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ANTITRUST ENFORCEMENT: HAS AIRLINE  
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# THE UNITED STATES AIRLINE INDUSTRY & ANTITRUST ENFORCEMENT: HAS AIRLINE CONSOLIDATION PAID OFF FOR CONSUMERS?

Andrew C. DeGory\*

## I. INTRODUCTION

Flying on commercial airlines is not particularly fun. Nearly one in five commercial flights does not reach its destination on time.<sup>1</sup> Thousands of passengers across the United States are involuntarily denied boarding their flight due to the well-known and notorious tactic of “overbooking” by airlines.<sup>2</sup> Over-cramped passengers are being squeezed tighter and tighter into planes with shrinking legroom.<sup>3</sup> Despite a brief period of declining airfares, round-trip flights cost an average of roughly \$386 in 2018 and are projected to rise in 2019.<sup>4</sup> Free peanuts or cookies are likely the

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<sup>1</sup> U.S. DEP’T OF TRANSP., MARCH 2019 AIR TRAVEL CONSUMER REPORT 6 (2019), <https://www.transportation.gov/sites/dot.gov/files/docs/resources/individuals/aviation-consumer-protection/335211/march-2019-atcr.pdf>.

<sup>2</sup> *Id.* at 38–42.

<sup>3</sup> Jon Ostrower, *American Airlines is cutting more legroom in economy class*, CNN MONEY (May 2, 2017), <http://money.cnn.com/2017/05/02/news/companies/american-airlines-legroom/index.html>; see also Martha C. White, *Air Travelers Resisting the ‘Incredible Shrinking Airline Seat,’* N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/business/airline-seat.html>.

<sup>4</sup> *U.S. Average Domestic Corporate Ticket Price*, STATISTA, <https://www.statista.com/statistics/562804/us-air-traffic-domestic-average-ticket-price/> (last visited Aug. 22, 2019); see also Gary Guthrie, *Travel Expected to Cost More in 2019*, CONSUMER AFFAIRS (July 27, 2019), <https://www.consumeraffairs.com/news/travel-expected-to-cost-more-in-2019-072718.html>.

biggest “perk” that an average traveler receives on a flight.<sup>5</sup> Due to an increasingly consolidated airline industry, passengers do not have a difficult time pinpointing their frustrations. As of 2019, four airlines control roughly 70% of domestic air travel: American, Delta, United, and Southwest.<sup>6</sup>

Such a high concentration of market power would seem to raise legitimate concern under United States antitrust laws. Specifically, a sequence of airline mergers in the last decade have created the current market structure, but were met with minimal resistance by the United States Department of Justice’s (“DOJ”) Antitrust Division.<sup>7</sup> Overall, the number of large and midsize airlines in the United States has shrunk from eighteen to ten in the last decade.<sup>8</sup>

This rampant consolidation would not raise antitrust concerns if it appeared that consumers were gaining some type of benefit from the consolidation process. From a layperson’s perspective, consumer welfare appears mediocre in the airline industry. However, it is not quite as simple as correlating cramped seating and flight delays to antitrust violations by dominant airlines. A deeper analysis of the industry reveals a complex market that is difficult to assess for antitrust purposes. One particularly compelling antitrust development in the industry is a class action lawsuit against the four major airlines that could provide further insight into questionable industry practices.<sup>9</sup>

This Note analyzes the current state of the United States airline industry and whether the DOJ has failed in its antitrust enforcement against the airlines. This is *not* an effort to personally prosecute the “big four” airlines with antitrust violations under the Sherman Act or the Clayton Act. Rather, this Note hopes to identify traits

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<sup>5</sup> Jad Mouawad, *Airlines Reap Record Profits, and Passengers Get Peanuts*, N.Y. TIMES (Feb. 7, 2016), <https://www.nytimes.com/2016/02/07/business/energy-environment/airlines-reap-record-profits-and-passengers-get-peanuts.html>.

<sup>6</sup> *Bureau of Transportation Statistics*, U.S. DEP’T. OF TRANSP., <https://www.transtats.bts.gov/> (last visited Aug. 24, 2019) (illustrating that American, Delta, United, and Southwest had a combined 67.5% market share in the United States from January–December 2018).

<sup>7</sup> See U.S. DEP’T. OF JUST., STATEMENT OF THE DEPARTMENT OF JUSTICE’S ANTITRUST DIVISION ON ITS DECISION TO CLOSE ITS INVESTIGATION OF THE MERGER OF DELTA AIR LINES INC. AND NORTHWEST AIRLINES CORPORATION (2008); see also U.S. DEP’T. OF JUST., JUSTICE DEPARTMENT REQUIRES US AIRWAYS AND AMERICAN AIRLINES TO DIVEST FACILITIES AT SEVEN KEY AIRPORTS TO ENHANCE SYSTEM-WIDE COMPETITION AND SETTLE MERGER CHALLENGE (2013) [hereinafter DOJ SETTLEMENT].

<sup>8</sup> Bill Hethcock, *How Mergers Have Driven Consolidation of the Airline Industry*, DALLAS BUS. J. (Apr. 6, 2017), <https://www.bizjournals.com/dallas/news/2017/04/06/how-mergers-have-driven-consolidation-of-the.html>.

<sup>9</sup> *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46 (D.D.C. 2016).

of the industry that indicate antitrust concerns, as well as to show how the DOJ's enforcement has failed to control or make a lasting impact on the industry.

Part II of this Note explains several of the important and relevant characteristics of the airline industry. Part III details the history of competition and antitrust enforcement (or lack thereof) in the United States airline industry. Part IV outlines the applicable antitrust standards relating to the industry. Part V analyzes the effects of airline consolidation on the modern airline industry. Finally, Part VI examines a current class action lawsuit claiming antitrust violations against the four major airlines.

## II. CHARACTERISTICS OF THE UNITED STATES AIRLINE INDUSTRY

The airline industry's business model is complex and confusing. That could be one explanation for the ability of the major airlines to avoid more serious antitrust measures from the DOJ. There are several defining aspects of the industry's business practices that are relevant when addressing antitrust considerations.

First, airlines face substantial fixed costs compared to their variable costs.<sup>10</sup> The large fixed costs associated with the business create a volatile market and, at times, a very fragile profit margin.<sup>11</sup> The most relevant fixed cost consideration is jet fuel.<sup>12</sup> Fuel accounts for over twenty percent of an airline's average operating costs,<sup>13</sup> thus the price of fuel has a significant impact on airline economics and pricing. Fluctuations in jet fuel prices have impacted the airlines negatively in the past, but decreases in fuel costs in recent years have helped the major companies reap record profits.

One byproduct of airline deregulation was the advent of the "hub and spoke" system of routing flights.<sup>14</sup> This type of system "concentrate[s] most of an airline's

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<sup>10</sup> Daniel J. Gifford & Robert T. Kudrle, *U.S. Airlines and Antitrust: The Struggle for Defensible Policy Towards a Unique Industry*, 50 IND. L. REV. 539, 544 (2017).

<sup>11</sup> *Id.* at 545.

<sup>12</sup> *Id.* at 544.

<sup>13</sup> INT'L AIR TRANSP. ASS'N, *2018 End-Year Report* (Dec. 12, 2018), <https://www.iata.org/publications/economics/Reports/Industry-Econ-Performance/IATA-Economic-Performance-of-the-Industry-end-year-2018-report.pdf> [hereinafter *IATA 2018 Report*].

<sup>14</sup> Michael E. Levine, *Airline Alliances and Systems Competition: Antitrust Policy Toward Airlines and the Department of Justice Guidelines*, 45 HOUS. L. REV. 333, 411 (2008); see also Daniel Dayen, *Unfriendly Skies*, AM. PROSPECT (Nov. 3, 2017), <http://prospect.org/article/unfriendly-skies>.

operations at one or a very few ‘hub’ cities, serving virtually every other city on the system nonstop from the hub and providing predominantly one-stop or connecting service through the hub between cities on the ‘spokes.’”<sup>15</sup> Major airlines utilized the hub and spoke strategy as a way to gain significant control at large and busy airports.<sup>16</sup> Such market power grabs by the major airlines allowed them to maximize pricing power while also causing greater congestion at airports.<sup>17</sup> Another pricing effect of the hub and spoke system is known as the “hub premium.” Passengers traveling to a concentrated hub tend to pay higher average fares than those traveling on comparable routes that do not include a concentrated hub as an endpoint.<sup>18</sup> Generally, a hub is only capable of supporting one major airline, which lessens competition on direct routes to and from the hub.<sup>19</sup> The DOJ takes the hub and spoke system into consideration when evaluating airline mergers, and has required merging airlines to divest gate control as a condition of merger approval.<sup>20</sup>

Another strategy deployed during the deregulation era was “yield management.” Yield management is a form of price discrimination used by all major airlines to charge higher rates for “inelastic” passengers, such as business travelers, and lower fares for more price-sensitive, leisure travelers.<sup>21</sup> Airlines take advantage of these variations in demand by offering business-class seating and more economic seating, as well as by varying ticket prices depending on the day of the week or time of day.<sup>22</sup>

In close relation to yield management is “capacity discipline,” in which airlines “limit the number of available seats or flights, which in turn allows for higher

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<sup>15</sup> Levine, *supra* note 14, at 411 n.83.

<sup>16</sup> Eldad Ben-Yosef, *The Evolution of the U.S. Airline Industry: Technology, Entry, and Market Structure—Three Revolutions*, 72 J. AIR L. & COM. 305, 328 (2007).

<sup>17</sup> Dayen, *supra* note 14.

<sup>18</sup> *United States v. AMR Corp.*, 335 F.3d 1109, 1111–12 (10th Cir. 2003).

<sup>19</sup> Simon Kurash, Note, *Airline Consolidation: A Study of the American-US Airways Merger, Other Major Mergers from the Past Two Decades, and Their Effect on Consumers*, 48 SUFFOLK U. L. REV. 897, 904 (2015).

<sup>20</sup> See DOJ SETTLEMENT, *supra* note 7; see also Gifford & Kudrle, *supra* note 10, at 574.

<sup>21</sup> James L. Robenalt, *Predatory Pricing in the Low-Fare Airline Market: Targeted, Discriminatory, and Achieved with Impunity*, 68 OHIO ST. L.J. 641, 658 (2007).

<sup>22</sup> *Id.*

fares.”<sup>23</sup> This tactic has gained considerably more attention, particularly due to the fact that it is a major pillar of the current class-action lawsuit filed against the major airlines (to be discussed further in Part VI).<sup>24</sup>

Ancillary fees are another, more recently developed strategy used by airlines to extract additional money from consumers.<sup>25</sup> A newer trend in the industry, ancillary fees consist of charges such as checked-bag fees (which, surprisingly, have only been in existence since 2008), slight seat upgrades, early check-in, and more.<sup>26</sup> In some cases, the ancillary fees are interconnected to take advantage of changes in consumer preferences. For example, when checked-bag fees caused consumers to prioritize carry-on roller bags, space in overhead bins became more coveted.<sup>27</sup> In response, airlines created pre-boarding fees for passengers who wished to have a better chance at finding space in the overhead bins. These types of fees have been quite beneficial to the airlines. A recent study found that airlines made roughly \$40.5 billion in ancillary fees in 2016—significantly higher than just a few years prior.<sup>28</sup> Ancillary fees represent another example of the major airlines revising their business model to bolster revenue—and the strategy is working.

Finally, a critical aspect of the domestic airline industry to understand is the impact of low-cost carriers (“LCC”). Entry of LCCs “into a hub market tends to drive down the fares charged by major carriers” because of the enhanced competition for the major airlines.<sup>29</sup> This market impact has been called the “Southwest effect,” because of the airline’s original strategy of providing low-cost, “no-frills” flights as an alternate option for passengers.<sup>30</sup> Consequently, major carriers generally earn higher profit margins on routes where they do not face LCC competition.<sup>31</sup> As we

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<sup>23</sup> Justin Elliott, *The American Way*, PROPUBLICA (Oct. 11, 2016), <https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust>.

<sup>24</sup> See *infra*, Part VI (examining *In re* Domestic Airline Travel Litigation).

<sup>25</sup> See *id.*

<sup>26</sup> Martha C. White, *Here’s How Airlines Made \$41 Billion Last Year*, TIME MONEY (Sept. 21, 2016), <http://time.com/money/4501949/airlines-41-billion-fees/>.

<sup>27</sup> Dayen, *supra* note 14.

<sup>28</sup> White, *supra* note 26.

<sup>29</sup> *United States v. AMR Corp.*, 335 F.3d 1109, 1112 (10th Cir. 2003).

<sup>30</sup> Micah Maidenber, *How Low-Cost Airlines Alter the Economics of Flying*, N.Y. TIMES (Sept. 1, 2017), <https://www.nytimes.com/2017/09/01/business/budget-airlines-ticket-prices.html>.

<sup>31</sup> *AMR Corp.*, 335 F.3d at 1112.

will see, LCCs have played a critical role in antitrust evaluations by the DOJ and evaluating the health of competition within the industry.<sup>32</sup>

### III. HISTORY OF COMPETITION IN THE UNITED STATES AIRLINE INDUSTRY

The past landscape of the domestic airline industry is vastly different than what we are familiar with today. The industry in the United States was heavily regulated for the first several decades of commercial air travel.<sup>33</sup> All of that changed in 1978 when Congress passed The Airline Deregulation Act of 1978.<sup>34</sup> At the time of the Act's passage, most academics and economists agreed that deregulating the industry would be beneficial by creating a more competitive environment.<sup>35</sup> Initially, it appeared they were correct as lower-cost airlines entered the market and airfares for consumers decreased.<sup>36</sup> However, favorable conditions in the industry quickly faded, and the larger airlines gradually developed measures to protect their market share.<sup>37</sup>

A string of post-2000 mergers have driven the consolidated structure of the current market. In 2001, American Airlines acquired Transworld Airlines ("TWA") after TWA declared bankruptcy.<sup>38</sup> The DOJ did not challenge the merger—a decision heavily influenced by TWA's dismal financial situation.<sup>39</sup> Next, in 2008, Delta and Northwest merged to create the then-largest airline in the world, and the DOJ once again did not challenge the merger and provided minimal information about how it reached that determination.<sup>40</sup> Delta's reign as the largest airline in the

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<sup>32</sup> See *infra* Part III (discussing the DOJ-American settlement and the goal of enhanced LCC competition).

<sup>33</sup> Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393, 394 (1987).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 395.

<sup>36</sup> Dayen, *supra* note 14.

<sup>37</sup> Levine, *supra* 14, at 335.

<sup>38</sup> Kurash, *supra* note 19, at 907.

<sup>39</sup> *Id.* at 908.

<sup>40</sup> *Id.* at 910–12.

world was very brief, as just two years later, in 2010, United and Continental Airlines merged to form an even larger airline under the name United.<sup>41</sup>

The most recent opportunity for impactful DOJ antitrust action against the major airlines came in 2013, when American Airlines and US Airways proposed a merger to create the what would become the largest airline in the world under the American brand.<sup>42</sup> The DOJ was far more active in this transaction and filed an antitrust lawsuit to enjoin the planned merger as violation of Section 7 of the Clayton Act.<sup>43</sup> In its Complaint, the DOJ gave a harsh critique of the consolidation trend in the industry:

Increasing consolidation among large airlines has hurt passengers. The major airlines have copied each other in raising fares, imposing new fees on travelers, reducing or eliminating service on a number of city pairs, and downgrading amenities. An August 2012 presentation from US Airways observes that consolidation has resulted in “Fewer and Larger Competitors.” The structural change to “fewer and larger competitors” has allowed “[t]he industry” to “reap the benefits.” Those benefits to the industry are touted by US Airways in the same presentation as including “capacity reductions” and new “ancillary revenues” like bag fees.<sup>44</sup>

Overall, the DOJ’s complaint was filled with specific condemnations of the ever-saturated industry. The United States Attorney General at the time, Eric H. Holder, Jr., asserted that the deal would decrease consumer welfare in the form of “higher airfares, higher fees and fewer choices.”<sup>45</sup> However, just three months after filing suit, the DOJ announced a settlement with the airlines allowing the merger to proceed, in exchange for American Airlines and US Airways divesting gates and space at several major United States airports.<sup>46</sup> The DOJ cited the settlement as one

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<sup>41</sup> Aaron Smith, *United and Continental to Merge*, CNN MONEY (May 3, 2010), [https://money.cnn.com/2010/05/03/news/companies/United\\_Continental\\_merge/](https://money.cnn.com/2010/05/03/news/companies/United_Continental_merge/).

<sup>42</sup> Chris Isidore, *US Airways-American to Merge*, CNN BUSINESS (Feb. 14, 2013), <https://money.cnn.com/2013/02/14/news/companies/us-airways-american-airlines-merger/index.html>.

<sup>43</sup> DOJ Amended Complaint at 7, *United States v. US Airways Grp., Inc.*, 2013 WL 5411082 (D.D.C. Sept. 5, 2013); *see also* 15 U.S.C. § 18 (2018).

<sup>44</sup> DOJ Amended Complaint, *supra* note 43, at 14.

<sup>45</sup> James B. Stewart, *Baffling About-Face in American-US Airways Merger*, N.Y. TIMES (Nov. 15, 2003), <http://www.nytimes.com/2013/11/16/business/baffling-about-face-in-american-us-airways-merger.html>.

<sup>46</sup> DOJ SETTLEMENT, *supra* note 7.



that would enhance consumer choices for flights and result in more competitive airfares.<sup>47</sup>

Despite the merging airlines' concessions to the DOJ, antitrust experts were lukewarm to its pro-competitive effects.<sup>48</sup> Further, the settlement was the last chance in the modern era of consolidation for the DOJ to exercise its authority and block a merger. Similarly, had the case actually gone to trial, scholars and consumers alike would have had the opportunity to gain significant insight into the industry and how the merger would impact industry efficiency and competition.<sup>49</sup> This was perhaps the last moment where the DOJ could have made a major impact on the increasingly concentrated industry. One particularly ominous claim made in the Complaint seems to still plague the industry today: "This Merger Would Increase the *Likelihood of Coordinated Behavior* Among the Remaining Network Airlines Causing Higher Fares, Higher Fees, and More Limited Service."<sup>50</sup>

Ultimately, the DOJ touted the agreement with the new American Airlines as a victory for consumers. The DOJ stated that the required slot divestitures would "dramatically enhance the ability of [LCCs] to compete system-wide."<sup>51</sup> Further, the DOJ touted that the "settlement [would] 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."<sup>52</sup>

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<sup>47</sup> *Id.*

<sup>48</sup> See Stewart, *supra* note 45 (quoting several antitrust professors and experts on the subject).

<sup>49</sup> Diana L. Moss, *Delivering the Benefits? Efficiencies and Airline Mergers*, AM. ANTITRUST INS. (Nov. 21, 2013), [http://www.antitrustinstitute.org/sites/default/files/AAI\\_USAir-AA\\_Efficiencies.pdf](http://www.antitrustinstitute.org/sites/default/files/AAI_USAir-AA_Efficiencies.pdf).

<sup>50</sup> DOJ Amended Complaint, *supra* note 43, at 15 (emphasis added); see also *infra* Part VI (recognizing that the plaintiffs' allegations in the *Domestic Airline* lawsuit are very similar to the concerns raised by the DOJ in their initial complaint).

<sup>51</sup> DOJ SETTLEMENT, *supra* note 7.

<sup>52</sup> *Id.*

## IV. APPLICABLE ANTITRUST STANDARDS

### A. Clayton Act

Congress passed the Clayton Act in 1914 as a supplement to the United States' other principle antitrust law—the Sherman Act of 1890.<sup>53</sup> As briefly noted in Part III, the DOJ filed its complaint to block the American-US Airways merger under the Clayton Act. Section 7 of the Clayton Act strikes down mergers when the effect of the merger “may be substantially to lessen competition, or to tend to create a monopoly.”<sup>54</sup> The DOJ cited that specific language when seeking the injunction on the American-US Airways merger.<sup>55</sup>

### B. Horizontal Merger Guidelines

The DOJ and Federal Trade Commission (“FTC”) promulgate Horizontal Merger Guidelines (“Guidelines”) to assist in their evaluation of mergers for potential antitrust violations.<sup>56</sup> Similar to the Clayton Act, these enforcement entities concede one of the principal difficulties of antitrust enforcement: “Most merger analysis is necessarily predictive, requiring an assessment of what will likely happen if a merger proceeds as compared to what will likely happen if it does not.”<sup>57</sup> The “unifying theme” of the Guidelines is to prevent a merger from creating or enhancing “market power.”<sup>58</sup> This result can arise in several ways, including “if [the merger] is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm customers as a result of diminished competitive constraints or incentives.”<sup>59</sup>

In evaluating a merger, the DOJ examines a variety of evidence, including historical experience of similar mergers, the potential market share for the merged

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<sup>53</sup> Ruwantissa Abeyratne, *Competition in Air Transport—The Need for a Shift in Focus*, 33 *TRANSP. L.J.* 29, 42–43 (2006).

<sup>54</sup> 15 U.S.C. § 18 (2018).

<sup>55</sup> DOJ Amended Complaint, *supra* note 43, at 7.

<sup>56</sup> U.S. DEP’T OF JUST. & FED. TRADE COM., *HORIZONTAL MERGER GUIDELINES I* (2010) (describing the guidelines as “the principal analytical techniques, practices, and the enforcement policy . . . with respect to mergers and acquisitions involving actual or potential competitors”).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 2.

<sup>59</sup> *Id.*

parties, whether the merging parties are head-to-head competitors, and possible adverse effects to consumers.<sup>60</sup>

### C. *The Consumer Welfare Standard*

While the DOJ and FTC have never defined a single, overarching goal as part of its enforcement, consumer welfare has been a dominant consideration in recent years.<sup>61</sup> Specifically, the United States Supreme Court and lower federal courts have appeared to focus on consumer welfare more heavily than questions of economic efficiency.<sup>62</sup> Defining an applicable legal standard for assessing consumer welfare has proven to be a difficult task. One of the more famous antitrust cases in recent memory—*United States v. Microsoft*<sup>63</sup>—addressed the importance of consumer welfare.<sup>64</sup> The D.C. Circuit opinion stated: “[T]o be condemned as exclusionary, a monopolist’s act must have an ‘anticompetitive effect.’ That is, it must harm the competitive process and thereby harm consumers.”<sup>65</sup> On an economic basis, the term means “the buyer’s well-being: the benefits a buyer derives from consumption of goods and services.”<sup>66</sup> Other scholars have narrowed the concept down to the goal of “protect[ing] consumers from paying higher prices to firms that have unfairly gained or maintained market power.”<sup>67</sup> Despite such attempts at articulating an appropriate standard, the term remains somewhat vague and up for debate.<sup>68</sup>

Despite the apparent agreement among courts that consumer welfare is the principal goal of United States antitrust policy,<sup>69</sup> the consensus arguably has not correlated to pro-consumer welfare antitrust enforcement in the airline industry. While the DOJ cited the consumer benefits that would spawn from the American

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<sup>60</sup> *Id.*

<sup>61</sup> Maurice E. Stucke, *Reconsidering Antitrust’s Goals*, 53 B.C. L. REV. 551, 571 (2012).

<sup>62</sup> John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 217 (2008).

<sup>63</sup> *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

<sup>64</sup> 253 F.3d 34 (D.C. Cir. 2001).

<sup>65</sup> *Id.* at 58.

<sup>66</sup> Barak Y. Orbach, *The Antitrust Consumer Welfare Paradox*, 7 J. COMPETITION L. & ECON. 133, 138 (2011).

<sup>67</sup> Kirkwood & Lande, *supra* note 62, at 196.

<sup>68</sup> *Id.*

<sup>69</sup> *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

Airlines-US Airways settlement,<sup>70</sup> it would be difficult to argue that they have come to fruition since the merger.

## V. POST-MERGER AIRLINE INDUSTRY CONDITIONS

In the years since the American Airlines-US Airways merger, the promised benefits of the merger do not appear to have been realized. Furthermore, many of the concerns that the DOJ raised in its initial complaint continue to exist in the industry. An overall look at the competition, financials, and consumer experience in the industry provides insight into the effects, or lack thereof, of airline consolidation.

### A. Carrier Share Competition

As part of the American Airlines-US Airways settlement, the DOJ required the airlines to divest, or give up, slots at numerous large airports across the United States: Boston Logan International, Chicago O'Hare International, Dallas Love Field, Los Angeles International, Miami International, New York LaGuardia International, and Ronald Reagan Washington (D.C.) National.<sup>71</sup> The DOJ was particularly focused on preventing the post-merger airline from dominating service at Ronald Reagan airport, and thus required the largest divestiture of slots at that location.<sup>72</sup>

To assess how this divestiture strategy has actually played out, I compared airline carrier share data from 2012 (last full year prior to the merger agreement) and 2018 (the most recent full year where statistics were available).<sup>73</sup> “Carrier shares” are assigned based on the number of passengers that arrive and depart by airline at a particular airport.<sup>74</sup> In many airports that serve as “hubs” for airlines, it is inevitable that there will be one or two airlines that have a larger share relative to other airlines that provide service at the airport.<sup>75</sup> However, carrier share data can provide insight into the competition of other airlines—in particular LCCs—at airports across the country. The Department of Transportation provides carrier share data for the five

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<sup>70</sup> DOJ SETTLEMENT, *supra* note 7.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; see also DOJ Amended Complaint, *supra* note 43, at 30–31.

<sup>73</sup> The time range for comparison was December 2011–November 2012 vs. December 2017–November 2018. By my judgment, this was the best time range available to provide a wide enough range for comparison, while also providing the most recent data.

<sup>74</sup> U.S. DEP'T OF TRANSP., *Bureau of Transportation Statistics*, <https://www.transtats.bts.gov/airports.asp?pn=1> (last visited Apr. 6, 2019).

<sup>75</sup> See *supra* Part II (describing the “hub & spoke system” utilized by major airlines).

biggest carriers at a given airport, followed by the share of “Other” airlines—where many of the LCCs are classified.<sup>76</sup>

I focused on the specific airlines that the DOJ chose for slot divestitures, but also included several smaller airports to see how their competition has evolved post-merger. Overall, following an examination of the carrier shares at airports in the United States, it is apparent that the increased competition and increased carrier shares for LCCs simply has not materialized.

Beginning with Ronald Reagan airport outside Washington, D.C., the slot divestitures did, in fact, serve their purpose of preventing newly-merged American from dominating the competition. Whereas in 2012, American Airlines and US Airways combined for a roughly 32% carrier share at the airport, American’s current share is roughly 25%.<sup>77</sup> However, competition from LCCs has not filled that void: carrier shares for “Other” airlines dropped from 41.51% to 35.55%.<sup>78</sup> Further, Air Wisconsin, a private LCC out of Wisconsin, had the fifth-largest share in 2012, at 5.52%.<sup>79</sup> Their carrier share had fallen out of the top five by 2018.<sup>80</sup> Thus, while the DOJ successfully prevented an uber-dominant American at Reagan airport, competition from other airlines outside of the “big four” has also decreased in the post-merger years.

Additional airports that were required to divest slots have shown less improvement than Reagan. At Boston Logan, despite post-merger American’s diminished share, Jet Blue has enhanced its top-ranked carrier share from 26.9% to nearly 32%, while “Other” airlines have dropped from roughly 24% to 13.7%.<sup>81</sup> Similarly, in Chicago, United has increased its top-ranked carrier share from 26.7% to over 31%, while “Other” airlines have dropped from 27.1% to 18.9%.<sup>82</sup> Perhaps more concerning, American has enhanced its share from 24.2% to 26.2% despite the slot divestitures.<sup>83</sup>

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<sup>76</sup> U.S. DEP’T OF TRANSP., *supra* note 74.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

The final four airports where American divested slots—Dallas, New York-LaGuardia, Los Angeles, and Miami—have seen carrier shares remain relatively static.<sup>84</sup> In the case of Dallas, this still means that American retains a nearly 70% carrier share at the airport.<sup>85</sup>

Miami International is perhaps the most “improved” competition-wise, as American’s carrier share has dropped nearly 2.5%, while “Other” airline shares have increased by almost 3.5%.<sup>86</sup> Further, a more well-known LCC, Frontier, has gained a top-five share—albeit at 2.8%.<sup>87</sup>

Overall, while none of these statistics are particularly staggering, they indicate that the slot divestitures have failed to bring about a positive change in competition at any of the targeted airports. Specifically, the comparisons show that the DOJ’s hope that the “settlement [would] increase the presence of the LCCs” at those airports has, for the most part, not been realized.<sup>88</sup>

A wider examination of carrier shares at United States airports reveals a similar trend in the post-merger years. Numerous airports, such as Denver, Minneapolis, Salt Lake City, and Tampa, have had their top carrier increase their share by multiple percentage points, while “Other” airline shares have decreased, in the post-American merger years.<sup>89</sup> One noteworthy shift in carrier share is that of Frontier in Denver, the headquarters and lone “hub city” for the LCC airline.<sup>90</sup> Frontier’s relatively strong share of 19% at the close of 2012 has shrunk to less than 12%, while Southwest and United have both grown their shares by over 5%.<sup>91</sup> While this is only one instance of an LCC losing ground to the “big four,” it is a stark example of the general trend nationwide post-merger.

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> DOJ SETTLEMENT, *supra* note 7.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*; see also Alex Schecter, *Frontier Airlines Is Launching New Routes and Adding Destinations*, TRAVEL & LEISURE, <http://www.travelandleisure.com/airlines-airports/frontier-airlines-new-routes> (last updated Dec. 4, 2017).

<sup>91</sup> U.S. DEP’T OF TRANSP., *supra* note 74.

In sum, the DOJ's promise of enhanced competition and room for growth of LCCs at United States airports has not materialized in the post-merger years. Rather than the DOJ's settlement leading to a "shift [in] the landscape of the airline industry,"<sup>92</sup> carrier shares have remained relatively static at best, or have continued to shift towards concentrated power in the dominant "big four" airlines. While carrier share is only one metric for examining competition among airlines, it is an important way to examine how the most recent mergers have impacted the industry.

### B. Pricing and Profits

Despite general negative feelings towards airline ticket prices, fares have actually decreased by over 15% in the last five years.<sup>93</sup> Further, when taking a longer view of fare trends, average fare has dropped significantly over the last twenty-plus years—27.8% since 1995.<sup>94</sup> While on its face this is a positive trend for consumers, it does not fully reflect how individuals are being charged for their air travel,<sup>95</sup> and how airlines have benefitted.

Airlines have met declining fares with a "secret weapon" to extract money from consumers: ancillary fees.<sup>96</sup> In its original complaint to block the American Airlines-US Airways merger, the DOJ explicitly stated that ancillary fees were harming consumers, the airlines were moving in lockstep to raise the fees, and the merger would lead to an increase in fees.<sup>97</sup> Towards the close of 2018, the major United States airlines were expected to finish with roughly \$26.9 billion in ancillary revenue.<sup>98</sup>

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<sup>92</sup> DOJ SETTLEMENT, *supra* note 7.

<sup>93</sup> Average fare adjusted for inflation dropped from \$408 in 2012 to \$346 in 2018, a roughly 15.1% decrease. See U.S. DEP'T OF TRANSP., *Bureau of Transportation Statistics—Annual U.S. Domestic Average Itinerary Fare in Current and Constant Dollars*, <https://www.bts.gov/content/annual-us-domestic-average-itinerary-fare-current-and-constant-dollars> (last visited Apr. 6, 2019).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* ("Fares include only the price paid at the time of the ticket purchase and do not include optional services, such as baggage fees.")

<sup>96</sup> See *supra* Part II (outlining the basic practice of ancillary fees).

<sup>97</sup> DOJ Amended Complaint, *supra* note 43, at 27–28.

<sup>98</sup> Press Release, IdeaWorksCompany, Airline Ancillary Revenue Projected to Be \$92.9 Billion Worldwide in 2018 (Nov. 27, 2018), <https://www.ideaworkscompany.com/wp-content/uploads/2018/11/Press-Release-133-Global-Estimate-2018.pdf>.

Perhaps not surprisingly, domestic airlines have enjoyed substantial profits in the post-merger era. Profits per passenger for the seven largest United States airlines were nearly \$20 (\$19.65, to be exact) at the close of 2017.<sup>99</sup> That margin is more than double the worldwide average of \$7.40.<sup>100</sup> Further, the airlines have managed to earn these profits despite a substantial increase in fuel prices.<sup>101</sup> It seems to be a reasonable inference that the major airlines are utilizing ancillary fees as a supplementary revenue stream to offset decreasing fares. With fuel prices expected to increase again in 2019,<sup>102</sup> it will be worth watching whether fares begin to creep up or, alternatively, consumers face increased ancillary fees. Regardless, it is evident that ancillary fees are becoming more and more a profit-building strategy by the major airlines, just as the DOJ forecasted.<sup>103</sup>

### C. Consumer Experience

When it comes to commercial air travel, defining the boundaries of the consumer experience can be a difficult task—fraught with subjectivity and uninformed opinions. The typical United States traveler probably has at least one story of air travel gone awry with substantial delays or uncomfortable accommodations.<sup>104</sup> However, consumers may not even recognize benefits that are less obvious. For example, it is undeniable that consumers have greater choice when choosing where to travel.<sup>105</sup> The number of unique city pairs globally surpassed 20,000 this year—a 108% increase over the last twenty years.<sup>106</sup> Despite these types

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<sup>99</sup> *Id.*

<sup>100</sup> *Industry Statistics—Fact Sheet*, INT’L AIR TRANSP. ASS’N (Dec. 2018), [https://www.iata.org/pressroom/facts\\_figures/fact\\_sheets/Documents/fact-sheet-industry-facts.pdf](https://www.iata.org/pressroom/facts_figures/fact_sheets/Documents/fact-sheet-industry-facts.pdf).

<sup>101</sup> Fuel price per barrel increased an estimated 31.3% worldwide in 2018. *IATA 2018 Report*, *supra* note 13, at 4; *see also supra* Part II (describing the significant impact of fuel prices on airline economics).

<sup>102</sup> The IATA report forecasts worldwide jet fuel prices to increase by 11.2% in 2019. *IATA 2018 Report*, *supra* note 13, at 4.

<sup>103</sup> *See* DOJ Amended Complaint, *supra* note 43 (warning of increased ancillary fees throughout the DOJ Complaint).

<sup>104</sup> *See* U.S. TRAVEL ASS’N, Consumer Report, [https://www.ustravel.org/sites/default/files/media\\_root/document/MC-Poll-Slides-V3.pdf](https://www.ustravel.org/sites/default/files/media_root/document/MC-Poll-Slides-V3.pdf).

<sup>105</sup> *IATA 2018 Report*, *supra* note 13, at 2.

<sup>106</sup> *Id.*



of efficiencies in the industry, United States air travelers remain disgruntled about their flying experiences.<sup>107</sup>

A recent study by a non-profit travel organization found that, by a margin of five-to-one, adult Americans consider air travel to be more of a hassle now compared to five years ago.<sup>108</sup> The greatest source of discontent came from the rise in ancillary fees.<sup>109</sup> The other two dominant concerns were the overall cost of flying and general airport hassles.<sup>110</sup> Finally, and perhaps most concerning for airlines, nearly one-quarter (24%) of the individual surveyed said that they had decided against taking a leisure trip due to problems with the air travel system.<sup>111</sup>

While these types of opinions may seem to fall under consumer protection, rather than antitrust principles, they are at least indicative of a consumer experience that leaves something to be desired. These types of complaints are unlikely to diminish any time soon, as major airlines seem as determined as ever to squeeze revenue out of passengers at the expense of the consumer experience. Airlines have continued to shrink legroom for passengers to the point that the courts have become involved: in 2017, the Court of Appeals for the District of Columbia ordered the Federal Aviation Administration (“FAA”) to review seat sizes and leg room on planes.<sup>112</sup>

In the fall of 2018, Congress passed a new FAA reauthorization bill to address, among other things, airline passenger “pet peeves.”<sup>113</sup> The act includes a requirement that the FAA administrator establish minimum standards for seat size and width.<sup>114</sup>

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<sup>107</sup> See U.S. TRAVEL ASS’N, Consumer Report, *supra* note 104.

<sup>108</sup> Of the 2,201 individuals polled, 51% stated that air travel has become “more of a hassle,” compared to 9% who stated it was “less of a hassle.” *Id.* at 2.

<sup>109</sup> Sixty percent of those surveyed stated that “airline fees, such as fees for checked bags, flight changes or seat assignments had “gotten worse” in the last five years. *Id.* at 3. This was the largest percentage of negative responses when asked about industry characteristics. *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 8.

<sup>112</sup> Ashley Halsey III, *Will the FAA Come to the Rescue of Cramped Fliers?*, WASH. POST (Feb. 24, 2018), [https://www.washingtonpost.com/local/trafficandcommuting/will-the-faa-come-to-the-rescue-of-cramped-fliers/2018/02/24/b35401a4-166b-11e8-92c9-376b4fe57ff7\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/will-the-faa-come-to-the-rescue-of-cramped-fliers/2018/02/24/b35401a4-166b-11e8-92c9-376b4fe57ff7_story.html).

<sup>113</sup> See FAA Reauthorization Act of 2018, Pub. L. No. 115-254 (2018).

<sup>114</sup> Barbara Peterson, *How the New FAA Bill Will Affect Air Travelers*, CONDE NAST TRAVELER (Sept. 24, 2018), <https://www.cntraveler.com/story/new-faa-bill-affect-travelers-what-to-know>.

While this is certainly an encouraging development, the FAA was quick to temper expectations—making it clear that they only have jurisdiction over the safety of airline seating, not consumer comfort.<sup>115</sup> The act also prohibited airlines from bumping passengers already aboard flights, among other incremental changes.<sup>116</sup> It is encouraging that Congress took up the issue of consumer experience, and hopefully they will continue to monitor the air travel experience in the future.

Ultimately, customer complaints and uncomfortable air travel are not going to have the DOJ knocking down the major airlines' door with antitrust violations. The DOJ would much sooner raise concerns over pricing practices or market power at airports before being alarmed by leg room issues. However, these issues are further evidence that the promises of consumer benefits from airline consolidation are not coming to fruition in the post-merger era.

#### **VI. *IN RE DOMESTIC AIRLINE TRAVEL ANTITRUST LITIGATION:* A POSSIBLE “PRIVATE” SOLUTION?**

Perhaps the most compelling development in antitrust law relating to the airline industry comes not from the DOJ, but from private consumers.<sup>117</sup> The consolidated class action lawsuit—*In re Domestic Airline Travel Antitrust Litigation*<sup>118</sup>—has the potential to bring to light more specifics about the “big four” airlines' questionable practices. The plaintiffs in the case, a large group of airline travelers, filed suit against all four major airlines: American, Delta, Southwest, and United Airlines.<sup>119</sup>

The plaintiffs allege that the airlines “colluded to limit capacity on their respective airlines in a conspiracy to fix, raise, maintain, and/or stabilize prices . . . in violation of Sections 1 and 3 of the Sherman Antitrust Act.”<sup>120</sup> Essentially, their claim argues that elevating the “capacity discipline” tactics of major airlines are a legitimate conspiracy under the Sherman Act.<sup>121</sup>

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> See *In re Domestic Airline Travel Antitrust Litig.*, 221 F. Supp. 3d 46 (D.D.C. 2016).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 53.

<sup>120</sup> *Id.*

<sup>121</sup> See Elliott, *supra* note 23.

The plaintiffs in the case discuss a myriad of details in their allegations.<sup>122</sup> Specifically, they allege that the highly-concentrated nature of the industry makes it more conducive to collusion among the major airlines.<sup>123</sup> Further, they note that a pricing mechanism, known as the Airline Tariff Publishing Company (“ATPCO”), allows each of the airlines to monitor real-time pricing on flights across the country.<sup>124</sup> The plaintiffs also cite statements by the airline executives in recent years, which they argue exhibit a commitment to capacity discipline and demonstrate the practice’s important role in the industry.<sup>125</sup> Finally, the plaintiffs cite the fact that airfare prices have risen between 2009 and 2016, despite the fact that jet fuel prices have “plummeted” over that time span and demand has diminished among consumers.<sup>126</sup> Essentially, the plaintiffs argue that “absent collusion to restrict capacity, fares would decrease with decreased demand and decreased costs.”<sup>127</sup>

While the District Court for the District of Columbia only ruled that the plaintiffs adequately pled a plausible claim under the Sherman Act,<sup>128</sup> compelling arguments are raised that emphasize many of the current concerns about the industry. This case also creates a compelling situation, in which private consumers could be the vehicle to ultimately inflict some legal damage on the major airlines, rather than the DOJ.

In early 2018, Southwest Airlines reached a settlement with the plaintiffs and agreed to pay out \$15 million, but denied any wrongdoing in the matter.<sup>129</sup> Beyond Southwest simply wanting to remove itself from the litigation, it is difficult to glean much from the settlement agreement. However, according to the plaintiffs’ lawyers, Southwest has agreed to supply “a full account of facts then known . . . that are

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<sup>122</sup> See *Airline Travel Antitrust*, 221 F. Supp. 3d at 59–66.

<sup>123</sup> *Id.* at 60.

<sup>124</sup> *Id.* at 60–61.

<sup>125</sup> *Id.* at 61–62.

<sup>126</sup> *Id.* at 64.

<sup>127</sup> *Id.* at 65.

<sup>128</sup> *Id.* at 74.

<sup>129</sup> Jonathan Stempel, *Southwest Airlines to Pay \$15 Million to Settle Price Collusion Lawsuit*, REUTERS (Jan. 4, 2018), <https://www.reuters.com/article/us-southwest-settlement/southwest-airlines-to-pay-15-million-to-settle-price-collusion-lawsuit-idUSKBN1EU02F>.

relevant to the claims asserted in the action.”<sup>130</sup> Depending on the type and depth of information that Southwest provides to the plaintiffs, useful evidence illustrating parallel behavior amongst the airlines could arise.

Shortly after, in June of 2018, American Airlines agreed to pay the plaintiffs \$45 million to end the lawsuit against the company.<sup>131</sup> Similar to Southwest, American admitted no wrongdoing in the matter and portrayed the settlement as a prudent business decision.<sup>132</sup> Furthermore, American also agreed to produce business records and make several current or former employees available for depositions.<sup>133</sup>

Ultimately, the plaintiffs will face a much tougher battle to prevail in court against United and Delta. However, their initial argument raises very specific concerns pertaining to consumer welfare that cannot be ignored. The lawsuit’s discovery period has been pushed back into 2019,<sup>134</sup> but it is certainly possible that the evidence eventually produced in this case could be the most transparent look at the industry in recent years.

## VII. CONCLUSION

It is entirely possible that the major United States airlines are not guilty of any antitrust violations. The inability of the DOJ to prevent the substantial mergers in recent years certainly indicates that the nature of the industry is far more complex than one might realize. Despite the DOJ’s lack of meaningful antitrust enforcement against the major airlines, the current class action litigation could illuminate practices by the airlines not previously revealed. The plaintiffs’ motion to defeat summary judgment contained a variety of specific and compelling arguments against the airlines, and the suit could be a step in the right direction of consumer welfare for air travelers.

Regardless of the outcome of the private litigation, it appears that consolidation in the airline industry has not brought about the desired benefits for consumers. While it is also difficult to forecast how consumers would have fared without the

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<sup>130</sup> Eleanor Tyler, *Southwest Flips on Big Three Airlines in Cartel Case*, BLOOMBERG L. (Jan. 2, 2018), <https://www.bna.com/southwest-flips-big-n73014473722/>.

<sup>131</sup> Andrew M. Harris & Mary Schlangenstein, *American Airlines Agrees to Pay \$45 Million to Settle Fare Collusion Lawsuit*, BLOOMBERG (June 15, 2018), <https://www.bloomberg.com/news/articles/2018-06-15/american-agrees-to-pay-45-million-to-settle-fare-collusion-suit>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Chuck Stanley, *Airline Antitrust MDL Discovery Deadline Pushed To 2019* (Feb. 12, 2018), LAW360, <https://www.law360.com/articles/1011548>; *In re Domestic Airline Travel Antitrust Litig.*, No. MC 15-1404 (CKK), 2018 WL 4441507, at \*1 (D.D.C. Sept. 13, 2018).

mergers, they have not created the positive competitive effects that the DOJ forecasted in its settlement with American Airlines, and consumers' overall air travel experience remains mediocre. Unfortunately, this may be the experience that consumers are stuck with. Further, it is becoming increasingly clear that the DOJ missed an opportunity to make a lasting impact on the industry with its lack of action during the era of mergers.