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# R E C E N T C A S E S

## *Frequent flyer breach of contract claims escape preemption*

by Melissa Jerves

In *American Airlines, Inc. v. Wolens*, 115 S.Ct. 817 (1995), the United States Supreme Court held that the Airline Deregulation Act of 1978 ("ADA") preemption provision bars actions brought under state-imposed regulation of air carriers, but permits court enforcement of contract terms set by the parties themselves.

The plaintiffs in this case were participants in American Airlines' frequent flyer program, AAdvantage, in which they earned mileage credits when they flew on American. Credits could be exchanged for flight tickets or class-of-service upgrades. The plaintiffs protested that 1988 changes in the AAdvantage program devalued credits they had already earned by imposing blackout dates when credits could not be used and by limiting the number of seats available to passengers with tickets obtained with mileage credits. Plaintiffs conceded that American reserved the right to change terms and conditions; however, they challenged the retroactive application of cutbacks on the use of previously accumulated credits. According to the plaintiffs, such retroactive cutbacks violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("Consumer Fraud Act") and constituted a breach of contract.

### **Illinois court rules against preemption**

The Illinois Supreme Court denied plaintiffs' request for an injunction. The court reasoned that an injunction would constitute a regulation of current airline services, an area clearly preempted by the ADA. However, the court did allow the breach of contract and Consumer Fraud Act claims to proceed, ruling that these claims were only tangentially related to the airline's rates, routes, or services, and therefore were not preempted by the ADA.

American petitioned the Supreme Court for certiorari, arguing that the Illinois Supreme Court's decision was out of sync with the recent Supreme Court decision in *Morales v. Trans World Airlines, Inc.*, 112 S.Ct. 2031 (1992), in which several states sought to enforce guidelines created by the National Association of Attorneys General ("NAAG") to govern the content and format of airline fare advertising. In *Morales*, the Court held that the NAAG fare advertising provisions were preempted by the ADA. The Court used its previous interpretation of the Employment Retirement Income Security Act of 1974 ("ERISA") language in interpreting the words "relating to rates, routes, or services of any air carrier" in the ADA. Under the ERISA, a state law "relates to" an employee benefit plan "if it has a connection with or

reference to such a plan." Similarly, the Court in *Morales* defined "relating to" in the ADA preemption provision as "having a connection with or reference to airline 'rates, routes, or services.'" Furthermore, the Court cited the objections of the federal agencies involved—the Department of Transportation ("DOT") and the Federal Trade Commission ("FTC")—to guidelines such as the NAAG because they were inconsistent with the deregulatory purpose of the ADA.

In light of *Morales*, American's petition for certiorari was granted; the Court vacated the judgment of the Supreme Court of Illinois and remanded the case for further consideration consistent with *Morales*. However, on remand the Illinois Supreme Court reaffirmed its prior judgment, calling frequent flyer programs not "essential" and only tangentially and tenuously related to American's rates, routes, and services. Once again, the Supreme Court granted American's petition for certiorari.

The Court found that plaintiffs' claims did "relate to" airline rates, routes, or services and rejected the Illinois Supreme Court's distinction between "essential" and "tangential" matters. The Court moved on to address the issue of interpreting the words "[N]o state ... shall enact or enforce any law ..." in the ADA preemption clause. Specifically, the Court considered whether the preemption clause applied to either the Consumer

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Fraud Act claims or the breach of contract claims asserted by plaintiffs.

### **Consumer fraud statutes conflict with ADA's deregulatory purpose**

The Court analogized the Consumer Fraud Act to the NAAG guidelines that were preempted in *Morales*, accepting the argument of the United States as amicus curiae that such legislation prescribes and controls the airlines' conduct (for example, instructing airlines on appropriate language to use in advertising). The Court concluded that the Consumer Fraud Act conflicted with the deregulatory purpose of the ADA by "serv[ing] as a means to guide and police the marketing practices of the airlines." Therefore, it held that the Consumer Fraud Act was preempted by the ADA.

### **Court finds that contract terms are private obligations**

American asserted that "Congress could hardly have intended to allow the States to hobble [competition for airline passengers] through the application of restrictive state laws." Although the Court agreed with this argument, it refused to apply the ADA preemption clause to suits seeking recovery "solely for the airline's alleged breach of its own, self-imposed

undertakings." The United States argued that terms and conditions offered by airlines and accepted by passengers are private obligations and not the same as a state's enactment or enforcement of a law or other provision having the force and effect of law.

In recognizing the plaintiffs' breach of contract claim, the Court relied on its reasoning in *Morales* that the ADA was designed to promote "maximum reliance on competitive market forces," and on the assertion by the United States that "[t]he stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made." Although American argued that it should be the role of the DOT to monitor the airlines, the Court rejected this argument, maintaining that the DOT has never taken the place of the courts in adjudicating airline contract disputes. Furthermore, according to the United States, the DOT lacks the authority and the resources to resolve contract disputes.

Finally, the Court justified its conclusion that state law breach of contract claims are not preempted by the ADA by referring to the Federal Aviation Act's ("FAA") saving clause, which preserves "the remedies now existing at common law or by statute." Reading the FAA's saving clause together with the ADA's preemption clause, the Court held that states cannot impose substantive standards relating to airline rates, routes, or services, but

must provide relief to parties with proven breach of contract claims based on terms privately agreed to by the airline.

### **Dissenting opinions take opposite positions**

In his opinion concurring in part and dissenting in part, Justice Stevens agreed with the majority that the ADA does not preempt the plaintiffs' breach of contract claims. However, he argued that the Consumer Fraud Act claims should not be preempted either. Justice Stevens distinguished the Consumer Fraud Act from the NAAG guidelines in *Morales*, noting that the Consumer Fraud Act does not instruct airlines specifically about marketing their services. Rather, it prohibits all businesses from defrauding their customers. Reasoning that state laws against breach of contract are no different than state laws against fraud, Justice Stevens agreed with the entire judgment of the Illinois Supreme Court that the ADA should not preempt any of the plaintiffs' claims.

In Justice O'Connor's opinion concurring in part and dissenting in part, she maintained that none of the plaintiffs' claims should proceed. Although she agreed with Justice Stevens that general breach of contract laws are no different than general consumer fraud statutes, Justice O'Connor did not agree that *Morales* is distin-

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guishable from the present case. She observed that the guidelines in *Morales* were not in themselves “law,” but invoked generally applicable consumer fraud statutes to enforce the NAAG guidelines relating to rates, routes, or services. Justice O’Connor reasoned that consumer fraud statutes not facially related to airlines were preempted in *Morales* because the subject matter of the action related to airline rates. Similarly, the Illinois Consumer Fraud Act at issue in this case also

should be preempted because the subject matter of the contract the plaintiffs sought to enforce related to airline rates and services. According to Justice O’Connor, *Morales* is indistinguishable from the present case, and therefore both the plaintiffs’ breach of contract and Consumer Fraud Act claims should be preempted by the ADA. However, Justice O’Connor acknowledged that personal injury claims against airlines are not always preempted under her view of *Morales*. She

distinguished many personal injury claims as not relating to airline services, but rather relating to safety.

In summary, although the dissenters took opposite positions on ADA preemption, the majority of the Court followed the middle ground, barring the plaintiffs’ claims against American Airlines based on state consumer fraud statutes, but allowing them to seek enforcement of contract terms agreed to by the airline.

## *Coors wins battle over beer labels*

*by Russell Collins*

Beer drinkers may now know exactly how much alcohol is in their drink of choice. The United States Supreme Court recently struck a federal ban on labeling beer with its alcohol content in *Rubin v. Coors Brewing Company*, 115 S.Ct. 1585 (1995).

Since 1935, the Federal Alcohol Administration Act (“FAAA”) has banned the disclosure of beer alcohol content on labels. The post-prohibition statute established federal rules governing the distribution, production and importation of alcohol; and created the Federal Alcohol Administration. The FAAA empowered the Secretary of the Treasury to regulate alcohol packaging through § 205(e)(2), which then delegated the power to the Bureau of Alcohol, Tobacco and Firearms (“ATF”). The ATF then enacted 27 C.F.R. § 7.26(a), which prohibited the disclosure of alcohol content on labels and in advertisements in states that did not have legislation mandating its inclusion on beer labels.

### **ATF rejects proposed Coors label**

In 1987, the ATF rejected Coors’ proposed beer label design and advertising campaign pursuant to its regulations. Both the label and ad campaign disclosed the alcohol content of Coors beer. Coors responded by filing suit in Colorado District Court against the Secretary of the Treasury. The court granted injunctive relief barring enforcement of the alcohol content disclosure ban, but the Tenth Circuit reversed and remanded, emphasizing the government’s substantial interest in suppressing alcohol “strength wars.”

On remand, the district court again invalidated the label ban; however, it upheld the prohibition against using the alcohol content of beer in advertising. Although the government requested review of the label ban nullification, Coors did not challenge the legitimacy of the advertising restriction. The Tenth Circuit affirmed the later district court decision nullifying the label