://www.economist.com/blogs/gulliver/2013/03/legacy-vs-low-cost-carriers>.

4. See Frank Voisin, *Staggering chart shows the decade of losses at American Airlines (AMR, AER)*, SMARTER INVESTING BY COVESTOR (Aug. 2, 2011), <http://investing.covestor.com/2011/08/staggering-chart-shows-the-decade-of-losses-at-american-airlines-amr-aer>.

5. Rushe, *supra* note 1.

6. Susan Carey, Brent Kendall & Jack Nicas, *U.S. Moves to Block US Airways—American Airlines Merger*, WALL ST. J. (Aug. 13, 2013), <http://online.wsj.com/article/SB10001424127887324769704579010612415800106.html> [hereinafter *U.S. Moves to Block Merger*].

7. Susan Carey, *U.S. Leaves American—US Airways Deal in a Lurch*, WALL ST. J. (Aug. 18, 2013), <http://online.wsj.com/article/SB10001424127887323423804579020762369438156.html> [hereinafter *U.S. Leaves Deal in a Lurch*].

8. Susan Carey, *US Airways Chief Describes Biggest Challenges in AMR Settlement*, WALL ST. J. (Dec. 1, 2013), <http://online.wsj.com/news/articles/SB10001424052702304579404579232100811998912#printMode> [hereinafter *Biggest Challenges*].

logical partnership that would allow the new entity to be a contender against large legacy airlines, as opposed to the low-cost carriers.⁹ He did not see the bankruptcy as a large problem but rather as an advantage that would allow AMR to address its inflated operating expenses.¹⁰ The opportunity allowed the companies to take advantage of each other's best assets, and promised an additional \$280 million each year in revenue.¹¹

The companies gave themselves until mid-December 2013 to finalize the proposed deal.¹² They agreed to keep the American Airlines company name and the U.S. Airways CEO in office;¹³ it seemed as if everyone, including the employees' and pilots' unions, were pleased.¹⁴

In August 2013, however, the parties were shocked to discover that their merger was the target of a Department of Justice ("DOJ") Antitrust Division lawsuit.¹⁵ The suit threatened to disrupt AMR's intentions to complete its bankruptcy proceedings quickly.¹⁶ A prompt resolution of the bankruptcy issue was an essential cornerstone for the merger, and therefore, American Airlines and U.S. Airlines were relying upon the government's blessing to move forward.¹⁷

The Antitrust Division's intervention came about quite unexpectedly given the division's history of offering rapid approval of a number of similar mergers.¹⁸ In recent years, the airline industry had become a red ocean because the level of competition made it difficult for legacy carriers to turn a profit.¹⁹ They were left with two options: merge with one another or reorganize in Chapter 11.²⁰

9. *Id.*

10. *Id.*

11. Steven Pearlstein, *Why the Justice Department Blocked the American-US Airways Merger*, WASHINGTON POST (Aug. 15, 2013), available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/15/why-the-justice-department-blocked-the-american-us-airways-merger/>.

12. *U.S. Leaves Deal in a Lurch*, *supra* note 7.

13. *Id.*

14. *U.S. Moves to Block Merger*, *supra* note 6.

15. *Biggest Challenges*, *supra* note 8.

16. *U.S. Moves to Block Merger*, *supra* note 6.

17. *Id.*

18. Pearlstein, *supra* note 11.

19. *Id.*

20. *Id.*

The surprise move by the Antitrust Division culminated in a settlement in November 2013.²¹ While the Antitrust Division has a reputation for not considering political factors when deciding whether to block corporate mergers,²² the American Airlines–U.S. Airways merger was different. In fact, politics seems to have played a significant role in its decision to settle the suit.

This note will discuss Section 7 of the Clayton Act and the general independence of the Department of Justice Antitrust Division and Federal Trade Commission as antitrust law enforcement agencies. Section II of this note will discuss why the Antitrust Division should have prosecuted the American Airlines–U.S. Airways merger on its antitrust merits, as well as the stand-alone theory and advantage pricing theory, both of which were strong incentives for pursuing the case at trial. Section III of this note will discuss three reasons why the Antitrust Division may have opted to settle this lawsuit, and will ultimately determine that a long-term settlement strategy and litigation risk fears were unlikely to be strong enough, but that political forces may have been the driver behind the lawsuit’s settlement.

I. GENERAL APPLICATIONS OF § 7 OF THE CLAYTON ACT AND THE INDEPENDENCE OF THE DEPARTMENT OF JUSTICE ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION

A. THE ANTITRUST DIVISION’S COMPLAINT WAS BASED UPON A VIOLATION OF § 7 OF THE CLAYTON ACT.

Section 7 of the Clayton Act bans commercial activity when a company acquires another one, which causes a substantial decrease in competition or creates a monopoly.²³ The antitrust merger doctrine aims

21. Jad Mouawad, *Merger of American and US Airways is Waved Ahead*, N.Y. TIMES (Nov. 27, 2013), <http://www.nytimes.com/2013/11/28/business/airlines-clear-final-merger-obstacle.html?ref=business&pagewanted=print>.

22. See D. Daniel Sokol, *Antitrust, Institutions, and Merger Control*, 17 GEO. MASON L. REV. 1055, 1112 (2010) (citing Malcolm B. Coate & Shaw W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process 1996-2003*, 73 ANTITRUST L.J. 531, 564 (2005)).

23. 15 U.S.C. § 18 (2012) (“No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of

to protect competition in a particular market or line of commerce.²⁴ The Antitrust Division argued that an American Airlines–U.S. Airways merger would threaten competition in the domestic airline industry by leaving only four remaining major domestic airlines and exposing consumers to rising ticket prices.²⁵ Therefore, if the Antitrust Division’s suit had been successful, it would have found a violation of Clayton Act Section 7.²⁶

B. IN THE PAST, THE GOVERNMENT’S ANTITRUST ENFORCERS HAD A REPUTATION FOR POLITICAL INDEPENDENCE.

While the DOJ is not traditionally considered an independent agency like the Federal Trade Commission (“FTC”),²⁷ its enforcement of antitrust laws through the Antitrust Division to guard the institutions of capitalism and freedom of opportunity²⁸ is generally non-partisan.²⁹ Congress did not intend the antitrust statutes to give courts jurisdiction over social issues and theories, such as the efficiency of the economy or small business initiatives, but rather it intended to protect consumers and their right to fair treatment.³⁰

Since their formation, the Antitrust Division and the Federal Trade Commission have established guidelines to analyze horizontal

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.”).

24. United States v. Phila. Nat’l Bank, 374 U.S. 321, 356 (1963).

25. Complaint at 3, United States v. U.S. Airways Group, Inc., No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013).

26. *Id.* at 7.

27. Sheila F. Anthony, Remarks at the Columbia University International Journalists Seminar (March 21, 2000), (transcript available at <http://www.ftc.gov/public-statements/2000/03/remarks>); see Marisa Taylor & Margaret Talev, *Politics Weakens Justice Dept. Independence*, MCCLATCHY DC (June 18, 2007), <http://www.mcclatchydc.com/2007/06/18/17061/politics-weakens-justice-dept.html> (showing evidence of the partisan nature of the Department of Justice).

28. *Antitrust Division Mission*, UNITED STATES DEP’T OF JUSTICE, <http://www.justice.gov/atr/about/mission.html>.

29. Bill Baer, Remarks as Prepared for Delivery to the New York State Bar Association (Jan. 30, 2014) (transcript available at <http://www.justice.gov/atr/public/speeches/303269.pdf>).

30. Philip C. Kissam, *Antitrust Boycott Doctrine*, 69 IOWA L. REV. 1165, 1174 (1984).

mergers.³¹ The guidelines describe what aspects of deals enforcement agencies should focus on to determine if the agency that opts to prosecute has grounds under antitrust law to do so.³² Of the aspects covered, the guidelines cover relevant market definition, measurement and concentration of the market, potential adverse competitive effects of the proposed merger, entry factors, efficiencies, and failing-company considerations.³³ Notably missing from the list of considerations are political factors.³⁴

The government has lived up to its apolitical calling, as an FTC study from 2006 examining the Bush Senior and Clinton administrations' antitrust records found no differences in the standards antitrust officials used to enforce cases.³⁵ This result emerged regardless of the officials' political affiliation or of the party in control of the White House.³⁶ This study by Malcolm Coate, a senior economist at the FTC's Bureau of Economics,³⁷ found that the "FTC merger policy has remained constant across both Republican and Democratic administrations over the past twenty years."³⁸

This study was included in an article by Coate and Shawn W. Ulrick that was published in the *Antitrust Law Journal*.³⁹ The article discussed transparency in the FTC enforcement of horizontal merger doctrine.⁴⁰ The study provided econometric analysis to pinpoint variables—such as market concentration, entry conditions, and viable customer concerns—which affected the differing enforcement of

31. C. PAUL ROGERS III, STEPHEN CALKINS, MARK R. PATTERSON & WILLIAM R. ANDERSEN, *ANTITRUST LAW: POLICY AND PRACTICE* 558 (4th ed. 2008).

32. *Id.*

33. *Id.* at 558-559.

34. *See id.*

35. Sokol, *supra* note 22 and accompanying text.

36. *Id.*

37. *Malcolm B. Coate – Antitrust Writing Awards 2014*, INSTITUTE OF COMPETITION LAW ANTITRUST WRITING AWARDS & RANKING 2014, awards.concurrences.com/auteur/malcolm-b-coate.

38. Sokol, *supra* note 22 and accompanying text.

39. Malcolm B. Coate & Shawn W. Ulrick, *Transparency at the Federal Trade Commission: The Horizontal Merger Review Process*, 73 *ANTITRUST L.J.* 531, 531 (2006).

40. *Id.* at 531-32.

mergers.⁴¹ The study found that the identity of the controlling party in the executive branch did not influence enforcement policy.⁴²

The study began by looking at the entirety of Hart-Scott-Rodino second requests sent by the FTC between 1996 and 2003.⁴³ Hart-Scott-Rodino is a set of amendments to federal antitrust laws, primarily the Clayton Antitrust Act,⁴⁴ which requires parties to file information and receive approval from the FTC or Antitrust Division before they can complete mergers.⁴⁵ This ensures the merger gets the approval and supervision of the government.⁴⁶ A so-called “second request” occurs when the Antitrust Division or FTC believes there may be an anticompetitive concern and needs more information from the parties merging.⁴⁷ The study conducted single-market competitive effects analysis and attempted to define the market.⁴⁸ In its analysis, it included factors such as concentration, ease of entry, and specific evidence showing anti-competitive concerns.⁴⁹ Of the 151 horizontal transactions, half involved a sole market where competition might be harmed,⁵⁰ while thirty-five transactions involved at least five markets for analysis.⁵¹

The econometric models the study utilized involve binary outcomes to determine the relationship between enforcement and the variables that might be behind the enforcement.⁵² The first model discussed is the core model, which analyzed a 570-observation sample and was the widest data set available.⁵³ It considered the enforcement decision based upon structural variables including the HHI,⁵⁴ the change in the HHI, the

41. *Id.* at 532.

42. *Id.*

43. *Id.* at 533 (excluding those that did not involve horizontal mergers of enough substance or those that did not warrant a full investigation).

44. FED. TRADE COMM’N, HART-SCOTT-RODINO PREMERGER NOTIFICATION PROGRAM: INTRODUCTORY GUIDE III 1 (June 2010), available at <http://www.ftc.gov/sites/default/files/attachments/merger-review/guide3.pdf>.

45. *Id.*

46. *Id.*

47. *Id.*

48. Coate & Ulrick, *supra* note 39, at 533.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 535.

53. *Id.* at 536.

54. The HHI is the Herfindahl-Hirschman Index, a measurement of market concentration calculated by squaring the market share, expressed in percentage points,

number of significant rivals, and industry control variables like those in oil, grocery, and chemical industries.⁵⁵ The remaining models looked at were the broad model and the final model.⁵⁶ The broad model looked specifically at those mergers that involved one to three markets. However, this model may not provide meaningful results since it was impossible to use it to look at how large mergers affect competition in many other relevant markets due to the lack of raw data.⁵⁷ Ultimately, the final model was the most useful in analyzing mergers that raised only one or two competitive concerns.⁵⁸

The relationships of the variables remained stable throughout the study, leading Coate and Ulrick to conclude that the political party in control of the executive branch was not influential in the outcome of a merger investigation.⁵⁹

An example of the Antitrust Division's apolitical approach to enforcement⁶⁰ can be found in the 2011 lawsuit to block the proposed merger of AT&T and T-Mobile.⁶¹ Andrew Hogley, an Espirito Santo Telecoms analyst, opined that the case gained momentum because many state governors and attorney generals were vocally supporting the case on behalf of the merging companies.⁶² He hypothesized that the strength and pressure of AT&T's lobbying was gaining traction with the Antitrust Division.⁶³ But the Antitrust Division weathered the intense lobbying efforts from the merging companies, ultimately deciding that

of all competing firms in the market and summing these results. *Herfindahl-Hirshman Index*, UNITED STATES DEP'T OF JUSTICE, <http://www.justice.gov/atr/public/guidelines/hhi.html>.

55. Coate & Ulrick, *supra* note 39, at 536.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* at 532.

60. See *Instant View: U.S. Gov't to Block AT&T Bid for T-Mobile*, 19 No. 6 Westlaw Journal Antitrust 2, Sept. 8, 2011, 2011 WL 3962737 (WJANTI) [hereinafter *Gov't Blocks AT&T Bid for T-Mobile*] (according to Andrew Schwartzman, Media Access Project senior vice president and policy director); *Justice Department Files Antitrust Lawsuit to Block AT&T's Acquisition of T-Mobile*, UNITED STATES DEP'T OF JUSTICE (Aug. 31, 2011), available at http://www.justice.gov/atr/public/press_releases/2011/274615.htm.

61. *Gov't Blocks AT&T Bid for T-Mobile*, *supra* note 60, at 2.

62. *Id.* at 1.

63. *Id.*

the merger should not go forward because it would be contrary to the interests of consumers.⁶⁴

C. THE ANTITRUST DIVISION IS OFTEN ONLY WILLING TO SETTLE AN ANTITRUST LAWSUIT WHEN IT THINKS THE SETTLEMENT ADDRESSES ITS ANTICOMPETITIVE CONCERNS.

In its complaint, the Antitrust Division stated that a merger would create a decreasingly competitive market for legacy airlines because of the price gap between legacy airlines and cheaper alternatives.⁶⁵ “In many relevant markets, these [non-legacy] airlines do not offer any service at all, and in other markets, many passengers view them as a less preferred alternative to the legacy carriers. Therefore, competition from Southwest, JetBlue, or other airlines would not be sufficient to prevent the anticompetitive consequences of the merger.”⁶⁶

The complaint stated that unless the merger was enjoined “(a) actual and potential competition between U.S. Airways and American Airlines would be eliminated; (b) competition in general among network airlines would be lessened substantially; (c) ticket prices and ancillary fees would be higher than they otherwise would; (d) industry capacity would be lower than it otherwise would; (e) service would be lessened; and (f) the availability of slots at Reagan National would be significantly impaired.”⁶⁷ The nature of this language suggested enjoinder was the only option unless the Department’s anticompetitive concerns were addressed.⁶⁸

II. THE ANTITRUST DIVISION’S COMPLAINT SHOULD HAVE BEEN PROSECUTED ON THE MERITS BECAUSE OF TWO MAJOR CONCERNS: THE STAND-ALONE THEORY AND THE ADVANTAGE-PRICING THEORY.

A. THE STAND-ALONE THEORY

The stand-alone theory was premised upon the idea that American Airlines would be better off post-bankruptcy without the merger because

64. *Id.* at 2 (according to Andrew Schwartzman, Media Access Project senior vice president and policy director).

65. Complaint, *supra* note 25, at 33.

66. *Id.*

67. *Id.* at 33-34.

68. *See id.*

of its extensive expansion plan, which a merger would disrupt.⁶⁹ In fact, the Antitrust Division in its initial complaint stated that “[a] US Airways’ executive vice president . . . wrote in July 2012 that ‘[t]here is NO question about AMR’s ability to survive on a standalone basis.’”⁷⁰

Even the media was aware of the options available to American Airlines should the merger not survive.⁷¹ For example, an opt-out course from the merger agreement for American Airlines seemed highly appealing.⁷² The potential reasons for a stand-alone result were varied: (1) American’s managers initially feared that the merger would cost them their jobs; (2) American’s management would, and could, keep working even without the merger; and (3) American was prospering in bankruptcy, enjoying its best second quarter in history.⁷³

With this option at the edge of the table, the Antitrust Division had little reason to settle or fail to see its trial through.⁷⁴ By preserving American Airlines as a stand-alone operation, the Antitrust Division could preserve the same, if not greater, level of competition than had previously existed.⁷⁵ A settlement that did anything other than resolve all of the Antitrust Division’s anti-competitive concerns was less than the government needed to accept.⁷⁶

B. THE ADVANTAGE-PRICING THEORY

The Antitrust Division’s advantage-pricing theory was that U.S. Airways was a maverick in the airline industry because of its low pricing.⁷⁷ U.S. Airways executed its pricing model through its Advantage Fares program—a strategy that undercut legacy airlines’ nonstop service fares by offering less expensive connecting flights.⁷⁸ The Advantage Fares program offered a flight with one stop for forty

69. Complaint, *supra* note 25, at 26; Joe Brancatelli, *How American Airlines Could Bail Out of the US Airways Merger—and Why It Might Want To*, JACKSONVILLE BUS. J. (Sept. 5, 2013), <http://www.bizjournals.com/jacksonville/news/news-wire/2013/09/04/will-american-airlines-ditch-usairways.html?page=all>.

70. Complaint, *supra* note 25, at 9.

71. See Brancatelli, *supra* note 69.

72. *Id.*

73. *Id.*

74. See *id.*; see Complaint, *supra* note 25, at 26.

75. See Brancatelli, *supra* note 69.

76. See Complaint, *supra* note 25, at 32-33.

77. Complaint, *supra* note 25, at 4-5.

78. *Id.*

percent less than a nonstop flight run by a legacy airline.⁷⁹ Unfortunately, a merger would make the new company less likely to keep prices low because even though it would retain U.S. Airways' management, it would now see itself as a "big boy" player in the industry that did not need revenue from Advantage Fares' passengers.⁸⁰

U.S. Airways was valuable to consumers because it declined to conform to the industry practice of not undercutting the nonstop prices offered by legacy competitors.⁸¹ Because of U.S. Airways' Advantage Fares program, legacy airlines like American, Delta, and United were often driven to offer less expensive fares for connecting service.⁸² The Antitrust Division's complaint suggested that "Advantage Fares will go the way of free baggage check once the merger is complete."⁸³

The Antitrust Division supported its theory of harm to consumers by showing that U.S. Airways had admitted, as far back as September 2010, that its Advantage Fares program would change if it had a different, perhaps larger, route network.⁸⁴ The complaint further stated that "[i]nternal analysis at American in October 2012 concluded that '[t]he [Advantage Fares] program would have to be eliminated in a merger with American, as American's large non-stop markets would now be susceptible to reactionary pricing from Delta and United.'"⁸⁵

Meanwhile, the Antitrust Division attempted to pin U.S. Airways against the wall by highlighting skepticism that the U.S. Airways' CEO had expressed about other airlines' commitment to promises made during antitrust review when they previously sought merger approval.⁸⁶ U.S. Airways' CEO Doug Parker had stated, "I'm hopeful they're just saying what they need . . . to get this [transaction] approved."⁸⁷ The complaint then asserted that U.S. Airways and American Airlines were

79. Steven Pearlstein, *The U.S. Airways–American Airlines Merger is a Go. Here's Why It Maybe Shouldn't Be*, WASHINGTON POST (Nov. 12, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/11/12/the-u-s-airways-american-airlines-merger-is-a-go-heres-why-it-maybe-shouldnt-be/> [hereinafter *Merger is a Go*].

80. Complaint, *supra* note 25, at 4-5.

81. *Merger is a Go*, *supra* note 79.

82. Complaint, *supra* note 25, at 4-5.

83. *Merger is a Go*, *supra* note 79.

84. Complaint, *supra* note 25, at 21.

85. *Id.* at 22.

86. *Id.* at 7.

87. *Id.*

doing the same thing: “saying what they believe needs to be said to pass antitrust scrutiny.”⁸⁸

An example of Doug Parker’s saying whatever was necessary to get merger approval was widely disseminated in the press.⁸⁹ Accordingly, the Wall Street Journal reported that Parker, the longest-sitting CEO of a U.S.-based airline, had a team that was particularly experienced in merger integration.⁹⁰ The article quoted Parker as saying, “We’ve seen what other airlines did But it’s really difficult work. We’re doing everything we can to do it as well as possible and not cause disruption to our customers.”⁹¹ Parker’s language hedged expectations that the merger would not affect services and prices, and it attempted to allay the antitrust concerns of the Antitrust Department.⁹²

III. THERE ARE THREE POTENTIAL REASONS THE ANTITRUST DIVISION HAD TO SETTLE THIS LAWSUIT, BUT ONLY THE POLITICAL MOTIVATION IS PERSUASIVE.

A. OPTION 1: A SETTLEMENT WAS THE ANTITRUST DIVISION’S STRATEGY ALL ALONG.

It is possible that the Antitrust Division had long planned to settle.⁹³ Perhaps the harsh language in its complaint against the airlines and the public statements of William Baer, Assistant Attorney General for the Antitrust Division, were mere puffery in support of an attempt to intimidate the parties into settling.⁹⁴ This is unlikely, however, because the Antitrust Division had serious misgivings with the merger due to its

88. *Id.*

89. *Biggest Challenges*, *supra* note 8.

90. *Id.*

91. *Id.*

92. *See id.*

93. Jad Mouwad & 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> (where the article stated that Eric Holder said “the department hoped for a settlement, but remained ‘fully prepared to take this case to trial’”).

94. *See* Complaint, *supra* note 25; *see* Terry Maxon, *Justice Official: Here’s Why We’re Fighting the US Airways–American Airlines Merger*, THE DALLAS MORNING NEWS (Aug. 13, 2013), <http://aviationblog.dallasnews.com/2013/08/justice-official-heres-why-were-fighting-the-us-airways-american-airlines-merger.html/> [hereinafter *Fighting the Merger*].

stand-alone and advantage-pricing issues.⁹⁵ These concerns were not mere puffery—they were substantive anti-competitive hazards that the Antitrust Division believed would become a reality if the merger went forward.⁹⁶

In previous lawsuits against proposed mergers, the language in the Antitrust Division's complaint was indicative of whether it was willing to settle.⁹⁷ Comparing the Anheuser-Busch– Grupo Modelo and AT&T–T-Mobile mergers to the American Airlines–U.S. Airways merger can illustrate this intention.⁹⁸

In its suit to block the merger of Anheuser-Busch InBev with Grupo Modelo, the Antitrust Division's complaint suggested that the parties would probably be able to reach a settlement.⁹⁹ While the complaint noted a high-low price gap between Anheuser-Busch and Modelo similar to the American Airlines and U.S. Airways difference in pricing models,¹⁰⁰ the language the complaint used in the Anheuser-Busch–Grupo Modelo complaint suggested a settlement was possible through a less forceful tone,¹⁰¹ unlike the language indicators in the American Airlines–U.S. Airways complaint.

The Antitrust Division's complaint in the Anheuser-Busch–Grupo Modelo merger contained weak language regarding remedies.¹⁰² The complaint stated that the parties' suggested remedy was merely "inadequate," but it did not elaborate with stronger language.¹⁰³ It stated that the suggested remedy (selling Grupo Modelo's interest in Crown Imports to another company and entering into supply agreements giving

95. Complaint, *supra* note 25, at 9, 21.

96. Competitive Impact Statement at 8, *United States v. U.S. Airways Group, Inc.*, No. 1:13-cv-01236 (D.D.C. Aug. 13, 2013).

97. See *Justice Department Files Antitrust Lawsuit Challenging Anheuser-Busch InBev's Proposed Acquisition of Grupo Modelo*, UNITED STATES DEP'T OF JUSTICE (Jan. 31, 2013), http://www.justice.gov/atr/public/press_releases/2013/292096.htm.

98. See *id.*

99. *Id.* (where Baer said, "The companies' attempt to fix this anticompetitive deal through the sale of Modelo's existing interest in Crown and a temporary supply agreement is not sufficient to prevent consumer harm from ABI's acquisition of its competitor, Modelo," leaving open the opportunity for a "fix" that would be sufficient).

100. *Id.*; Complaint, *supra* note 25, at 4-5.

101. Complaint at 20-21, *United States v. Anheuser-Busch InBev SA/NV*, No. 1:13-cv-00127 (D.D.C. Jan. 1, 2014), available at <http://www.justice.gov/atr/cases/f292100/292100.pdf>.

102. See *id.*

103. *Id.*

that company the right to import Grupo Modelo beer into the United States) “provides no guaranteed protection for consumers that any of its terms will be followed if [Anheuser-Busch] is able to secure antitrust approval for this acquisition.”¹⁰⁴ This suggested that if a guarantee could be provided, the potential that Anheuser-Busch would be “able to secure antitrust approval” was a distinct possibility.¹⁰⁵

Even analysts expected Anheuser-Busch and the Antitrust Division “to reach an accord on reasonable terms.”¹⁰⁶ This was in part because Anheuser-Busch believed obtaining the rights to Corona and some other Grupo Modelo brands through the merger was less significant for the company’s growth than maintaining control of Grupo Modelo’s operations in other localities.¹⁰⁷

Gina Talamona, a spokeswoman for the Department of Justice (“DOJ”), was quoted in a newspaper article saying, “As we have said all along, any settlement would have to fully protect U.S. consumers by preserving the competition that Grupo Modelo currently provides, while giving a divestiture buyer the freedom and capability to compete vigorously going forward.”¹⁰⁸ Her language indicated the DOJ’s openness to settling its suit from the very beginning.¹⁰⁹

The resulting settlement allowed Anheuser-Busch to move forward with a \$20.1 billion acquisition of Grupo Modelo.¹¹⁰ The Antitrust Division was still able to draw some concessions, including Grupo Modelo’s sale of its fifty percent stake in Crown Imports—the company responsible for distributing Corona and some Grupo Modelo brands in the United States.¹¹¹

By contrast, the Antitrust Division stated that its concerns with the AT&T–T-Mobile merger could not be resolved, and it was quite

104. *Id.* at 24.

105. *See id.*

106. Michael J. de la Merced, *Anheuser-Busch Merger Deal Clears an Antitrust Hurdle*, N.Y. TIMES (Apr. 5, 2013), <http://dealbook.nytimes.com/2013/04/05/20-billion-beer-deal-reaches-agreement-to-clear-antitrust-hurdle/>.

107. *Id.*

108. *Id.*

109. *See id.*

110. Edward Wyatt, *Antitrust Agreement in Merger of Brewers*, N.Y. TIMES (Apr. 19, 2013), <http://dealbook.nytimes.com/2013/04/19/anheuser-busch-reaches-deal-with-antitrust-regulators/>.

111. *Id.*

committed to its position.¹¹² The language in the AT&T–T-Mobile complaint was similar to the language used in the American Airlines–U.S. Airways complaint and public statements from the Antitrust Division.¹¹³ Sharis Pozen, the acting head of the Antitrust Division at the time said, “Any way you look at this merger, it is anticompetitive It raised serious concerns, and we believe it violates the law.”¹¹⁴

The Antitrust Division in its AT&T–T-Mobile complaint stated that it was concerned with the high consolidation of the mobile wireless telecommunications services business¹¹⁵ and the nearly inevitable increase in AT&T’s market power following the merger, particularly in major metropolitan areas such as Dallas, Houston, Oklahoma City, Birmingham, Honolulu, and Seattle.¹¹⁶ The first anticompetitive effect the complaint addressed was the possibility that the merger would stifle innovation.¹¹⁷ The complaint stated that this anticompetitive effect was a possibility because, much like U.S. Airways, T-Mobile was a “faster, more agile, and scrappy” competitor who would “find innovative ways to overcome scale disadvantages.”¹¹⁸ The nature of the market also increased the chances that this merger would only lead to a more consolidated market because of the industry’s “transparent pricing, little buyer-side market power, and high barriers to entry and expansion.”¹¹⁹ According to the Antitrust Division, allowing the merger to be consummated would result in higher prices and decreased “quality and quantity of services.”¹²⁰

Industry commentators resoundingly opined that the strong stance of the Antitrust Division indicated that a settlement was unlikely.¹²¹

112. See David Goldman, *DOJ Files Antitrust Suit to Block AT&T Merger with T-Mobile*, CNN (Aug. 31, 2011), http://money.cnn.com/2011/08/31/technology/att_tmobile_antitrust/.

113. *Id.*

114. *Id.*

115. Complaint at 11-12, *United States of America v. AT&T Inc.*, No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011), available at <http://www.justice.gov/opa/documents/Justice-ATT-TMobile-Complaint.pdf>.

116. *Id.* at 2-3, Appendix B iii.

117. *Id.* at 14.

118. *Id.*

119. *Id.* at 16.

120. *Id.* at 21.

121. *Gov’t Blocks AT&T Bid for T-Mobile*, *supra* note 60, at 1; James B. Stewart, *Antitrust Suit Is Simple Calculus*, N.Y. TIMES (Sept. 9, 2011), <http://www.nytimes.com/2011/09/10/business/att-and-t-mobile-merger-is-a-textbook-case.html?pagewanted=all>;

Thus, Richard Dineen, an HSBC analyst, speculated that “[t]he DOJ’s concerns imply that they don’t want less than four big national players. There had been speculation that Sprint and T-Mobile may get together, but it looks on this basis that even that would be objectionable.”¹²² Similarly, the New York Times published that “confidence on AT&T’s part seems inexplicable ... For if ever there was a merger likely to be blocked on antitrust grounds, this is it.”¹²³ It quoted Herbert Hovenkamp, a professor of law at the University of Iowa and a leader in American antitrust law, as saying, “It’s only a slight overstatement to say that if they weren’t going to block this one, the Justice Department might as well just throw the antitrust guidelines out the window ... This merger clearly seems to violate them.”¹²⁴

Bert Foer opined in an interview that the Antitrust Division had “clearly drawn a line in the sand” against a settlement with AT&T and T-Mobile.¹²⁵ At the time, Foer was the head of the American Antitrust Institute in Washington, which opposed the deal.¹²⁶

In the American–U.S. Airlines case, Bill Baer said that the two airlines were “viable, healthy and in a position to be competitively aggressive and successful on a standalone basis.” He also refused to concede much ground, stating that “while shareholders might benefit, [and] creditors might benefit from consolidation, the fact of the matter is that consumers [would] get the shaft.”¹²⁷ The strong wording of his statements suggested that the suit should have followed a pathway more akin to that of the AT&T–T-Mobile merger.¹²⁸ However, it ended up adopting a settlement more similar to that of Anheuser-Busch–Grupo Modelo merger.¹²⁹

Tom Schoenberg, Sara Forden & Jeff Bliss, *T-Mobile Antitrust Challenge Leaves AT&T With Little Recourse on Takeover*, BLOOMBERG (Sept. 1, 2011), <http://www.bloomberg.com/news/2011-08-31/u-s-files-antitrust-complaint-to-block-proposed-at-t-t-mobile-merger.html>.

122. *Gov’t Blocks AT&T Bid for T-Mobile*, *supra* note 60, at 2.

123. Stewart, *supra* note 121.

124. *Id.*

125. Schoenberg, Forden & Bliss, *supra* note 121.

126. *Id.*

127. *Fighting the Merger*, *supra* note 94.

128. *See id.*

129. *See* Jennifer Koons, *Airlines Settlement: A ‘Retreat’ or Victory for the Justice Department?*, MAIN JUSTICE: POLITICS, POLICY AND THE LAW (Nov. 12, 2013), <http://www.mainjustice.com/2013/11/12/airlines-settlement-a-retreat-or-victory-for-the-justice-department/>.

While he vowed that the Antitrust Division would evaluate “each merger on its own merit,” the Antitrust Division’s analysis of the U.S. Airways and American Airlines merger and antitrust history showed that in the Antitrust Division’s “view, looking at the evidence before [it], is that the right outcome here (is) a full-stop injunction.”¹³⁰

However, three months later, Baer changed his tone and boasted that the Antitrust Division believed its case had gotten stronger as the parties neared trial, and that the Antitrust Division surmised that the merging parties knew this fact.¹³¹ Baer cited the “high bar” American Airlines and U.S. Airlines had to jump over as one of reasons the parties settled,¹³² suggesting it was because the airlines feared losing.¹³³ He denied that politics played a role in the settlement, calling it a “good substantive, pro-competitive result.”¹³⁴ Therefore, while the Antitrust Division may have said the settlement was good for the economy, its 180-degree turnabout from Baer’s hard line seems inexplicable and unlikely to be part of the Antitrust Division’s long-term strategy.¹³⁵

B. OPTION 2: ANOTHER POTENTIAL EXPLANATION FOR PARTIES’
SETTLEMENT IS THE ANTITRUST DIVISION’S FEAR OF FULLY PURSUING THE
SUIT.

By necessity, agencies at times act with consideration to their probability of success in particular antitrust cases because a suit’s success or failure may affect the agency’s own size and power.¹³⁶ This means that government agencies may consider political implications when deciding which cases to pursue since successfully prosecuted high-profile cases garner greater rewards for the agency and the individual lawyers’ careers.¹³⁷ It also matters which cases the agencies decline to pursue because a loss may affect the agency’s budget allocation and staffing quality.¹³⁸

130. *Fighting the Merger*, *supra* note 94.

131. Koons, *supra* note 129.

132. *Id.*

133. *See id.*

134. *Id.*

135. *Id.*; *see Fighting the Merger*, *supra* note 94.

136. Sokol, *supra* note 22, at 1073-74.

137. *Id.*

138. *Id.*

However, the chances the Antitrust Division had for success in this case at trial were strong.¹³⁹ Even though numerous experts and lawyers were quoted in the media as saying that the merger was likely to go through in spite of the Antitrust Division’s suit,¹⁴⁰ many antitrust experts also published articles that the government had a strong case and would win.¹⁴¹

Despite the divide between experts’ predictions on the case’s outcome, in deciding to settle, Baer was not motivated by a fear of losing the case because he was confident in the merits of his position and had strong convictions that an injunction was the only viable solution.¹⁴² His language in the complaint was forceful, stating, “This merger positions US Airways’ management to continue the trend (of consolidation)—at the expense of consumers.”¹⁴³

139. Bill Baer, Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conference Call Regarding the Justice Department’s Proposed Settlement with U.S. Airways and American Airlines (Nov. 12, 2013) (transcript available at http://www.justice.gov/atr/public/press_releases/2013/301626.htm) [hereinafter Conference Call Remarks] (where Baer himself even after announcing the merger strongly said, “I can assure you that we were confident in the evidence we would have presented at trial.”).

140. Terry Maxon, *How Will the American Airlines–US Airways Lawsuit Turn Out? Depends on Whom You Ask*, DALLAS MORNING NEWS (Oct. 28, 2013), <http://www.dallasnews.com/business/headlines/20131028-how-will-the-american-airlines-us-airways-lawsuit-turn-out-depends-on-whom-you-ask.ece> [hereinafter *How Will the Lawsuit Turn Out?*] (Aviation consultant Scott Hamilton of Leeham Co. LLC said “I’d like to think this will be settled before it goes to trial, though this might be wishful thinking. Pressure is building on DOJ (and presumably the White House) to drop this. Unions, a Democratic constituency, are for the merger. American and US Airways want this off the table. I think DOJ may look for a face-saving way out and call it a day. I hope,” adding that there would likely be slot divestitures at Washington Reagan National and New York LaGuardia Airports. Airline analyst Hunter Keay of Wolfe Research said “We assume the chances for a settlement before the trial starts are very remote... We say there’s about a 1 in 4 chance that there’s a settlement after the trial begins.”).

141. *Id.* (where Jonathan Lewis, antitrust lawyer with Baker Hostetler in Washington D.C., said “The airlines’ own documents (many of which are cited in the complaint) are damning. It will be difficult for the airline executives to walk away from what they have said in those documents.”).

142. See *Fighting the Merger*, *supra* note 94.

143. Complaint, *supra* note 25, at, 4.

The only voices that seemed to believe a settlement was likely came from outside the Antitrust Division.¹⁴⁴ After the Antitrust Division filed its complaint, Reuters reported a U.S. Airways spokesman as saying, “The concessions we were willing to offer were designed to address competitive concerns that DOJ had raised during the investigation. We continue to believe there ought to be a realistic possibility of settlement.”¹⁴⁵

Another voice for settlement came from U.S. Bankruptcy Judge Sean Lane, who implied he might approve the bankruptcy plan of AMR, American Airlines’ parent company, in spite of the Antitrust Division’s lawsuit against the cornerstone of the bankruptcy plan: the merger.¹⁴⁶

Baer alleged the Antitrust Division filed the lawsuit because it had determined the merger would affect just what § 7 of the Clayton Act prohibits by substantially reducing competition in the domestic commercial air-travel industry.¹⁴⁷ Baer cited the non-necessity of the merger for both parties, how the competition between the two airlines was essential in keeping prices low for consumers, and the nature of the already heavily consolidated airline industry.¹⁴⁸ Baer strongly urged that the Antitrust Division “simply cannot approve a merger that would result in U.S. consumers’ paying higher fares, higher fees and receiving less service.”¹⁴⁹ He did not mention the possibility of a settlement, but instead called the lawsuit “the best possible chance for continued competition in an important industry that [consumers] have come to rely upon.”¹⁵⁰

144. David Ingram & Diane Bartz, *Countdown begins to U.S. airline merger trial in November*, REUTERS, Aug. 30, 2013, available at <http://www.reuters.com/article/2013/08/30/us-american-usairways-trial-idUSBRE97T0IJ20130830>.

145. *Id.*

146. *Id.*

147. Conference Call Remarks, *supra* note 139.

148. *Id.*

149. Remarks as Prepared for Delivery by Assistant Attorney General Bill Baer at the Conference Call Regarding the Justice Department’s Lawsuit Challenging Us Airways’ Proposed Merger with American Airlines (August 13, 2013) (transcript available at <http://www.justice.gov/opa/speech/remarks-prepared-delivery-assistant-attorney-general-bill-baer-conference-call-regarding>).

150. *Id.*

C. OPTION 3: RATHER THAN A LONG-TERM STRATEGY OR A FEEBLE FEAR OF LITIGATION FAILURE, POLITICAL FORCES MAY HAVE MORE LIKELY THAN NOT BEEN THE DRIVER BEHIND THE SETTLEMENT OF THIS LAWSUIT.

It may be considered naïve to believe antitrust is normally free from political considerations;¹⁵¹ however, this is not naïve—it is correct.¹⁵² Nevertheless, the combination of the lobbying efforts by the parties, the Antitrust Division’s admissions in its competitive impact statement following the settlement, and Attorney General Eric Holder’s statements apart from the Justice Department suggest politics did play a role in the agreement the parties reached in the American Airlines–U.S. Airways case.¹⁵³ Therefore, the merger appears to be an exception to the norm of non-partisan antitrust enforcement.¹⁵⁴

1. Lobbying is quite commonplace throughout much of the government’s decision-making,¹⁵⁵ but what is significant in this settlement is who lobbied and with whom the lobbying had traction.

Lobbying groups are powerful forces in affecting government decisions.¹⁵⁶ Interest groups save informational costs when they develop and advocate for their policy issues because of their economies of scale.¹⁵⁷ They are also better at mobilizing the public behind legislation for which they advocate.¹⁵⁸

151. Sokol, *supra* note 22, at 1073.

152. *See id.* at 1072 (where agency antitrust enforcement develops slowly and based upon institutional needs, not rapid political or partisan shifts).

153. Jad Mouawad, *A Tricky Airline Merger, but With Labor’s Blessing*, N.Y. TIMES (Dec. 6, 2013), <http://www.nytimes.com/2013/12/07/business/a-tricky-airline-merger-but-with-labors-blessing.html> [hereinafter *Labor’s Blessing*]; Competitive Impact Statement, *supra* note 96 at 8; Ben Mutzabaugh, *Holder on AA Suit: “We Hope to Resolve This Short of a Trial,”* USA TODAY (Nov. 5, 2013), <http://www.usatoday.com/story/todayinthesky/2013/11/04/report-feds-want-broad-divestitures-from-aa-us-airways/3433157/>.

154. *See Labor’s Blessing*, *supra* note 153; Competitive Impact Statement, *supra* note 96, at 8; *see* Mutzabaugh, *supra* note 153.

155. *See* Brad Plumer, *The Outsized Returns From Lobbying*, WASHINGTON POST (Oct. 10, 2011), http://www.washingtonpost.com/blogs/wonkblog/post/the-outsized-returns-from-lobbying/2011/10/10/gIQADSNEaL_blog.html; *see Lobbying Database*, OPEN SECRETS (Jan. 27, 2014), <http://www.opensecrets.org/lobby/>.

156. Sokol, *supra* note 22, at 1091-92.

157. *Id.*

158. *Id.*

In the case of the American Airlines–U.S. Airways merger, labor unions were unusually and strongly in favor of the merger.¹⁵⁹ “The two main bogeys that an airline needs to worry about during any merger integration are labor and technology,” said Hunter Keay, an analyst with Wolfe Research.^{160,161} Oftentimes, gaining the support of labor unions is difficult in spite of the strong sense of trust between management and union leadership.¹⁶²

In the United–Continental Airlines merger, the labor unions did not support the merger.¹⁶³ The Antitrust Division’s case itself against the United–Continental merger was somewhat of a surprise because the Antitrust Division had not previously voiced major concerns when other airlines merged with one another.¹⁶⁴ For instance, the Antitrust Division did not protest when U.S. Airways and America West Airlines merged in 2005, nor did the Antitrust Division speak up in Delta’s 2008 purchase of Northwest Airlines or the 2011 Southwest Airlines purchase of AirTran Airways.¹⁶⁵

Eventually, the key issues with the labor unions came to light, showing the public that they did not support the United–Continental merger.¹⁶⁶ Pilots were worried about furloughs and seniority, while

159. *Labor’s Blessing*, *supra* note 153.

160. Wolfe Research is a research boutique that specializes in a number of industry sectors, including the airline industry. *About*, WOLFE RESEARCH, <http://wolferesearch.com/about/the-wolfe-edge/>.

161. *Labor’s Blessing*, *supra* note 153.

162. *Id.*

163. Brett Snyder, *Bad News: United, Continental Merger Already Seeing Pilot Unrest*, MONEY WATCH, CBS NEWS, (July 8, 2010), <http://www.cbsnews.com/news/bad-news-united-continental-merger-already-seeing-pilot-unrest/> (where Capt. Wendy Morse, chief representative for the United pilots, said, “As I’ve consistently said, there is a right path and a wrong path. This merger could be simple if the right path is chosen. Regrettably it appears the companies at this early juncture are headed down the wrong path. Obviously, allowing talks to stall over non-economic issues shows that management is once again choosing the wrong path.”).

164. *U.S. Moves to Block Merger*, *supra* note 6.

165. *Id.*

166. See Jenalia Moreno, *With Airlines Merged, Unions Must Try to Fly United*, HOUSTON CHRONICLE (Oct. 16, 2010), <http://www.chron.com/business/article/With-airlines-merged-unions-must-try-to-fly-1617354.php> (where the labor unions for each group, including pilots, flight attendants, mechanics, ramp workers and cargo employees, operated on such different pay scales and operations methods that a dispute over new collective bargaining agreements was expected to result from the merger).

flight attendants were concerned with contract negotiations.¹⁶⁷ Even into 2013, three years after the 2010 merger of United and Continental, employees were still struggling to ratify labor contracts.¹⁶⁸

The unions in the case of American Airlines and U.S. Airways said they foresaw better benefits from the merged corporation.¹⁶⁹ Unions for American Airlines' three largest sets of employees—its pilots, flight attendants, and ground workers—publicly and in court supported the merger.¹⁷⁰ Based on the agreed terms, the unions would receive roughly a quarter of what American Airlines' creditors would receive in the case that the merger went through in the form of shares of the newly merged corporation.¹⁷¹

Another sign that politics played a key role in the American Airlines–U.S. Airways settlement is the sort of congressional support the American Airlines and U.S. Airways merger received.¹⁷² In addition to the airline industry's typical lobby funding from Republican candidates,¹⁷³ the merger also had support from sixty-five Democratic

167. Jenalia Moreno, *Labor Issues Key to Continental-United Merger Success*, HOUSTON CHRONICLE (May 1, 2010), <http://www.chron.com/business/article/Labor-issues-key-to-Continental-United-merger-1694557.php>.

168. Jack Nicas, *United Continental Employees Ratify New Labor Contracts*, WALL ST. J. (Oct. 29, 2013), <http://online.wsj.com/news/articles/SB10001424052702304655104579165580531518844>.

169. Mike Spector & Susan Carey, *American Airlines Unions Support US Airways Merger*, WALL ST. J. (Aug. 19, 2012), <http://online.wsj.com/news/articles/SB10001424052702303425504577354493373319140> [hereinafter *Unions Support Merger*]; *Sky Talk: Unions Reaction to Closing of American, US Airways Merger*, STAR TELEGRAM (Dec. 10, 2013), http://blogs.star-telegram.com/sky_talk/2013/12/unions-reaction-to-closing-of-american-us-airways-merger.html (where pilots unions said they foresaw “mutually beneficial results” from a joint collective bargaining agreement; where flight attendants foresaw the benefits of “receiving their allocation of the new American’s equity”; where machinists declined to participate in celebrating the new merger because they were allegedly refused a fair contract and because they believed the merger would not allow the companies to realize the synergies that had been promoted).

170. *Labor’s Blessing*, *supra* note 153

171. *Id.*

172. See Ely Portillo, *Democratic members of Congress urge Obama, DOJ to allow US Airways merger*, CHARLOTTE OBSERVER (Oct. 16, 2013), http://www.charlotteobserver.com/2013/10/16/4392651/democratic-congressmen-urge-obama.html#.Ut7Ke_30Du0.

173. *Airlines*, OPEN SECRETS, <https://www.opensecrets.org/industries/indus.php?ind=T1100>.

Congressmen and Congresswomen.¹⁷⁴ This was unusual, given that pro-business, Republican-affiliated politicians, and not Democrats, usually support non-intervention in business-merger decisions.¹⁷⁵

The letter of Democratic support for the merger was an open showing of pressure from Congress on the executive branch to allow the merger to proceed.¹⁷⁶ The letter, addressed to President Barack Obama, stated:

We believe DOJ's legal challenge puts at risk the future economic security of our constituents, tens-of-thousands of unionized workers at both airlines, and the economic well-being of communities that we represent... We are concerned that the DOJ's lawsuit creates an atmosphere of uncertainty for our respective congressional districts and constituents. While we share your concern regarding any potential impact on consumers as consolidation in any industry is contemplated, we believe that DOJ's concerns as outlined in the complaint filed last month are not an adequate representation of all of the facts.¹⁷⁷

This unique combination of union and Democratic Congressional support made it highly probable that politics played at least some role in the decision to allow the merger to move forward in a settlement.¹⁷⁸

2. The competitive impact statement stated that the settlement failed to resolve the Antitrust Division's concerns with the stand-alone and advantage pricing theories, making the settlement highly unusual.

While the settlement would go on to please the labor unions, AMR's creditors, and the management of both American Airlines and U.S. Airways, the Antitrust Division's Competitive Impact Statement of the settlement stated that it does "not create a new independent competitor, nor does it purport to replicate American's capacity

174. Portillo, *supra* note 172.

175. See Letter from Representative Michael C. Burgess, M.D. to U.S. Attorney General Eric Holder (Sept. 3, 2013), available at <http://burgess.house.gov/news/documentsingle.aspx?DocumentID=347480>.

176. Portillo, *supra* note 172.

177. Letter from Democratic Representatives to Obama Administration in support of merger (Oct. 15, 2013), available at <http://veasey.house.gov/media-center/press-releases/veasey-pastor-and-colleagues-call-on-obama-administration-to-settle>.

178. Portillo, *supra* note 172; *Unions Support Merger*, *supra* note 169.

expansion plans or create Advantage Fares where they might otherwise be eliminated.”¹⁷⁹

Instead, the merger leaves a heavily consolidated airline industry with only three legacy carriers with large domestic and international flight networks that can offer well-known brands and frequent-flyer programs.¹⁸⁰ Smaller networks will still exist, which can offer lower-fare options,¹⁸¹ but the newly merged airline would be considered by antitrust regulators and consumers to be one of the three legacy airlines.¹⁸² This merger eliminated one of consumer’s low-cost options, a role which U.S. Airways had played forcefully through its Advantage Fares program.¹⁸³

The merger settlement attempts to address the feared harms from an amplified presence at some airports and wider anticompetitive harms by requiring “the divestiture of an unprecedented quantity of valuable facilities at seven of the most important airports in the United States.”¹⁸⁴

The Competitive Impact Statement also discusses alternatives to the settlement, which included a trial on the merits against American Airlines and U.S. Airways.¹⁸⁵ The Antitrust Division’s Competitive Impact Statement predicted the settlement would save the government time, money, and the uncertainty of trial,¹⁸⁶ but did not elaborate on the alleged uncertainty or give a quantitative measure for how unsure it was of success at trial, had it gone forward.¹⁸⁷

3. Attorney General Eric Holder made a statement that was out of step and not in conjunction with the Antitrust Division, stating that the suit could likely be settled depending on what concessions were reached.

On November 4, 2013, while U.S. Attorney General Eric Holder conferred with the press regarding another issue, he made a detour in his statements to address the American Airlines–U.S. Airways merger

179. Competitive Impact Statement, *supra* note 96, at 8.

180. *Id.* at 5.

181. *Id.*

182. *Id.* at 6.

183. *Id.* at 8.

184. *Id.*

185. *Id.* at 16.

186. *Id.*

187. *See id.*

suit.¹⁸⁸ He said the discussions were “ongoing,” and that the DOJ “hope[s] to be able to resolve this short of trial.”¹⁸⁹

When the press asked him if the government wanted to ensure that a potential settlement would be required to include a divestiture of slots at major airports like Ronald Reagan National, Holder agreed and said the focus was “to make sure that any resolution in this case necessarily included divestitures of facilities at key constrained airports throughout the United States. That, for us, is something that has to be a part of—of any resolution.”¹⁹⁰

This language differs from the previous statements of Baer on behalf of the Antitrust Division,¹⁹¹ and suggests that something else (perhaps political concerns) influenced the DOJ and what actually resulted: a settlement that avoided trial, did not solve any of the Antitrust Division’s key concerns with the merger’s anticompetitive effects, and only included minor divestitures of slots at particular airports of concern.¹⁹²

CONCLUSION

Ofentimes, interest groups like airline lobbyists are seen as selfish because they seek their own economic interests at the expense of the constituents that legislators are elected to represent.¹⁹³ Similarly, a skeptical public perceives legislators as serving their own re-election and personal motivations.¹⁹⁴ Interest groups and legislators can rebrand their efforts as “progress,” but regardless of the characterization, in some unique instances it appears that politics can influence antitrust law

188. Mutzabaugh, *supra* note 153.

189. *Id.*

190. Michael Lindberger, *Attorney General Eric Holder: We are in ‘ongoing’ settlement talks with airlines*, DALLAS MORNING NEWS (Nov. 4, 2013), <http://aviationblog.dallasnews.com/2013/11/attorney-general-eric-holder-we-are-in-ongoing-settlement-talks-with-airlines.html/> (“We will not agree to something that does not fundamentally resolve the concerns that were expressed in the complaint, and do not substantially bring relieve to— to consumers.”).

191. Conference Call Remarks, *supra* note 139.

192. Competitive Impact Statement, *supra* note 96, at 8.

193. Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905, 945 (1990).

194. *Id.*

enforcement to the detriment of average consumers.¹⁹⁵ In the case of the American Airlines and U.S. Airways merger, it seems that many other factors could have explained the settlement.¹⁹⁶ President Barack Obama’s administration vowed in 2009 to return to more aggressive enforcement of antitrust laws after the Bush administration treated defendant corporations far too leniently.¹⁹⁷ The Obama administration’s toughened antitrust enforcement¹⁹⁸ makes the possibility that politics influenced the decision to settle this particular antitrust merger suit—as opposed to taking it to trial—seem all the more likely.

195. See Andrew I. Gavil, *Competition and Cooperation on Sherman Island: An Antitrust Ethnography*, 44 DEPAUL L. REV. 1225, 1230-31 (1995).

196. Olivier Antoine, Lecture at Fordham University School of Law in Mark Patterson’s Antitrust Law Course (April 1, 2014) (where he said he believed the motivations for the settlement were because the Antitrust Division “didn’t want to lose at trial” and feared a “real litigation risk.” Antoine said, “They don’t want to be known as the agency that keeps losing deals.”).

197. Stephen Labaton, *Obama Takes Tougher Antitrust Line*, N.Y. TIMES (May 11, 2009), http://www.nytimes.com/2009/05/12/business/economy/12antitrust.html?page_wanted=all.

198. Edward Wyatt, *Industry Shifts May Aid Comcast in Takeover Bid*, N.Y. TIMES (Feb. 13, 2014), <http://dealbook.nytimes.com/2014/02/13/industry-shifts-may-aid-comcast-in-takeover-bid/?ref=us>.