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Legal Sidebar

Airline Deregulation Act of 1978: Preemption of State Consumer Protection Laws

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Recent widespread flight cancellations and delays have raised questions about the respective roles of the states and the federal government in protecting airline consumers. In August 2022, a group of 38 state attorneys general sent a letter to Congress arguing that the U.S. Department of Transportation (DOT) does not adequately protect airline consumers, and urging Congress to enact legislation authorizing states to enforce state and federal consumer protection laws against airlines. The Airline Deregulation Act of 1978 (ADA) expressly preempts states from enacting or enforcing laws "related to a price, route, or service of an air carrier." The Supreme Court has interpreted this provision as broadly preempting the enforcement of state laws against airlines in consumer protection contexts, thus making DOT the primary consumer protection authority overseeing airlines. Enabling states to enforce their consumer protection laws against airlines would thus generally require Congress to exempt such laws from preemption under the ADA. This Legal Sidebar provides background on the ADA and federal preemption principles, and examines how the Supreme Court has interpreted the scope of preemption under the ADA.

The Airline Deregulation Act of 1978

Before 1978, the Federal Aviation Act of 1958 (FAA) authorized the federal government to closely regulate air carriers. Under the FAA, the now-abolished Civil Aeronautics Board controlled air carrier prices, routes, and services. States also could regulate air carriers, however, because the FAA contained a saving provision that preserved pre-existing state statutory and common-law remedies.

In enacting the ADA, Congress sought to place "maximum reliance on competitive market forces" to encourage "an air transportation system relying on actual and potential competition . . . to provide efficiency, innovation, and low prices." Congress thus included an express preemption provision in the ADA to "ensure that the States would not undo federal deregulation with regulation of their own." The current version of that provision, 49 U.S.C. § 41713(b)(1), states:

> Except as provided in this subsection, 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

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> and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

General Preemption Principles

The Supremacy Clause of the U.S. Constitution (Article VI, clause 2) provides the basis for the doctrine of federal preemption, under which "state laws that interfere with, or are contrary to, federal law" are invalidated. Federal law can preempt state law in multiple ways. Federal law may impliedly preempt state law, but Congress also may enact legislation with language expressly preempting state law, as it did in the ADA. The Supreme Court has emphasized that, regardless of the type of preemption at issue, Congress's intent is the "ultimate touchstone" of a statute's preemptive effect. In evaluating Congress's preemptive intent, courts look primarily to the statutory text itself.

Supreme Court Precedent

The Supreme Court has analyzed and applied the ADA's preemption clause in three cases: *Morales v. Trans World Airlines, Inc.*; *American Airlines, Inc. v. Wolens*; and *Northwest, Inc. v. Ginsberg*. In these cases, the Court interpreted the ADA's preemption clause as having an "expansive" scope that preempts states from enforcing laws that "reference" or have a "connection" with airline prices, routes, or services. The Court explained that preemption under the ADA can reach generally applicable laws that affect airlines only indirectly, including common-law rules that states have not enacted in a statute. The Court also cautioned, however, that some state laws may affect airline prices, routes, or services "in too tenuous, remote, or peripheral a manner" to trigger preemption.

Morales

In *Morales v. Trans World Airlines, Inc.*, the Court held that the ADA preempts states from "prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes." A group of airlines had sued state attorneys general to block them from enforcing guidelines that purported to "explain in detail how existing state laws apply to air fare advertising and frequent flyer programs." After lower courts agreed with the airlines that the ADA preempted enforcement of the guidelines, the Texas Attorney General, Dan Morales, appealed to the Supreme Court. Morales contended that the ADA only preempted states from "actually prescribing" prices, routes, or services, and imposed "no constraints on laws of general applicability" that were not "specifically addressed to the airline industry." Morales also argued that the ADA did not preempt enforcement of state laws that were consistent with federal consumer protection rules applicable to airlines.

Rejecting those arguments, the Court began its analysis by focusing on the text of the ADA's preemption provision, with "the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." The Court determined that the statute's key term—*related to*—conveys "a broad pre-emptive purpose," and the Court adopted an interpretation that it had applied when interpreting similarly worded language in the Employee Retirement Income Security Act of 1974 (ERISA). Emphasizing that it had interpreted ERISA's "relate to" language as having an "expansive sweep," the Court held that the ADA similarly preempts state enforcement actions "having a connection with or reference to" airline prices, routes, or services. The Court reasoned that the ADA thus not only preempts laws that expressly "reference" airline prices, routes, or services, but also can preempt laws "not specifically designed to affect" airlines and where "the effect is only indirect."

Applying this broad interpretation, the Court observed that the guidelines' advertising restrictions did expressly "reference" airline prices, but the Court also determined that the restrictions had a connection

with airline prices even apart from those references. The Court explained that, as a matter of economics, the restrictions had a "forbidden significant effect upon fares," because "the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge."

While the Court interpreted the ADA's preemption provision as having an expansive scope, it also explained that some state laws might affect airline prices, routes, or services "in too tenuous, remote, or peripheral a manner to have pre-emptive effect," such as "state laws against gambling and prostitution as applied to airlines." The Court also emphasized that its "decision does not give the airlines *carte blanche* to lie to and deceive consumers," because "DOT retains the power to prohibit advertisements which in its opinion do not further competitive pricing."

Three dissenting Justices objected to the Court's broad interpretation of the ADA's preemption provision. Focusing on the ADA's legislative history, the dissent concluded that Congress intended to preempt state laws that relate "directly" to airline prices, routes, or services, but not generally applicable advertising laws that only "indirectly" relate to airline prices.

Wolens

The Supreme Court next addressed the ADA's preemption clause in *American Airlines, Inc. v. Wolens*. Participants in American Airlines' frequent-flyer program sued American because its retroactive changes to the program's terms allegedly violated the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act) and constituted a breach of contract. Among other things, American's changes retroactively imposed blackout dates on when participants could use frequent flyer credits. American argued that the ADA preempted the plaintiffs' claims. The Court held that the ADA preempted the Consumer Fraud Act claims, but not the contract claims.

With respect to the Consumer Fraud Act claims, the Court summarily explained that the claims related to airline prices and services under the ADA's "related to" prong insofar as the frequent-flyer program entitled members to free tickets and access to flights and service upgrades. The Court's analysis instead focused on the ADA's "enact or enforce" prong. Observing that the Consumer Fraud Act is "prescriptive" and "controls the primary conduct of those falling within its governance," the Court explained that the law "serves as a means to guide and police the marketing practices of the airlines" and does not "simply give effect to bargains offered by the airlines and accepted by airline customers." The Court added that the Consumer Fraud Act demonstrated the "potential for intrusive regulation of airline business practices inherent in state consumer protection legislation."

As for the breach of contract claims, however, the Court held that, although the ADA "bars state-imposed regulation of air carriers," it does not "shelter airlines from suits . . . seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." The Court explained that in breach-of-contract actions related to an airline's prices, routes, or services, courts are restricted to enforcing "the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement."

Three Justices dissented in part to the majority's opinion. Justice Stevens interpreted the ADA's preemption clause more narrowly than the majority and concluded that it does not preempt generally applicable laws like the Consumer Fraud Act. Justices O'Connor and Thomas, on the other hand, interpreted the preemption clause more broadly than the majority and concluded that the ADA preempted both the fraud claims and the breach of contract claims. Justices O'Connor and Thomas characterized *Morales* as holding that the ADA "prevents enforcement of 'any [state] law' against the airlines when the subject matter of the action 'relates' to airline rates, routes, or services." They reasoned that *Morales* thus

requires preempting state contract law "where the terms of a private contract relate to airline rates and services, and those terms can only be enforced *through state law*."

Ginsberg

In *Northwest, Inc. v. Ginsberg*, a unanimous Court held that the ADA preempts state common-law contract claims where the claims seek to "enlarge the contractual obligations that the parties voluntarily adopt." The dispute arose when Northwest informed the respondent, Ginsberg, that it unilaterally cancelled his frequent-flyer status based on its determination that he had "abused" the program by making too many travel complaints and requests for compensation from the airline. Ginsberg sued Northwest and alleged that, among other things, Northwest breached an implied covenant of good faith and fair dealing under Minnesota law by revoking his membership "in a way that contravened his reasonable expectations."

The central issue on appeal to the Supreme Court was whether Ginsberg's implied-covenant claim was "based on a state-imposed obligation or simply one that the parties voluntarily undertook." The Court explained that, although the laws of most states include some form of the good faith and fair dealing doctrine, there is no "uniform understanding of the doctrine's precise meaning." According to the Court, some states employ the doctrine "to effectuate the intentions of parties," while other states "employ the doctrine to ensure that a party does not 'violate community standards of decency, fairness, or reasonableness.'"

In concluding that Ginsberg's implied-covenant claim sought to enforce a state-imposed obligation, the Court focused on the fact that Minnesota law does not permit contracting parties to agree not to be bound by the implied covenant. The Court also determined that Minnesota's selective application of the implied covenant provided an independent basis for concluding that it was a state-imposed obligation. The Court explained that, for policy reasons, Minnesota law applied the implied covenant to all contracts except employment contracts. In the Court's view, "[w]hen the application of the implied covenant depends on state policy, a breach of implied covenant claim cannot be viewed as simply an attempt to vindicate the parties' implicit understanding of the contract."

Considerations for Congress

As discussed above, the Supreme Court's interpretation of the ADA's express preemption clause broadly limits enforcement of state consumer protection laws against airlines. If Congress wishes to authorize states to enforce such laws, it may consider enacting legislation revising or otherwise clarifying the ADA's preemptive effect.

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