Federal Preemption over Air Carrier Prices, Routes, and Services: Recent Developments

By Jol A. Silversmith

Aviation in the United States historically has been a matter for which the federal government has primary oversight, and for which the states' responsibility has been limited. Accordingly, when Congress deregulated the industry in 1978, it included an express preemption provision, prohibiting the enforcement of any state "law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier."[1] Because the goal of deregulation was that aviation has "maximum reliance on competitive market forces,"[2] Congress sought to ensure that its repeal of much of the federal regulatory program would not be undercut by new and invasive state regulation.[3]

Nonetheless, controversy persists as to the outer limits of preemption. The U.S. Supreme Court has been called upon to provide direction on several occasions. In 1992, the Court held that the statute's "related to" language "express[es] a broad pre-emptive purpose" and accordingly the states could not directly regulate advertising by air carriers.[4] Three years later, the Court added that preemption was not limited to laws specifically targeted at aviation, holding that a consumer protection statute could not be invoked to challenge the terms of an airline frequent flyer program.[5] Then, in a 2008 case involving another federal statute—modeled on the preemption language of the Airline Deregulation Act (ADA)[6]—the Court reasoned that a state law should be preempted if it has a "significant and adverse impact" on the objectives of a statute with a preemption provision.[7]

Despite this direction from the Supreme Court, the boundaries of federal preemption over air carrier conduct can be uncertain. For example, the preemption statute refers only to "air carriers." Certain—but not all—federal aviation statutes use this term to refer only to U.S. airlines, while non-U.S. airlines are referred to as "foreign air carriers." For many years, the industry assumed that the preemption provision encompassed both U.S.-flag and foreign-flag airlines, but few courts had addressed the issue. In 2011, a federal appeals court affirmed that the ADA's preemption language should be interpreted broadly. It reasoned that, in context, the term "air carrier" could only be understood to include both U.S. and foreign airlines; i.e., allowing states to regulate foreign but not domestic airlines would not only "create a confusing patchwork of regulations" but be "contrary to our country's general preference for free trade"; "Congress intended to preserve its authority to regulate the airline industry by prohibiting states from regulating all air carriers, both domestic and foreign."[8]

Preemption-related decisions historically could be allocated into three broad categories: (1) cases involving direct and indirect regulation of air carrier practices by states; (2) cases involving allegations of torts by airlines, including both physical and nonphysical harms; and (3) cases involving contract law disputes between an airline and either passengers or agents. This article provides an overview of recent decisions in each of these categories.

State Regulation of Air Carriers

Courts generally have rejected state efforts to directly regulate how air carriers conduct their business. Courts also typically have ruled that consumer protection and other similar laws of general applicability are preempted, but in some cases have found that the relationship between a law and a "price, route or service of an air carrier" was too attenuated for preemption to be invoked.

Direct Regulation

In response to publicized incidents of lengthy ground delays, New York adopted its own "passenger bill of rights," specifying how airlines must prepare for and respond to such incidents. The Second Circuit invalidated the law, explaining that "we have little difficulty concluding that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier." The court further explained that "[i]t substitutes New York's commands for competitive market forces, requiring airlines to provide the services that New York specifies during lengthy ground delays and threatening the same 'patchwork of state service-determining laws, rules, and regulations' that concerned" the Supreme Court.[9]

Federal district courts also recently struck down a state law requiring that ticket agents federally approved to market charter services to Cuba post a bond,[10] as well as laws in two states that imposed

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additional obligations on the operations of air ambulance services.[11] The U.S. Court of Appeals for the District of Columbia Circuit, however, upheld the adoption of a policy by the U.S. Department of Transportation (DOT) that would allow airports to engage in "congestion pricing" (i.e., charging higher landing fees at peak times), despite arguments that such a pricing scheme would enable local airports to influence air carrier pricing, and thus be contrary to the ADA. The court noted that another federal law specifically authorized airports to collect reasonable landing fees, and that the preemption statute included an exemption for an airport to "carry[] out its proprietary powers and rights."[12]

In addition, an administrative proceeding currently pending at DOT will decide whether a plant and animal inspection fee assessed by Hawaii is preempted.[13]

Indirect Regulation

Consumer protection statutes and similar laws of general applicability typically are preempted to the extent they would dictate airline services. Federal district courts recently have denied on preemption grounds claims that an airline, by terminating service to a city at which it had entered into a group service agreement with the plaintiffs, violated state consumer protection law;[14] that an airline's inconsistent implementation of its paid boarding priority program violated state consumer protection law;[15] and that airport ticket kiosks inaccessible to the blind violated state civil rights and disabilities laws.[16] Additionally, state courts have found that the ADA preempts state laws that prohibit expiration dates on gift certificates[17] and that the ADA preempts *qui tam* suits against airlines under state false claims statutes.[18] Finally, recent decisions have confirmed that state antitrust claims are preempted, to the extent that airlines are alleged to have conspired to coordinate prices, including surcharges.[19]

However, a federal district court in California recently concluded that a claim brought under state civil rights and disabilities laws regarding airport kiosks and websites inaccessible to the blind was not preempted, relying on a prior Ninth Circuit decision that interpreted "services" narrowly.[20] Many state and federal courts in California historically have been reluctant to acknowledge the broad scope of federal preemption, ignoring both Supreme Court guidance and the expansive reading given the term in other circuits, and thus have issued aberrant decisions. This pattern poses a challenge for airlines that do business in California, even though any inconsistent precedents emerging from its courts are likely to be treated with skepticism elsewhere.

An issue that recently has risen to prominence is whether airline skycaps can assert state-law claims based on their terms of employment.[21] Many airlines now collect a fee for curb-checked baggage. This has resulted in reduced tip income for the skycaps, who have responded by filing lawsuits that claim that the curb-check fees violate state employment laws by effectively re-allocating tips to the airlines. In the initial appeals court decision on the topic, the First Circuit held that the state-law claims were preempted: "[T]he tips law does more than simply regulate the employment relationship between the skycaps and the airline; . . . the tips law has a direct connection to air carrier prices and services and can fairly be said to regulate both."[22]

Further, courts also have held that state environmental laws (e.g., a requirement for an airport to obtain a permit under state environmental law before trimming trees) are not preempted because the impact of their requirements on airlines is remote.[23] A federal district court found that a state liquor law was not preempted and thus an airline was required to obtain a state permit to serve alcoholic beverages in-flight over its territory, although on appeal the decision was overturned based on field preemption, without reaching the merits of the district court's interpretation of the ADA.[24] Finally, a state law that criminalized a pilot's operation of an aircraft under the influence of alcohol was ruled not to be preempted.[25]

Tort Law

Tort law traditionally has been regulated by the states. Although certain tort claims are typically held to be preempted by section 41713, others are not. The exact nature of the claim as well as the underlying facts of the case—and the court in which the claim is brought—can lead to varying outcomes. For example, claims for physical injuries usually are not held to be preempted, but claims for lost cargo or baggage usually are held to be preempted.

Courts typically have concluded that Congress, when it enacted the ADA, did not intend to preempt claims for physical injuries. Accordingly, passengers can pursue claims that allege injuries caused by an airline's negligence, such as a claim for wrongful death grounded in an airline's failure to provide wheelchair assistance to a passenger and failure to adequately respond to his subsequent heart attack.[26]

However, courts are divided as to whether an assertion of a nonphysical injury is preempted by the ADA. In one case, a passenger was allowed to pursue claims that a flight attendant had discriminated against him based on his ethnicity—including by reporting him to an air marshal—to the extent that the crewmember's actions were not "reasonably necessary" to provide the airline's services.[27] Likewise, in a tarmac delay case, the court held that emotional distress and other tort claims were preempted only to the extent that they implicated issues about which the federal government had promulgated regulations.[28] In other recent cases, however, claims of emotional distress—usually premised on asserted discrimination—have been held preempted.[29]

Tort claims concerning the boarding of an aircraft also usually—but not invariably—have been found subject to

preemption. A federal appeals court recently held that a tort claim premised on "bumping"—i.e., passengers being denied boarding of a flight for which they held tickets due to overbooking—was clearly a service within the scope of the ADA.[30] Likewise, passengers were not allowed to pursue a claim for negligence premised on an airline having so badly "flunked" the check-in process such that they missed the deadline for their flight.[31] However, in another denied boarding case, the court held that a common-law fraud claim could be pursued, although it noted that the complaint had been framed in terms similar to a contract law claim, as well as that punitive damages were not available.[32]

Finally, tort claims based on the loss of baggage typically are held preempted—often with the acknowledgment that a separate claim based on a contract or federal common law is not barred.[33] Likewise, tort claims for the loss of cargo transported by air often are denied, but claims grounded in contract or federal common law are allowed to proceed.[34] A similar finding of preemption of fraud and other noncontractual claims also was reached in a lawsuit between two air carriers after a teaming agreement to provide charter services to the military broke down.[35] A U.S. territorial court, however, recently concluded that a passenger's negligence claim for the loss of baggage could be maintained, after ruling that a carrier had failed to submit evidence proving that its contract of carriage governed his travel.[36]

Contract Law

Even though states cannot intrude on federal prerogatives when imposing obligations on airlines, the U.S. Supreme Court has noted that breach-of-contract claims grounded in an air carrier's "own, self-imposed undertakings" are not preempted: "A remedy confined to a contract's terms simply holds parties to their agreements—in this instance, to business judgments an airline made public about its rates and services."[37] Decisions continue to confirm that passengers—and ticket agents—typically can bring claims that are based on the explicit terms of their agreement with an air carrier.[38]

Notably, a federal district court held that a carrier could be obligated to pay compensation for a delayed flight pursuant to European regulations that specifically had been incorporated into its passenger contract.[39] Indeed, in many of the cases discussed above—in which claims brought under state statutes or tort theories were held to be preempted—contract-based claims were allowed to proceed.[40] One recent contract case—in which a passenger alleged that an airline collected a tax that did not apply to her—was nominally rejected on preemption grounds, but perhaps could more accurately be described as having been dismissed because the airline had made no commitment in its contract with the passenger not to collect the tax.[41]

However, certain claims grounded in contract do fail to clear the hurdle of preemption. The baggage fees now imposed by many carriers are widely disliked by consumers, but courts have held that, absent a distinct commitment to refund fees for delayed baggage, a claim for such a refund is preempted.[42] Generally, a claim may not be grounded in documents that are not incorporated into the contract and thus are not self-imposed undertakings of the airline.[43] Further, punitive damages are preempted in an airline-related contract dispute,[44] as are consequential damages (or, at least, the cost of a private aircraft chartered by passengers who were denied boarding because they allegedly missed their flight's check-in deadline).[45] But courts are divided as to whether claims based solely on the implied covenant of good faith and fair dealing are preempted, as they assert obligations beyond the terms of a contract. The Ninth Circuit again has taken an approach, relying on a narrow reading of the terms "prices" and "services," that seemingly conflicts with Supreme Court decisions, as well as with other courts.[46]

Finally, ADA preemption does not work in reverse; i.e., it does not bar an airline from bringing a contract—or tort—claim against a ticket agent. Notably, the Ninth Circuit recently held that a ticket agent that bought and resold frequent flier miles was barred from challenging the terms of the program, but the airline was not preempted from bringing counterclaims against the agent for breach of contract as well as fraud.[47] In an apparent case of first impression, a court similarly found that an airline was not preempted from pursuing claims against an individual who allegedly had engaged in ticket fraud.[48]

Conclusion

Preemption can present complex issues. The legal standards for preemption, despite Supreme Court precedents and the historical decisions of lower courts, are continuing to evolve. Air carriers (as well as other industry participants, such as ticket agents) are likely to continue to challenge the legality of obligations imposed by state law that they believe should be preempted due to the federal government's preeminent role in regulating aviation.

Endnotes

1. Airline Deregulation Act of 1978 (ADA), *codified at* 49 U.S.C. § 41713(b)(1). Originally, 49 U.S.C. app. § 1305(a)(1) preempted enforcement of state laws "relating to rates, routes, or services of any air carrier." In 1994, Congress recodified the aviation-related statutes in Title 49 and modified the language of the preemption provision, but the revision was not intended to be a substantive change. *See* Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 223 n.1 (1995).

2. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. app. § 1302(a)(4)).

3. A separate issue—not addressed in this article—is field preemption of aviation matters other than air carrier prices, routes, and services. *See, e.g.*, US Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1326 (10th Cir. 2010) ("federal regulation occupies the field of aviation safety to the exclusion of state regulations"); Foley v. JetBlue Airways Corp., 2011 WL 3359730 (N.D. Cal. Aug. 3, 2011) (the Air Carrier Access Act,

49 U.S.C. § 41705, was held to substantially if not completely occupy the field of regulation to prohibit discrimination on the basis of disability in air travel).

4. *Morales*, 504 U.S. at 383.

5. *Wolens*, 513 U.S. at 228.

6. 49 U.S.C. § 14501(c)(1).

7. Rowe v. New Hampshire Motor Transp. Ass'n, 552 U.S. 364, 365 (2008) (quotation marks omitted).

8. *In re* Korean Air Lines Co., Ltd. Antitrust Litig., 642 F.3d 685 (9th Cir. 2011). *See also In re* Air Cargo Shipping Services Antitrust Litig., 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008).

9. Air Transp. Ass'n v. Cuomo, 520 F.3d 218 (2d Cir. 2008). *See also* Dep't of Transp., Enhancing Airline Passenger Protections, 73 Fed. Reg. 11843, 11844 (Mar. 5, 2008) (With respect to proposed DOT regulations, "any State or local rules addressing, or related to, the services offered by air carriers already are preempted under the ADA. In addition, if the proposed rule . . . is finalized, it is likely that the final rule would also separately preempt any such State or local regulations under other provisions of law.").

10. ABC Charters, Inc. v. Bronson, 591 F. Supp. 2d 1272, 1301 (S.D. Fla. 2008).

11. Med-Trans Corp. v. Benton, 581 F. Supp. 2d 721, 736–39 (E.D.N.C. 2008); Eagle Air Med Corp. v. Colorado Bd. of Health, 570 F. Supp. 2d 1289 (D. Colo. 2008), *aff'd on other grounds*, 377 F. App'x 823 (10th Cir. 2010). *See also* Letter from D.J. Gribbin, DOT Gen. Counsel, to Greg Abbott, Tex. Att'y Gen. (Nov. 3, 2008), http://airconsumer.dot.gov/GCopinions/storage/2008/11/2008110301/2008110301_1.pdf (advising that certain Texas regulations for air ambulances were preempted). *But see* Kansas Attorney General Opinion No. 2011-018, 2011 WL 6120326 (Dec. 5, 2011) (state equipment and staffnig regulations not preempted).

12. Air Transp. Ass'n v. U.S. Dep't of Transp., 613 F.3d 206 (D.C. Cir. 2010) (citing 49 U.S.C. § 40116(e) and 49 U.S.C. § 41713(b)(3)).

13. Hawaii Inspection Fee Proceeding, Order 2010-9-29 (Sept. 20, 2010).

14. Flaster/Greenberg P.C. v. Brendan Airways, LLC, 2009 WL 1652156 (D.N.J. June 10, 2009). *See also* Aretakis v. Fed. Express Corp., 2011 WL 1226278 (S.D.N.Y. Feb. 28, 2011) (intended recipient alleged loss of package); Hodges v. Delta Air Lines, Inc., 2010 WL 5463832 (W.D. Wash. Dec. 29, 2010) (passenger alleged injury due to inadequate deplaning assistance); Butler v. United Air Lines, Inc., 2008 WL 1994896 (N.D. Cal. May 5, 2008) (carrier allegedly failed to honor tickets).

15. Fernald v. Sw. Airlines Co., slip op., No. 11-453 (S.D. Cal. Sept. 28, 2011). The court further held that the plaintiff's claims based on unjust enrichment also were preempted.

16. Nat'l Fed'n of the Blind v. United Air Lines, Inc., 2011 WL 1544524 (N.D. Cal. Apr. 25, 2011). *See also* Seymour v. Cont'l Airlines, Inc., 2010 WL 3894023 (D.R.I. Oct. 4, 2010) (passenger alleged wheelchair-based discrimination); Panitch v. Cont'l Airlines, Inc., 2008 WL 906240 (D.N.J. Mar. 31, 2008) (passenger alleged nut allergy–based discrimination).

17. Tanen v. Sw. Airlines Co., 114 Cal. Rptr. 3d 743 (Cal. Ct. App. 2010); Restivo v. Cont'l Airlines, Inc., 947 N.E.2d 1287 (Ohio App. 2011).

18. DHL Express (USA), Inc. v. State *ex rel.* Grupp, 60 So. 3d 426 (Fla. Dist. App. Mar. 10, 2011). *See also* State *ex rel.* Grupp, Moll v. DHL Express (USA), Inc., 922 N.Y.S.2d 888 (N.Y. App. Div. 2011).

19. *In re* Korean Air Lines Co., Ltd. Antitrust Litig., 642 F.3d 685 (9th Cir. 2011). *See also In re* Air Cargo Shipping Services Antitrust Litig., 2008 WL 5958061 (E.D.N.Y. Sept. 26, 2008).

20. Foley v. JetBlue Airways Corp., 2011 WL 3359730 (N.D. Cal. Aug. 3, 2011) (citing Charas v. Trans World Airlines, Inc., 160 F.3d 1259 (9th Cir. 1998)). Subsequently, DOT initiated a proceeding that would establish specific standards for airline kiosks and websites. *See* Nondiscrimination on the Basis of Disability in Air Travel: Accessibility of Web Sites and Automated Kiosks at U.S. Airports, Supplemental Notice of Proposed Rulemaking, 76 Fed. Reg. 59307 (Sept. 26, 2011).

21. Recent decisions also have considered whether other state employment laws are preempted—sometimes with apparently inconsistent outcomes. In Hanold v. Raytheon Co., 662 F. Supp. 2d 793 (S.D. Tex. 2009), a federal district court concluded that a wrongful termination claim was preempted; but in Meyer v. United Airlines, Inc., 2009 WL 367762 (N.D. Ill. Feb. 15, 2009), another federal district court concluded that a wrongful termination claim was not preempted. In Wright v. Nordam Grp., Inc., 2008 WL 802986 (N.D. Okla. Mar. 20, 2008), a federal district court held that a state whistleblower law was preempted; but in Ventress v. Japan Airlines, 603 F.3d 676 (9th Cir. 2010), the Ninth Circuit held that the state whistleblower law was not preempted. *See also* Torikawa v. United Airlines, Inc., 2009 WL 2151821 (D. Haw. July 17, 2009); Gervasio v. Cont'l Airlines, Inc., 2008 WL 2938047 (D.N.J. July 29, 2008).

22. Difiore v. Am. Airlines, Inc., 646 F.3d 81 (1st Cir. 2011). Two federal district courts in the First Circuit have reached the same conclusion. *See* Brown v. United Air Lines, Inc., 656 F. Supp. 2d 244 (D. Mass. 2009), and Travers v. JetBlue Airways Corp., 2009 WL 2242391 (D. Mass. July 23, 2009). But another federal district court concluded that state employment laws were *not* preempted. *See* Thompson v. US Airways, Inc., 717 F. Supp. 2d 468 (E.D. Pa. 2010).

23. Goodspeed Airport LLC v. East Haddam Inland Wetlands & Watercourses Comm'n, 634 F.3d 206 (2d Cir. 2011). *See also* Tweed-New Haven Airport Auth. v. Town of East Haven, Conn., 582 F. Supp. 2d 261 (D. Conn. 2008).

24. US Airways, Inc. v. O'Donnell, 706 F. Supp. 2d 1135 (D.N.M. 2009), *rev'd on other grounds*, 627 F.3d 1318 (10th Cir. 2010). The appeals court also remanded the case for consideration of the implications of the Twenty-first Amendment to the U.S. Constitution.

25. Hughes v. McNeil, 2010 WL 282592 (S.D. Fla. Jan. 22, 2010). Alcohol consumption is an example of an issue that can implicate field preemption instead of or in addition to ADA preemption. *See, e.g.*, Webb v. Estate of Cleary, 2008 WL 5381225 (C.D. Cal. Dec. 19, 2008).

26. Tobin v. AMR Corp., 637 F. Supp. 2d 406 (N.D. Tex. 2009). *See also* Jiminez-Ruiz v. Spirit Airlines, Inc., 794 F. Supp. 2d 344 (D.P.R. 2011) (passenger allegedly slipped and fell on boarding stairs); Hodges v. Delta Air Lines, Inc., 2010 WL 5463832 (W.D. Wash. Dec. 29, 2010) (passenger alleged injury due to inadequate deplaning assistance); Daniell v. Fed'n of State Med. Bds. of the U.S., Inc., 2010 WL 3463340 (N.D. Tex. Sept. 1, 2010) (plaintiff alleged injury due to falling suitcase); Paredes v. Air-Serv Corp., Inc., 251 P.3d 1239 (Colo. App. 2010) (passenger alleged injury due to inadequate wheelchair assistance).

27. Farash v. Cont'l Airlines, Inc., 574 F. Supp. 2d 356 (S.D.N.Y. 2008), *aff'd on other grounds*, 337 F. App'x 7 (2d Cir. 2010). The "reasonably necessary" distinction was based on a three-prong test described in Robom v. United Air Lines, Inc., 867 F. Supp. 214 (S.D.N.Y. 1994) (Sotomayor, J.), despite its questionable validity in light of the subsequent Supreme Court decisions in *Wolens* and *Rowe*. *See also* Baez v. JetBlue Airways, 745 F. Supp. 2d 214 (E.D.N.Y. 2010).

28. Hanni v. Am. Airlines, Inc., 2008 WL 1885794 (N.D. Cal. Apr. 25, 2008)—another aberrant Ninth Circuit decision. *See also* Ray v. Am. Airlines, Inc., 2008 WL 2323923 (W.D. Ark. June 2, 2008) (following Ninth Circuit decisions).

29. Onoh v. Nw. Airlines, Inc., 613 F.3d 596 (5th Cir. 2010). *See also* Seymour v. Cont'l Airlines, Inc., 2010 WL 3894023 (D.R.I. Oct. 4, 2010); Khan *ex rel.* Haque v. Am. Airlines, Inc., 2008 WL 5110852 (S.D.N.Y. Nov. 26, 2008); Panitch v. Cont'l Airlines, Inc., 2008 WL 906240 (D.N.J. Mar. 31, 2008).

30. Weiss v. El Al Israel Airlines, 309 F. App'x 483 (2d Cir. 2009). *See also* Reed v. Delta Air Lines, Inc., 2011 WL 1085338 (S.D.N.Y. Mar. 23, 2011).

31. A.P. Keller, Inc. v. Cont'l Airlines, Inc., 2011 WL 5056241 (Tex. Ct. App. Oct. 25, 2011).

32. Kalick v. Nw. Airlines Corp., 2009 WL 2448522 (D.N.J. Aug. 7, 2009), *aff'd on other grounds*, 372 F. App'x 317 (3d Cir. 2010). *But see Hanni*, 2008 WL 1885794 (punitive damages are not preempted if tort claims are not preempted). Another aberrant California tort decision is Braden v. All Nippon Airways Co., Ltd., 2010 WL 3993215 (Cal. App. Oct. 13, 2010), which held that preemption did not shield an airline from claims for negligence and interference with

custodial relations that alleged that it allowed a parent to transport his child out of the United States without the consent of the other parent.

33. Malik v. Cont'l Airlines, Inc., 305 F. App'x 165 (5th Cir. 2008); Hickcox-Huffman v. US Airways, Inc., 2011 WL 1585560 (N.D. Cal. Apr. 27, 2011); Bary v. Delta Air Lines, Inc., 2009 WL 3260499 (E.D.N.Y. Oct. 9, 2009); Varga v. United Airlines, 2009 WL 2246208 (N.D. Cal. July 24, 2009).

34. Aretakis v. Fed. Express Corp., 2011 WL 1226278 (S.D.N.Y. Feb. 28, 2011); Gemnet Exp., Inc. v. Fed. Express Corp., 2009 WL 928299 (S.D.N.Y. Mar. 30, 2009); Otterson v. Fed. Express Corp., 2009 WL 536280 (D. Or. Mar. 3, 2009); Cathedral of Hope v. FedEx Corporate Servs., Inc., 2008 WL 2242546 (N.D. Tex. May 30, 2008); Feldman v. United Parcel Serv., Inc., 2008 WL 800989 (S.D.N.Y. Mar. 24, 2008), *modified*, 2008 WL 2540814 (S.D.N.Y. June 25, 2008).

35. ATA Airlines, Inc. v. Fed. Express Corp., 2010 WL 1754164 (S.D. Ind. Apr. 21, 2010).

36. Cape Air Int'l v. Lindsey, 2010 WL 2612600 (V.I. June 23, 2010).

37. Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228–29 (1995).

38. DOT regulations dictate some requirements that must be included in contracts between airlines and passengers ("contracts of carriage"); for example, although terms can be incorporated by reference and need not appear on the face of a ticket, "salient features" must be highlighted, and the full terms must be made available on the airline websites. *See* 14 C.F.R. §§ 221.107(d), 253.7, 259.6(c). However, DOT recently declined to adopt a proposal that would require airlines to incorporate their customer service plans and tarmac delay contingency plans into their contracts of carriage, which would have made the plans' provisions directly enforceable by consumers. *See* Dep't of Transp., Enhancing Airline Passenger Protections, Final Rule, 76 Fed. Reg. 23110, 23131 (Apr. 25, 2011).

39. Giannopoulos v. Iberia Lineas Aereas de Espana, S.A., 2011 WL 3166159 (N.D. Ill. July 27, 2011). *See also* Westways World Travel, Inc. v. AMR Corp., 265 F. App'x 472 (9th Cir. 2008) (agent disputed termination of ticketing agreement); Kalick v. Nw. Airlines Corp., 2009 WL 2448522 (D.N.J. Aug. 7, 2009), *aff'd on other grounds*, 372 F. App'x 317 (3d Cir. 2010) (passenger was bumped from oversold flight).

40. *See, e.g.*, Reed v. Delta Air Lines, Inc., 2011 WL 1085338 (S.D.N.Y. Mar. 23, 2011); Hodges v. Delta Air Lines, Inc., 2010 WL 5463832 (W.D. Wash. Dec. 29, 2010); Kalick v. Nw. Airlines Corp., 2009 WL 2448522 (D.N.J. Aug. 7, 2009). *See also supra* notes 33–35.

41. Sanchez v. Aerovias de Mexico, S.A. de C.V., 590 F.3d 1027 (9th Cir. 2010).

42. Schultz v. United Airlines, Inc., 2011 WL 2491590 (W.D. Wash. June 22, 2011); Hickcox-Huffman v. US Airways, Inc., 2011 WL 1585560 (N.D. Cal. Apr. 27, 2011). A new regulation requires carriers to refund any fees charged to transport a bag that is lost. 14 C.F.R. § 259.5(b)(3).

43. Hanni v. Am. Airlines, Inc., 2008 WL 1885794 (N.D. Cal. Apr. 25, 2008). *See also* Onoh v. Nw. Airlines, Inc., 613 F.3d 596 (5th Cir. 2010) (passenger allegedly denied boarding due to visa problems); Ray v. Am. Airlines, Inc., 2008 WL 2323923 (W.D. Ark. June 2, 2008) (passenger allegedly experienced extended tarmac delay). Although DOT now requires carriers to adopt customer service plans, it has declined to require the plans to be incorporated into their contracts of carriage. DOT, Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23131.

44. ATA Airlines, Inc. v. Fed. Express Corp., 2010 WL 1754164 (S.D. Ind. Apr. 21, 2010); Manassas Travel, Inc. v. Worldspan, L.P., 2008 WL 1925135 (D. Utah Apr. 30, 2008).

45. A.P. Keller, Inc. v. Cont'l Airlines, Inc., 2011 WL 5056241 (Tex. Ct. App. Oct. 25, 2011).

46. *Contrast* Ginsberg v. Nw. Airlines, Inc., 653 F.3d 1033 (9th Cir. 2011) (passenger disputed revocation of frequent flier account), *with* ATA Airlines, Inc. v. Fed. Express Corp., 2010 WL 1754164 (S.D. Ind. Apr. 21, 2010); Ray v. Am. Airlines, Inc., 2008 WL 2323923 (W.D. Ark. June 2, 2008); *and* Hanni v. Am. Airlines, Inc., 2008 WL 1885794 (N.D. Cal. Apr. 25, 2008).

47. Alaska Airlines Inc. v. Carey, 395 F. App'x 476 (9th Cir. 2010). *See also* Frequent Flyer Depot, Inc. v. Am. Airlines, Inc., 281 S.W.3d 215 (Tex. Ct. App. 2009). *Cf.* Mayer v. United Air Lines, Inc., 2010 WL 4570206 (N.J. Super. App. Div. Nov. 15, 2010) (airline is not preempted from modifying the terms of its frequent flyer program).

48. United Air Lines, Inc. v. Gregory, 716 F. Supp. 2d 79 (D. Mass 2010).

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