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Consumers challenge US frequent-flyer programmes

Timothy J. Lynes, a partner at Katten Muchin Rosenman LLP, examines a recent case before the US Supreme Court involving frequent flyer programmes. The issue for the Court to consider is whether certain US state common law claims are preempted under the Airline Deregulation Act.

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The US Supreme Court will hear argument this term in Northwest, Inc v Ginsburg[1], in which it will consider whether the Ninth Circuit Court of Appeals erred in holding that a plaintiff's implied covenant of good faith and fair dealing claim in an action involving a frequent-flyer programme was not preempted under the Airline Deregulation Act of 1978.

Airline Deregulation Act

In 1978, in an effort to further efficiency, lower prices and increase competition by deregulating domestic air transport, Congress passed the Airline Deregulation Act of 1978 (ADA)[2], which included a preemption clause "[t]o ensure that the States would not undo federal deregulation with regulation of their own"[3]. The preemption clause provides that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of an air carrier…"[4]

Supreme Court precedent

The Supreme Court has considered preemption under the ADA in three cases: Morales v Trans World Airlines[5]; American Airlines, Inc v Wolens[6]; and Rowe v New Hampshire Motor Transport Ass'n[7].

In Morales, the court confronted an effort by the National Association of Attorneys General to enforce guidelines governing the content and format of airline fare advertising under state general consumer protection laws. The court explained that the phrase "relating to" indicated a "broad preemptive purpose" and meant "having a connection with, or reference to, airline 'rates, routes or services'," ultimately holding that the ADA preempted the state restrictions on price advertising because such guidelines related to airline rates[8].

Even if the guidelines at issue were considered to refer directly to advertising, and touched on airline fares indirectly, the court concluded that such indirect regulation would "have the forbidden significant effect upon fares" to warrant preemption under the ADA[9]. The Morales court noted, however, that the ADA may not preempt state laws that are "too tenuous, remote, or peripheral… to have a preemptive effect".[10]

Wolens involved a class action in which the plaintiffs alleged that American Airlines violated the Illinois consumer fraud and deceptive business practices laws, and breached its contract with customers by modifying the frequent-flyer programme through imposed capacity controls and blackout dates on a retroactive basis, thus devaluing credits previously accumulated. The court, noting that frequent-flyer programmes relate to rates and services, concluded that the plaintiffs' claims under the consumer fraud statute required enforcement of state law, and thus were preempted under the ADA.

The breach of contract action, however, was not preempted: "We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings."[11]

Where a remedy is confined to the terms of a contract, there is no enactment or enforcement of state law to trigger ADA preemption. Because the remedy in such a cause of action is "simply hold[ing] parties to their agreements", according to Wolens, federal law does not preempt breach of contract claims.[12]

Federal courts hearing breach of contract actions are confined to the bargain of the parties to an air carrier contract, and must not enlarge or enhance the remedies sought by state laws or parties external to the agreement.[13] Moreover, the court noted that neither the US Department of Transportation nor its predecessor have the authority or ability to oversee

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air carrier contract disputes – a reality that supports the exclusion of breach of contract claims from ADA preemtpion.[14]

In Rowe, the Supreme Court considered the preemptive effect of the Federal Aviation Administration Authorization Act (FAAAA),[15] which prohibits states from enacting any law relating to a carrier's price route, or service.[16]

The Rowe plaintiffs challenged as preempted by the FAAAA a Maine law that forbade any person from knowingly transporting tobacco to a person in Maine unless the sender or recipient has a Maine licence, and which required tobacco retailers to use a delivery service that verified that the recipient of a tobacco order may legally purchase tobacco. The court, noting that the preemption clause of the FAAAA was borrowed from the ADA, held that under Morales, the Maine law related to carrier services because it prompted tobacco retailers to seek delivery services that differed from those that "in the absence of the regulation, the market might dictate".[17]

The Rowe court also noted that if a frequent-flyer programme can be preempted under federal law, as the court in Wolens held, then it must also preempt state regulation of a carrier's picking up and delivery of goods.[18]

Background and procedural posture

Respondent S Binyomin Ginsberg was a member of Northwest's WorldPerks frequent-flyer programme, gaining Platinum Elite Status in 2005. In 2008 Northwest revoked Ginsberg's membership. Ginsberg allegedly abused the programme by complaining too frequently about Northwest's services, and continually asking for compensation over and above the programme guidelines.

In January 2009, alleging that Northwest acted arbitrarily by revoking his WorldPerks membership without valid cause, Ginsberg brought a class action against Northwest, asserting four state law claims: breach of contract; breach of implied covenant of good faith and fair dealing; negligent misrepresentation; and intentional misrepresentation. Ginsburg sought damages of more than $5 million and injunctive relief requiring Northwest to restore the frequent-flyer membership status of the class members and prohibiting Northwest from future revocations of frequent-flyer membership status without valid cause.

The federal district court granted Northwest's motion to dismiss, disposing three of Ginsberg's claims as being preempted by the ADA, concluding that the dismissed claims required the enforcement of state law and related to both airline prices and services. The district court further noted that, under Wolens, frequent-flyer programmes relate to prices and services, and the WorldPerks programme was none other than a frequent-flyer programme.

On the other hand, the district court concluded that a cause of action alleging a breach of the terms of an agreement the airline entered into voluntarily was not preempted under the ADA because such a claim did not require the enforcement of state law. Instead, the district court concluded that such a claim would involve the enforcement of the parties' own undertakings, as Wolens requires.

Nevertheless, the district court dismissed Ginsberg's breach of contract claim for failure to provide sufficient evidence of any material breach by Northwest under the WorldPerks Agreement. That agreement provided that any abuse of the WorldPerks programme, including improper conduct determined by Northwest in its sole judgment, is ground for cancellation of the membership. The district court concluded that Northwest was not obligated to explain its decisions regarding membership revocation or define what constituted "improper conduct". To hold otherwise would be an enlargement or enhancement of the parties' agreement beyond its express terms. Such a result is prohibited by Wolens.

At the motion to dismiss stage Ginsberg argued that the implied covenant of good faith and fair dealing should be treated as a breach of contract claim because Minnesota law imposed such a duty on all parties in every contract. Such a duty, according to Ginsberg, applied to (and limited) Northwest in exercising its "sole judgment" in revoking Ginsberg's WorldPerks membership. The district court rejected that argument, explaining that the requirement that parties conduct themselves in good faith and deal fairly with one another is one of state policy, and not one of contract, that is given the force and effect of law.

Ginsberg moved for reconsideration of dismissal of his claims, renewing his previous arguments and arguing that the district court erred in failing to recognize that the ADA preemption clause does not apply to state common law claims. The court denied the motion, explaining that

[1] No 12-462.
[2] 49 USC App § 1301 et seq.
[3] Morales v Trans World Airlines, 504 US 374, 378 (1992).
[4] 49 USC § 41713(b).
[5] 504 US 374 (1992).
[6] 513 US 219 (1995).
[7] 552 US 364 (2008).
[8] Morales, 504 US at 384.
[9] Id at 388.
[10] Id at 390.
[11] Wolens, 513 US at 228.
[12] Id at 229.
[13] Wolens, 513 US at 232.
[14] Id at 230-32. Under 49 USC § 41712, the US Department of Transportation has jurisdiction over airlines in regard to alleged deceptive trade practices.
[15] 49 USC § 40120, et seq.
[16] 49 USC § 14501(c).
[17] Rowe, 552 US at 370.
[18] Id at 373.

At stake is the uniform regulatory mechanism under which airlines conduct themselves.

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Wolens distinguishes between terms an airline itself stipulates and any enlargement or enhancement based on state laws or polices external to the agreement.

For purposes of evaluating potential exclusions from ADA preemption under Wolens, no distinction is made between state common law claims and state statutes. In conclusion, the court noted that state common laws affecting contracts are expansions beyond the express terms of the agreement that exist independently of such contracts.

Ninth Circuit opinion[19]

Ginsberg asserted one error on appeal to the Ninth Circuit: that the district court's conclusion that the ADA preempted his implied covenant of good faith and fair dealing claim.[20] The Ninth Circuit accordingly reversed the district court's ruling, concluding that the ADA does not preempt state-based common law contract claims, such as the implied covenant of good faith and fair dealing.[21] The dismissal of Ginsberg's claim based on federal preemption doctrine, according to the Ninth Circuit, was a misapplication of the law because the ADA was never designed to preempt that type of dispute.

The Ninth Circuit, citing its precedent in West v Northwest Airlines, Inc,[22] held that implied covenant of good faith claims are "too tenuously connected to airline regulation to trigger preemption under the ADA",[23] and concluded that while West, which stands for the same proposition, was a pre-Wolens case, it remains good law in the Ninth Circuit. It also concluded that its holding in Charas v Trans World Airlines, Inc,[24] that the savings clause and preemption clause of the ADA provide evidence that Congress did not intend to preempt state tort remedies already existing at common law (provided that such remedies do not significantly impact federal deregulation), applies to already existing state contract remedies.[25]

The Ninth Circuit further noted that the implied covenant of good faith and fair dealing neither interferes with the deregulation mandate of ADA nor forces airlines to adopt or change their prices, routes or services, which is a prerequisite for ADA preemption.[26]

The Ninth Circuit also held that implied covenant claims do not "relate to" prices or services. According to the court, the link between the restrictions placed on airlines by implied covenant claims and the airlines' rates is too tenuous to consider the cause of action "related to" airline fares. The district court also interpreted the ADA's "related to" language too broadly, concluding that Congress intended the preemption language to apply to state laws directly regulating rates, routes, or services.

Conclusion

The Ninth Circuit, by categorically excluding state common law claims from ADA preemption (thus keeping Ginsberg's implied covenant claim alive), has misconstrued Supreme Court precedent and perpetuated a conflict among the circuit courts of appeals. Where Wolens acknowledged a limited exclusion from ADA preemption for claims involving enforcement of private contractual obligations, the Ninth Circuit seeks to expand an air carrier's obligations to those beyond its voluntary undertakings – citing Wolens as support. Such a reading is inconsistent with both Morales and Wolens, and at least one circuit to rule on the issue. [28]

This is an important case for airlines and the administration of frequent-flyer programmes. At stake is the uniform regulatory mechanism under which airlines conduct themselves. Moreover, should the Supreme Court affirm the holding of the Ninth Circuit, air carriers may see an increase in breach of contract claims that would have otherwise been preempted by federal law without the Ninth Circuit's misstep in Ginsberg.

But given the fact that the Ninth Circuit's holding appears at odds with the precedents of both the Supreme Court and its sister circuits, it seems unlikely that the court will adopt the Ninth Circuit's categorical exclusion of state common law claims from preemption under the ADA and FAAAA.

[19] Ginsberg v Northwest, Inc, 695 F3d 873 (9th Cir 2012).
[20] Id at 875.
[21] Id.
[22] 995 F2d 148 (9th Cir 1993).
[23] Wolens, 995 F2d at 151.
[24] 160 F2d 1259, 1264 (9th Cir 1998) (en banc).
[25] Ginsberg, 695 F3d at 880.
[26] Id.
[27] Id at 881.
[28] See Travel All Over the World, Inc v Kingdom of Saudi Arabia, 73 F3d 1423, 1433 (7th Cir 1996) ("Morales does not permit us to develop broad rules concerning whether certain types of common-law claims are preempted. Instead we must examine the underlying facts of each case to determine whether the particular claims at issue 'relate to' airline rates, routes, or services.").