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]

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 AMRtp:g.-1.3m602 144e,pSidas* BLOOMBERG NEWS (Sept. 26, 2013), http://www.businessweecom/news/2013-09-26/airline-merger-records-irrelevant-in-amr-c:g.-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.

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

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

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.

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

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

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

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]

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 Cth1 Tf3.4014 0 TD29[illegible]

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]

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

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-

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

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

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]

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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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