

1992

Restrictions on the Transferability of Frequent Flyer Awards Enforced

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Recommended Citation

Michael J. Lubeck *Restrictions on the Transferability of Frequent Flyer Awards Enforced*, 5 Loy. Consumer L. Rev. 27 (1992).
Available at: <http://lawcommons.luc.edu/lclr/vol5/iss1/9>

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Lande's violations were in fact included within the plain meaning of §§ 2511 and 2512 and therefore affirmed the lower court in this respect.

The appellate court first considered the applicability of § 2511 of the Wiretap Law. This section prohibits the intentional interception and disclosure of wire, oral and electronic communications "except as . . . specifically provided." Among the specific exceptions provided by the statute were the unauthorized viewing of cable television and the viewing of certain unscrambled satellite programming. The court, however, found no specific exception for the unauthorized interception of scrambled satellite signals. Therefore, it concluded that the plain meaning of § 2511 applied to Lande's interception of scrambled satellite signals.

Next, the court considered § 2512 of the Wiretap Law. This section regulates those devices whose design makes them "primarily useful for . . . the surreptitious interception of wire, oral or electronic communications." Focusing on the design, the court reasoned that by modifying the descramblers to unscramble all satellite programming, Lande had rendered them of use to unauthorized viewers. Furthermore, the court found that Lande's interception of satellite programming was surreptitious because the producers of the programming had no way of knowing that their signals were being intercepted. Therefore, the court reasoned that the plain meaning of § 2512 applied to Lande's violations.

What Did Congress Mean?

Having concluded that the plain language of the Wiretap Law applies to satellite interceptions, the court then considered Lande's argument that Congress did not actually intend the law to apply in this manner.

First, Lande argued that the legislative history of the law showed an intent to exclude from its purview "satellite cable programming," as defined in the Communications Act at 47 U.S.C. §

605, which regulates the unauthorized publication and use of communications. In the Communications Act, the term "satellite cable programming" is expressly defined as "video programming . . . transmitted via satellite and . . . primarily intended for the direct receipt by cable operators for their retransmission to cable subscribers." The Ninth Circuit, however, concluded that the drafters of the Wiretap Law were not referring to the Communications Act definition. Instead, the court stated that the most natural interpretation of the legislators' statements was that they indicate an intention to exclude from the Wiretap Law not all satellite programming, but only unscrambled satellite programming. Lande was charged with pirating scrambled satellite programs.

Next, Lande argued that the Communications Act already criminalized satellite television piracy, and that it was unlikely that Congress intended to override that law with § 2511 or to have the two overlap. The court also rejected this argument, finding that Congress intended to avoid overlap with some, though not all, existing statutes. The court pointed out that the Wiretap Law treats different statutes differently and also cited evidence of legislative history that the two laws were in fact intended to overlap.

Third, Lande argued that even if the statutes did overlap, it would be contrary to Congressional intent to allow prosecution under either of the two because the penalties differed significantly. Under the Communications Act, a simple conviction carried a sentence of up to six months; under § 2511, a violation could bring a term of up to five years. The appellate court rejected this argument, finding that when the same conduct could be prosecuted under either of two statutes, prosecutors have the discretion to decide which to pursue.

Finally, the court turned to the absence of specific discussions of satellite piracy in the legislative history of the Wiretap Law. The court focused upon

United States v. Herring, 933 F.2d 932 (11th Cir. 1991), a decision that gave considerable weight to the absence of specific discussions. In *Herring*, the Eleventh Circuit concluded that by omitting mention of such a significant technology from a debate that included consideration of a range of other specific technologies, Congress indicated that the Wiretap Law did not to apply to satellite television. The Ninth Circuit, however, found this argument unpersuasive because, although Congress provided specific exemptions that even covered some unscrambled satellite television transmissions, it made no specific exemption for scrambled signals. The appellate court further stated that this could not have been an oversight because Congress was well aware of such technology and had in fact held hearings on signal scrambling in response to complaints from satellite dish owners. ♦

— Timothy Stanton

Restrictions on the Transferability of Frequent Flyer Awards Enforced

In *American Airlines v. Christensen*, 967 F.2d 410 (10th Cir. 1992), the United States Court of Appeals for the Tenth Circuit enforced frequent flyer "no-sale" rules that prohibited the resale of frequent flyer awards. The court found that a business which brokered frequent flyer program awards interfered with contractual relations and engaged in unfair competition. Additionally, the court held that the airline whose travel awards are brokered suffers real damages for which each individual member of the brokering corporation was liable.

Recent Cases

Tickets, Anyone?

American Airlines (“American”) offered frequent flyers the opportunity to earn travel awards by patronizing American and American affiliates under its “AAdvantage” program. The program paid customers in miles, which the customers then redeemed for various awards such as free travel, first class upgrades, hotel discounts, and rental car discounts. When exchanging these miles for awards, program members promised not to sell or exchange the award for cash or any other kind of consideration. However, American allowed program members to give awards as gifts.

Randall Christensen and five others (“the Brokers”) operated the Coupon Connection, a Utah travel agency specializing in brokering frequent flyer coupons. The Brokers purchased travel awards from AAdvantage program members and sold them at discount prices. In order to avoid the no-sale provision, the Brokers altered airline tickets and provided buyers with bogus identification cards in the names of the award sellers. In addition, the Brokers encouraged buyers to misrepresent the purchased awards as gifts, and furnished “cheat sheets” that familiarized buyers with the alleged gift giver to help buyers authenticate their stories when dealing with American agents. Furthermore, the Brokers improperly accumulated mileage by paying people to fly under the assumed names of program members who were entitled to AAdvantage accounts.

American brought an action against the operators of the Coupon Connection in a federal district court of Utah claiming tortious interference with contract rights and unfair competition. The district court found the Brokers liable and permanently enjoined them from buying, selling, or brokering travel awards. On appeal, the Court of Appeals for the Tenth Circuit affirmed the district court’s decision and relegated the determination of damages to subsequent proceedings.

No-Sale Restrictions Are Enforceable

The Brokers first argued that the no-sale clause was unenforceable because it violated the public policy against restraint of trade. In support of their position, the Brokers assembled a list of statutory and other legal authority supporting this position. The court found, however, that none of the statutes provided a legal basis for an action arising out of American’s no-sale rule. The court noted Utah’s custom of narrowly interpreting public policy and reasoned that the absence of any statute dealing with a no-sale rule, indicated a prevailing public policy to favor the kind of restrictions on transferability of contract rights embodied by the no-sale clause.

Additionally, the court found that the transferability restrictions lawfully accompanied the tickets sold by American. The court reasoned that since American owned the right to sell non-transferable tickets to original purchasers, it logically enjoyed the connected right to limit the transferability of tickets issued through its award program. Furthermore, persons acquiring the tickets through brokers’ surreptitious practices were subject to the same non-transferability. Accordingly, the court held the no-sale provision enforceable as a matter of law.

Tortious Interference by Brokers

The court unequivocally found that the no-sale provision was an enforceable term in a contract between American and the program member who exchanged their mileage for a travel award. The court noted that when members presented American with the appropriate number of miles and promised to honor the no-sale clause, they accepted American’s offer of free travel and formed a contract.

The Brokers argued, however, that no contract was formed until the member actually accepted the award. According to this position, the Brokers’ solicitation of sellers before actual re-

ceipt of the award from American constituted interference with prospective economic relations, not with an existing contract between American and the frequent flyer customer. Furthermore, the Brokers stated that American must prove that the Brokers acted “for an improper purpose or by improper means.” The court, however, declined to pinpoint the moment of contract formation and found that the Brokers’ “undisputed deceit and misrepresentation” satisfied this higher standard of proof. Therefore, the court held that the Brokers’ actions clearly constituted tortious interference.

Airline Proves Damages by Misappropriation Theory

The Brokers next argued that American had failed to show damages resulting from the alleged interference. American conceded the need to prove some economic harm in order to prevail since damages were an essential element of both the interference and unfair competition claims. Consequently, the airline advanced three damage theories: misappropriation of services; unjust enrichment; and nominal damages.

The court of appeals affirmed the district court’s finding that American suffered damages when the Brokers misappropriated American’s services. The court found that since the no-sale provision rendered the brokered tickets invalid, buyers travelling on those tickets were “stowaways” who cheated American out of its regular fare and occupied seats that would otherwise have been filled by paying customers. Furthermore, the court stated that even though the seats may have remained empty or the stowaways would not have flown had they been required to pay the full fare did not diminish American’s damages. The court did not rule on the other theories of damages because the misappropriation theory fulfilled the requirement of damages essential to the claims.

Corporate Officers Liable for Damages

Finally, the Brokers argued that the district court erred in granting judgment against the individual corporate officers. The appellate court rejected this argument. Instead, the court used the well settled principle that corporate officers who actively participate in a tortious act are personally liable for resulting injuries to affirm the district court's decision. The court stated that since the Brokers had established their businesses specifically to interfere with contractual relations and to misappropriate airline services, and that because each defendant had actively participated in the business' activities, the individual defendants were personally responsible. The court of appeals also affirmed the district court's decision to enforce the no-sale rules, finding the Brokers liable for contract interference, and upheld the permanent injunction prohibiting the Brokers from dealing in AAdvantage awards. ♦

— Michael J. Lubeck

Public Policy Prohibits Parent from Signing Away Child's Negligence Claim

In *Scott v. Pacific Mountain Resort*, 834 P.2d 6 (Wash. 1992), the Supreme Court of Washington held that, as a matter of public policy, a parent could not waive its child's future claims against a negligent third party. The court further held that a plaintiff's assumption of the risks inherent in participation in a sports activity did not bar the plaintiff's claims against an operator who failed to maintain reasonably safe conditions. Instead, the skier who assumed the risks innate in the sport could be contributorily negligent, and thus receive a lower damage award.

Ski School Argued Parent Released Child's Claim

Twelve-year-old Justin Scott ("Justin") was a student in the Grayson Connor Ski School ("Ski School"), which conducted lessons at a commercial Ski Resort owned by Pacific West Mountain Resort ("Ski Resort"). Justin's mother completed and signed his Ski School application, which included personal information as well as an agreement to refrain from holding the Ski School liable for any injuries sustained during Justin's lessons. While practicing on a race course designed and arranged by the Ski School, Justin lost control and veered away from the course into an abandoned tow-rope shack. Justin collided with one of the shack's exposed support poles and sustained serious head injuries as a result of the accident.

Justin and his parents sued the Ski Resort and Ski School, alleging that the course was carelessly planned and positioned too close to the hazardous tow-rope shack. Not disputing the facts, the Ski School and the Ski Resort both moved for judgments as a matter of law. The Ski School claimed that the exculpatory clause in the Ski School application released the school from responsibility for its negligence. The Ski Resort asserted that Justin could not recover because he had assumed the risks inherent in the sport when he skied the course. The trial court granted both motions and dismissed the Scotts' claims. The Washington Supreme Court then granted Justin's petitions for direct review.

Parents Could Not Sign Away Child's Claims

Reviewing the language of the exculpatory clause signed by Justin's mother, the Washington Supreme Court found that the language of the clause was clear and therefore satisfactorily showed the parties' intent to shift the risk of loss away from the Ski School. The court held that the language of the release need not include the word negligence to be effective.

After finding the language of the clause effective, the court considered the validity of Mrs. Scott's release under the general Washington state rule that a clear exculpatory clause is enforceable unless it violates public policy. The court discussed whether a parent-signed exculpatory clause precluding a child's prospective cause of action violated public policy. In analyzing the issue, the court focused on cases from Washington and other jurisdictions which held that parents could not legally discharge a child's claim after an injury without a court's permission. The court reasoned that allowing parents to release their child's claims before injury would be illogical and contrary to those earlier cases. Therefore, although Mrs. Scott's signature on the contract prevented her and her husband from suing the Ski School, her signature did not preclude Justin's claim.

Ski Resort Liable for Dangerous Conditions

Since Justin himself had never signed a contract which expressly prevented him from bringing suit, the court examined whether he impliedly assumed the risk of injury inherent in the sport of skiing. The court maintained that the doctrine of implied primary assumption of the risk prohibits any recovery where the injury sustained ensues from known and appreciated risks that are common to the sport.

The court distinguished these assumed risks from those which are caused by a third party. To determine the extent of fault attributable to Justin and to the Ski Resort, the court examined Washington case law and the state's ski statute. The court referred to *Kirk v. WSU*, 746 P.2d 287 (Wash. 1987), in which the Washington Supreme Court distinguished between those risks inherent to the sport of cheerleading, and those risks caused by the negligent provision of practice facilities or improper supervision. The court in *Kirk* stressed that to the extent a cheerleader knowingly continued to practice under