Judicial Beacons Light the Way for Interpreting Airline "Service" under the ADA

By Roy Goldberg

Passenger and cargo airlines confronting class actions, state and local government investigations, or other forms of judicial or administrative proceedings enjoy qualified federal statutory immunity granted by the preemption clause in the Airline Deregulation Act of 1978 (ADA), currently codified at 49 U.S.C. section 41713(b), with regard to claims directly or indirectly related to the "price, route, or service of an air carrier." However, the lack of a definition of "service of an air carrier" in the ADA has created uncertainty regarding whether or not particular claims are preempted. Fortunately, both long-standing and recent court decisions offer meaningful instruction for determining whether an airline act is a covered "service," including the following four guideposts:

1. Air transportation between two airports is a "service," and therefore state and local law claims arising from the failure of an airline to operate a flight should be preempted as long as the carrier provides an alternative flight or refund, pursuant to its contract of carriage.
2. "Service" includes the process of taking passenger reservations and issuance of tickets and seat assignments, including the use of websites and mobile apps, and the consumer privacy issues that are an inherent part of these activities, according to most courts.
3. The process of "boarding" passengers is a "service," according to most courts.
4. The treatment of passengers during a tarmac delay is a "service."

The ADA Preemption Clause

Section 41713(b) states that, unless otherwise provided, "a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or *service of an air carrier*."[1]

In *Morales v. Trans World Airlines, Inc.*, the U.S. Supreme Court held that the ADA preempted Travel Industry Enforcement Guidelines of the National Association of Attorneys General, which regulated the content and format of airline fare advertising.[2] The Court emphasized that the phrase "relating to" as used in the ADA is "a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with,' Black's Law Dictionary 1158 (5th ed. 1979)—and the words thus express a broad pre-emptive purpose."[3] A state law could "relate to" airline prices, routes, or services even if the state law did not directly affect those activities.[4] The Court similarly concluded that ADA preemption could apply to "laws of general applicability."[5]

The *Morales* Court acknowledged that "[s]ome state actions may affect [airline services] in too tenuous, remote, or peripheral a manner" to be preempted.[6] For example, the relationship of "state laws against gambling and prostitution" to airline prices, routes, and services would be too tenuous, remote, or peripheral.[7] This implies that a broad range of state and local laws of general applicability exist that are sufficiently connected to airline prices, routes, or services (unlike laws against gambling and prostitution) to fall under the preemption umbrella. Nevertheless, for some courts, personal injury tort claims are not preempted because the connection of such claims to airline prices, routes, or services is too tenuous, remote, or peripheral.[8]

Congressional Intent behind the Preemption Clause

Congress's purpose in enacting the ADA preemption clause was to ensure "maximum reliance on competitive market forces," thereby stimulating "efficiency, innovation, and low prices" as well as "variety" and "quality."[9] Congress sought to "ensure that the States would not undo federal deregulation with regulation of their own."[10]

In *American Airlines, Inc. v. Wolens*, the U.S. Supreme Court held that claims under the Illinois Consumer Fraud and Deceptive Business Practices Act relating to American's frequent flyer program were preempted because they "relate[d] to 'rates,' i.e., American's charges in the form of mileage credits for free tickets and upgrades, and to 'services,' i.e., access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates."[11] The Court stated that preemption was required in "light of the full text of the preemption clause, and . . . the ADA's purpose to leave largely to the airlines themselves, and not at all to States, the selection and design of marketing mechanisms appropriate to the furnishing of air transportation services."[12] The Court added that "Congress could hardly have intended to allow the

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States to hobble [competition for airline passengers] through the application of restrictive state laws."[13]

Four Judicial Beacons for Interpreting Air Carrier "Service"

Air Transportation

If a state or local law claim against an airline relates to the transportation of passengers or cargo, it likely falls under the "service" language in the ADA. In the most recent U.S. Supreme Court decision concerning ADA preemption, *Northwest, Inc. v. Ginsberg*, the Court ruled that an airline frequent flyer program related to "services," because it involved "access to flights and to higher service categories."[14] Prior to *Ginsberg*, the Fifth Circuit, in its en banc decision in *Hodges v. Delta Airlines, Inc.*, defined "service" to include "items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, *in addition to the transportation itself*."[15] More recently, the Fifth Circuit, in 2017, affirmed a district court decision that the ADA preempted a tort claim relating to an airline's refusal to transport big game wildlife.[16] The district court had emphasized that the "Fifth Circuit's definition of service includes not only 'baggage handling,' but also, 'the transportation'" of passengers and cargo, and the ban on big game trophies "is a refusal to provide transportation."[17]

Even if a state or local law claim relates to airline transportation (or another airline "service") it still may not be preempted by the ADA if the claim merely seeks to enforce an airline's "self-imposed" contractual obligation. In *Wolens*, the Supreme Court established a narrow exception to preemption by declining to "read the ADA's preemption clause . . . 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*."[18]

Importantly, however, only alleged contract breaches that fall within the *Wolens* exception survive express ADA preemption.[19] For example, in *Sanchez v. Aerovias De Mexico, S.A. De C.V.*, the Ninth Circuit considered a breach of contract claim where the plaintiff did not cite any provision in the contract creating the defendant's obligation.[20] The court held that the claim could not proceed under the *Wolens* exception because, "[t]here being no contractual obligation to advise passengers about Mexico's tourism tax, or not to collect it from those who are exempt, or to refund it to exempt passengers from whom it was nevertheless collected, [the plaintiff's] claims against [the defendant] may not proceed."[21] If a breach of contract claim seeks "to use state law to *avoid* the part of the contract that limits the carrier's liability," that claim is preempted.[22] Similarly, in *Howell v. Alaska Airlines, Inc.*, the court held that the ADA preempted claims for refunds by airline customers unable to use tickets that were explicitly nonrefundable.[23] The plaintiffs were "attempting to enlarge or enhance their agreements with Alaska based on the laws or policies of this state."[24]

Passenger Reservations and Issuance of Tickets and Seat Assignments, including Use of Websites and Mobile Apps

Airline activity in enabling and facilitating air travel reservations and ticket issuance and modifications, as well as airline acts (and omissions) relating to consumer privacy, are also a preempted "service" as most courts construe that term.

In 2005, a federal district court held that the ADA preempted claims that JetBlue violated the state and common laws by transferring personal information of passengers to a data mining company working with the Transportation Security Administration (TSA).[25] The court applied a three-part test for deciding that a state law claim relates to an airline service: First, is the activity an airline service; second, does the claim affect the airline service directly or remotely; and, third, is the allegedly tortious conduct reasonably necessary to provide the airline service? In finding that the test was satisfied, the court concluded that (1) "the relevant activity . . . is the provision of reservations and the sale of tickets to travel with JetBlue," which is an airline service; (2) "an attempt to regulate the representations and commitments that JetBlue makes in connection with reservations and ticket sales directly affects the airline's provision of those services"; and (3) "the communication of company policy concerning data collection and disclosure is reasonably necessary to the facilitation of reservations and ticket sales."[26]

In *Privacy Rights Clearinghouse v. JetBlue Airways Corp.*, a California appellate court similarly found that the ADA preempted a challenge to JetBlue's conduct in releasing passengers' personal information because it related to an airline "service."[27] The court found that the claims "clearly" intruded upon or affected the Department of Transportation's (DOT's) regulation (or the airline's self-regulation) of air fares and other rates, routes, or services.[28] Specifically, DOT "regulations expressly govern an airline's collection of passenger information (intended to be used after an aviation disaster) and the circumstances in which an airline must divulge that data to a government agency."[29]

In *People ex rel. Harris v. Delta Air Lines, Inc.*, the California appellate court held that the ADA preempted a claim by the state that the lack of a privacy policy posted on Delta's mobile app violated the California Online Privacy Protection Act (OPPA).[30] The OPPA required that operators of a commercial website or online service post a privacy policy that informed California-based consumers of the website's or online service's information practices with regard to consumers' personally identifiable information, and to abide by its policy.

The privacy policy, among other things, had to: (1) identify the categories of personally identifiable information that the operator collects through the website or online service about individual consumers who use or visit its commercial website or online service, and the categories of third-party persons or entities with whom the operator may share that personally

identifiable information; and (2) disclose whether other parties may collect personally identifiable information about an individual consumer's online activities over time and across different websites when a consumer uses the operator's website or online service.

To facilitate access to its services by actual and potential passengers, Delta maintained a commercial website (Delta.com) and a mobile app (Fly Delta) that passengers used to check-in online for flights, view reservations for air travel, rebook canceled or missed flights, pay for checked baggage, track checked baggage, access a frequent flyer account, take photos, or save a user's geolocation. Whereas the app allowed customers to send and receive information over the Internet and collected certain personally identifiable information about individual customers residing in California, Delta had not posted a readily accessible privacy policy concerning the personally identifiable information collected from users of the Fly Delta app, either via the app itself, the platform stores from which the app could be downloaded, or on the Delta.com website.

California sued Delta in state court seeking injunctive and monetary damages for the airline's failure to have a conspicuously posted privacy policy reasonably accessible to consumers within the carrier's mobile app. California specifically alleged that Delta's failure to have the privacy policy constituted "unlawful, unfair, or fraudulent business acts and practices" in violation of the OPPA and California's unfair competition law.[31] In affirming dismissal of the complaint, the appellate court held that enforcement of the OPPA "relate[d] to Delta's services."[32] Specifically, the "Fly Delta mobile application, selected and designed to facilitate access to the airline's services, is a marketing mechanism 'appropriate to the furnishing of air transportation services.'"[33] The app could "be used to check-in online for an airplane flight, view reservations for air travel, rebook cancelled or missed flights, pay for checked baggage, track checked baggage, [and] access a user's frequent flyer account."[34]

The court also found that the OPPA obligations "would have a significant impact upon the airline['s] ability to market [its] product [through its Fly Delta mobile application], and hence a significant impact upon the fares they charge."[35] In addition, if "each State were to require Delta to comply with its own version of the OPPA, it would force Delta to design different mobile applications to meet the requirements of each state."[36] Indeed, "enforcement of the OPPA's privacy policy requirements might well make it impossible for an airline to use a mobile application as a marketing mechanism at all."[37]

The Process of "Boarding" Passengers

Airline acts and omissions relating to boarding of passengers also should be encompassed within the term "service." In *Smith v. Comair, Inc.*, the Fourth Circuit held that tort claims "based in part upon [an airline's] refusal of permission to board" the aircraft are preempted because "boarding procedures are a service rendered by an airline."[38] The plaintiff was allowed to board the first leg of his journey in Roanoke, Virginia, without producing his photo ID because the airline agent failed to ask for it. When the plaintiff attempted to board the second leg in Cincinnati on his way to Minneapolis, he was denied boarding because he did not have his ID. The plaintiff claimed that the airline was at fault because had he been asked for his ID in Roanoke he would have fetched it from his car in the airport parking lot. The court held that the claim was preempted because it related to the "service" of boarding, and the airline was entitled to deny boarding given FAA regulations which, for safety reasons, require that a passenger have a photo ID to board an aircraft. The court stated that "airlines must be accorded broad discretion in making boarding decisions related to safety. Allowing [the plaintiff's] claim to proceed would frustrate this important federal objective. Airlines might hesitate to refuse passage in cases of potential danger for fear of state law contract actions claiming refusal to transport."[39]

Treatment of Passengers during a Tarmac Delay

The DOT strictly regulates tarmac delays from a federal perspective. However, efforts by state and local governments to regulate what occurs during a tarmac delay should be preempted as relating to an air carrier "service." In *Air Transport Ass'n of America, Inc. v. Cuomo*, the Second Circuit held that the ADA preempted a New York law which required airlines to provide water and other items during lengthy tarmac delays because it "substitute[d] New York's commands for competitive market forces, requiring airlines to provide the services that New York specifies during lengthy ground delays."[40]

Caution: The Ninth Circuit's Narrow Definition of "Service"

As a general rule, airlines seeking to use ADA preemption as a defense fare better in federal court rather than state court. However, an exception still exists for states within the Ninth Circuit, including Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The Ninth Circuit has adopted a very narrow view of what constitutes a "service." In *Charas v. Trans World Airlines, Inc.*, the Ninth Circuit stated that "service" refers "to such things as the frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided (as in, 'This airline provides service from Tucson to New York twice a day.')."[41] The court added that to "interpret 'service' more broadly is to ignore the context of its use; and, it effectively would result in the preemption of virtually everything an airline does. It seems clear to us that that is not what Congress intended."[42] The court further stated that there was no legislative history to support the position that "service" included "the dispensing of food and drinks, flight attendant assistance, or the like."[43]

Although courts and commentators predicted that the Ninth Circuit would broaden its definition of "service" following the U.S. Supreme Court's 2008 decision in *Rowe v. New Hampshire Motor Transport Ass'n*,[44] this has not yet happened. Rather, in the 2016 decision in *National Federation of the Blind v. United Airlines Inc.*, a three-judge Ninth Circuit panel held that an airline's automated airport terminal ticketing kiosks were not a "service" within the meaning of the ADA.[45] The court reasoned that kiosks were not prices, schedules, origins, or destinations of point-to-point transportation of passengers. To the extent that California's antidiscrimination laws regulated kiosks, they regulated an amenity and not the provision of air transportation. Although kiosks are convenient for passengers, they are not services in the public utility sense. The panel noted that other circuits had interpreted "service" more broadly, but claimed that the *Charas* definition was better, and that nothing in *Rowe* was so "clearly irreconcilable" with *Charas* "as to allow a three-judge panel to overrule" the en banc decision in *Charas*.[46]

Accordingly, if an airline wants a broader definition of "service" in a case filed in one of the Ninth Circuit states, it may want to try to have the matter heard in state court if possible.[47] State courts within the Ninth Circuit are not bound by Ninth Circuit precedent.[48]

Endnotes

1. 49 U.S.C. § 41713(b)(1) (emphasis added).
2. 504 U.S. 374, 379 (1992).
3. *Id.* at 383.
4. *Id.* at 384.
5. *Id.* at 386.
6. *Id.* at 390.
7. *Id.*
8. *See* Montalvo v. Spirit Airlines, 508 F.3d 464, 475 (9th Cir. 2007) ("Congress' intent in deregulating the aviation industry was to 'encourage the forces of competition,' not to obviate all tort claims under state law that *might in some peripheral way* impact the airlines." (emphasis added)).
9. *Morales*, 504 U.S. at 378.
10. *Id.*
11. 513 U.S. 219, 226 (1995).
12. *Id.* at 228.
13. *Id.* (alteration in original).
14. 572 U.S. 273, 284 (2014).
15. 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (emphasis added).
16. Conservation Force v. Delta Air Lines, Inc., 190 F. Supp. 3d 606, 613 (N.D. Tex. 2016), *aff'd*, 682 F. App'x 310 (5th Cir. 2017).
17. *Id.*
18. 513 U.S. at 228 (emphasis added).
19. *See, e.g.*, Smith v. Comair, Inc., 134 F.3d 254, 257 (4th Cir. 1998) (concluding that the *Wolens* exception applies only to "actions confined to the terms of the parties' bargain"); Delta Air Lines, Inc. v. Black, 116 S.W.3d 745, 755 & n.6 (Tex. 2003) (holding that the plaintiff's breach of contract claim related to airline "services" and was preempted under the ADA).
20. 590 F.3d 1027 (9th Cir. 2010) (reviewing the plaintiff's claim that the airline breached the contract by improperly collecting a Mexican tourism tax after having failed to disclosed that the tax was not due from exempt passengers).
21. *Id.* at 1030–31.
22. Treiber & Straub, Inc. v. UPS, Inc., 474 F.3d 379, 386–87 (7th Cir. 2007).
23. 994 P.2d 901, 905 (Wash. Ct. App. 2000).
24. *Id.*
25. *In re* JetBlue Airways Corp. Privacy Litig., 379 F. Supp. 2d 299 (E.D.N.Y. 2005).
26. *Id.* at 315–16.
27. No. D045568, 2005 WL 3118798, at *3–5 (Cal. Ct. App. Nov. 22, 2005).
28. *Id.* at *5.
29. *Id.*
30. 202 Cal. Rptr. 3d 395 (Ct. App. 2016).
31. Cal. Bus. & Prof. Code §§ 17200 *et seq.*
32. *Harris*, 202 Cal. Rptr. 3d at 408.
33. *Id.* (quoting Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228 (1995)).
34. *Id.*
35. *Id.* at 410 (alterations in original).
36. *Id.*
37. *Id.*
38. 134 F.3d 254, 259 (4th Cir. 1998).
39. *Id.*
40. 520 F.3d 218, 223–24 (2d Cir. 2008).
41. 160 F.3d 1259, 1265–66 (9th Cir. 1998) (en banc).
42. *Id.* at 1266.
43. *Id.*
44. 552 U.S. 364 (2008). In *Rowe*, the Court held that a statute governing trucking which contained preemption language that tracked the ADA preempted a state law that required truckers to confirm recipients of tobacco deliveries were of adult age, because it required the trucking company to provide a "system of services that the market does not now provide (and which the carriers would prefer not to offer)." *Id.* at 372.
45. 813 F.3d 718 (9th Cir. 2016) (rejecting United's ADA express preemption argument, but dismissing the case on the basis of implied preemption under the Air Carrier Access Act). *But see* Ko v. Eva Airways Corp., 42 F. Supp. 3d 1296, 1302–03 (C.D. Cal. 2012) (finding that the ADA preempted tort claims of a father whose children were taken to Singapore by their mother because the boarding process is a "service").
46. *Nat'l Fed'n of the Blind*, 813 F.3d at 727–28. The court also stated that the definition of "service" in *Charas* was not inconsistent with the Supreme Court's 2014 ruling in *Northwest, Inc. v. Ginsberg*.
47. Airlines also may be better served in state court in the states that are part of the Third Circuit, such as New Jersey and Pennsylvania. *See* Taj Mahal Travel, Inc. v. Delta Airlines Inc., 164 F.3d 186, 194 (3d Cir. 1998) (adopting the *Charas* definition of "service").
48. *See* People *ex rel.* Harris v. Delta Air Lines, Inc., 202 Cal. Rptr. 3d 395, 409 n.13 (Ct. App. 2016).