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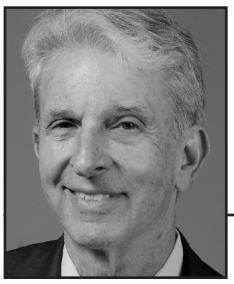

The Case for an Enhanced and Updated International Air Transportation Policy

By Michael Goldman

May 1995 was a significant time for the United States and for U.S. aviation policy. On May 23, 1995, six years before 9/11, the United States suffered its first major terrorist attack—the bombing of the Murrah Federal Building in Oklahoma City—an event that was a turning point in President Clinton's first term. In aviation, the United States had just completed negotiation of Open Skies agreements with the Scandinavian countries following the breakthrough Open Skies Agreement with the Netherlands in 1992. May 1995 also was when the U.S. Department of Transportation (DOT) last issued

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Ginsberg v. Northwest: An Opportunity to Bring the Ninth Circuit into the Fold on ADA Preemption

By Roy Goldberg and Megan Grant

The Airline Deregulation Act (ADA) was intended to preempt state laws that regulate an airline's prices, routes, or services.[1] It applies not only to state agency enforcement actions but also to private causes of action arising under state law. Although many U.S. circuit courts of appeals have applied ADA preemption to immunize airlines from an array of state law claims, the Ninth Circuit has been an outlier, at times allowing disgruntled consumers to thwart congressional objectives and pursue state law claims relating to core airline functions and services that the ADA was intended to preempt. Moreover, these often insignificant and even frivolous claims may be pursued as class actions, causing the airlines to incur significant legal fees and related costs.

Help may be at hand. The U.S. Supreme Court

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22. Bill Poling, *Airport Entry Still a Hassle for Foreign Visitors, Says U.S. Travel*, Travel Weekly (Mar. 19, 2013), http://www.travelweekly.com/Travel-News/Government/Airport-customs-still-a-hassle-for-foreign-visitors-says-US-Travel/.

23. Patricia Mazzei, *Federal Budget Cuts Lead to Customs Delays, Missed Flights at MIA*, Miami Herald (Mar. 19, 2013), http://www.miamiherald.com/2013/03/19/3295059/federal-budget-cuts-lead-to-customs.html; Andrew Compart, *Airlines Worry About Sequestration's Effect on Airport Customs Lines*, Aviation Daily, Apr. 2, 2013, at 4; *see also* Scott McCartney, *The Summer of Long Customs Waits*, Wall St. J. (June 12, 2013), http://online.wsj.com/article/SB10001424127887323734304578541432566205480.html (reporting on three-hour Customs clearance wait times at MIA and that, at JFK, "wait times can routinely be more than twice as long as last year in some terminals").

24. 2012 Progress Report, *supra* note 13, at 11.

25. *Id.* at 17. Recently, a controversial agreement to expand preclearance to Abu Dhabi was announced in April 2013. Josh Hicks, *DHS Plans for Customs Pre-clearance in Abu Dhabi Raises Concerns*, Wash. Post (Apr. 19, 2013), http://www.washingtonpost.com/blogs/federal-eye/wp/2013/04/19/dhs-plan-for-abu-dhabi-customs-pre-clearance-raises-concerns/.

Ginsberg v. Northwest: The Ninth Circuit and ADA Preemption

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recently granted certiorari to review a Ninth Circuit decision, *Ginsberg v. Northwest Airlines, Inc.*, that, if left undisturbed, would allow claims for breach of the implied covenant of good faith and fair dealing unencumbered by ADA preemption even where the claims are wholly at odds with the express contractual terms agreed to by the parties. Hopefully the Court will use this opportunity to rein in the Ninth Circuit—for good.

Ginsberg arises from Northwest Airlines' decision to terminate the membership of a customer (Ginsberg) in the airline's WorldPerks frequent flier program.[2] The terms and conditions of the WorldPerks program granted Northwest discretion to remove individuals from the program for any improper conduct "as determined by Northwest in its sole judgment."[3] Northwest determined that Ginsberg's persistent complaining about his treatment by the airline supported termination of his membership in the frequent flyer program.

Unhappy with the consequences from his having complained too much, Ginsberg resorted to yet further complaining—this time by filing suit in the Southern District of California. Ginsberg claimed that Northwest's actions amounted to breach of contract, breach of the implied covenant of good faith and fair dealing, negligent misrepresentation, and intentional misrepresentation.[4]

The district court dismissed all of Ginsberg's claims, holding that the ADA preempted them as relating to airline prices and services. Ginsberg appealed only the district court's conclusion that the ADA preempts a claim for breach of the implied covenant of good faith and fair dealing. All of Ginsberg's other claims remained dismissed.

A three-judge panel of the Ninth Circuit reversed with regard to Ginsberg's claim for breach of the implied covenant of good faith and fair dealing, stating:

> The purpose, history, and language of the ADA, along with Supreme Court and Ninth Circuit precedent, lead us to conclude that the ADA does not preempt a contract claim based on the doctrine of good faith and fair dealing.[5]

If an airline gives itself the contractual right to take a certain action solely within its unilateral discretion, that should end the matter.

The Ninth Circuit's decision in *Ginsberg* is in direct conflict with Supreme Court and other circuit precedent. It creates an unfounded exception that can swallow the rule by permitting disgruntled consumers to pursue cases against airlines merely by claiming that the airline breached an implied covenant to exercise good faith and engage in fair dealing in its treatment of customers—a standard that is inherently vague and ambiguous in the context of airline-customer relations. If an airline gives itself the contractual right to take a certain action solely within its unilateral discretion, that should end the matter. The airline should not have to find itself sued for allegedly failing to exercise such unilateral discretion in good faith.

This article reviews federal preemption of claims against airlines in the context of the Ninth Circuit's decision in *Ginsberg*, examines both Supreme Court and circuit court analysis of the ADA's preemption provisions, describes the areas of conflict with Ninth Circuit law, and discusses the implications of the Ninth Circuit's approach on the airline industry. The article concludes that the Ninth Circuit's position diverges substantially from the Supreme Court's interpretation of ADA preemption law as well as from statutory policy, and that the Supreme Court should bring the Ninth

Roy Goldberg (rgoldberg@sheppardmullin.com) is a partner at Sheppard Mullin Richter & Hampton, LLP in Washington, D.C. Megan Grant is a summer associate at the same firm, and a J.D. candidate, University of Chicago School of Law, Class of 2014.

Circuit's jurisprudence into accord with the prevailing (and correct) interpretation of federal law.

Preemption of State Law Claims Against Airlines

Steeped in the belief that market forces most compellingly encourage airlines to provide the products consumers desire at the best possible rates, federal law regarding airline operations reflects a largely hands-off approach to the industry's regulation. Since airline deregulation, the overarching government policy has been to encourage, develop, and maintain an air transportation system relying on competition "to provide efficiency, innovation, and low prices."[6]

Strengthening these goals and ensuring that "the states would not undo federal deregulation with regulation of their own,"[7] the ADA's express preemption provision prohibits states and any state entities from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier" that provides air transportation.[8] By removing the burden of implementing 50 unique policies and procedures to conduct business within the jurisdiction of each individual state, the ADA enables airlines to conduct their interstate businesses in a largely uniform manner throughout the country.

Preemption provides a large safe harbor protecting airlines from interstate or federal-state statutory idiosyncrasies.

Despite the clear deregulatory mandate contained in the ADA, the Supreme Court has needed to interpret and enforce the ADA's preemption directive. The Court's precedents broadly hold that preemption precludes claims based on all state laws "having a connection with or reference to airline [prices], routes, or services" because the wording of the preemption provision is deliberately expansive and should therefore be broadly construed.[9] Thus, preemption provides a large safe harbor protecting airlines from interstate or federal-state statutory idiosyncrasies that airlines would be required to navigate in the absence of federal preemption of state law claims.

Although the federal law and rationale behind airline preemption are clear, certain aspects of the preemption doctrine have become murky as applied by some courts. However, the rule regarding whether a claim will be preempted under the ADA remains: generally, a claim must (1) involve enactment or enforcement of a state law, regulation, or other provision having the force and effect of law and (2) relate to a price, route, or service of an air carrier.[10]

Lack of Preemption in *Ginsberg*

The Ninth Circuit's holding in *Ginsberg*—which enables a passenger to sue for breach of the implied covenant of good faith and fair dealing—implicates both elements of the preemption test and adds further uncertainty to the bodies of law that have developed surrounding ADA preemption.

The roots of *Ginsberg* lie in the seminal case *American Airlines, Inc. v. Wolens*, where the Supreme Court held that "the ADA's preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves."[11] In other words, if an airline expressly promises to do something, and fails to do it, then the claim for breach of that promise may not be preempted by the ADA.

Wolens involved a challenge to American Airlines' modifications of its frequent flyer program. The Court allowed the breach of contract claim to proceed because American had expressly made certain representations regarding its program that the plaintiffs claimed were being breached.[12]

Ginsberg argued that *Wolens* allowed his claim for breach of the implied covenant of good faith and fair dealing because the cause of action pertained only to the terms of the agreement between him and Northwest, without implicating law or policy that states create and enforce. The *Wolens* Court determined that, to be subject to ADA preemption, a contractual term must refer to "binding standards of conduct that operate irrespective of any private agreement."[13] However, binding standards of conduct *that the parties choose to impose upon themselves* are enforceable because agreements freely made are "based on the needs perceived by the contracting parties at the time" the agreement is made.[14]

In light of *Wolens*, the allegations in *Ginsberg* required the court to address whether a claim for breach of the implied covenant of good faith and fair dealing constituted a binding standard of conduct independent of the airline's contract. The Ninth Circuit had already extended *Wolens* to breach of implied covenant of good faith and fair dealing claims in prior cases because—according to the Ninth Circuit—such claims were "too tenuously connected to airline regulation to trigger preemption"[15] and Congress's only purpose in the passage of the ADA was to prevent state interference with deregulation, which is not implicated in the implied covenant claim.[16]

The Ninth Circuit went further in *Ginsberg* and determined that claims for breach of the implied covenant of good faith and fair dealing *categorically* do not trigger ADA preemption.[17] According to the court, such contract claims present no material risk of nonuniform adjudication, and, in deciding to enter into economic arrangements with third parties, airlines had the ability and the sophistication to take into consideration

the conditions under state and local law by which they would have to abide as a byproduct of their bargains.[18]

On the second prong of the preemption test—requiring that a claim relate to prices, routes, or services—Ginsberg argued that frequent flyer programs fall into none of the categories to which preemption applies. Although the district court held that the claim related to both prices and services, the Ninth Circuit determined that the legislative history of the ADA indicates the "relating to" language was not intended to create a broad scope for the preemption provision and that allowing the claim to proceed, though it may have implications for airline costs and fares, would not have the effect of regulating the airline's pricing structure.[19]

The Ninth Circuit decision did not even address why it apparently believed that the district court's determination that the claim related to airline services was incorrect. In a prior version of the opinion that was later withdrawn, the panel limited the applicability of "service" to its relation to "rates" and "routes," arguing that any broader interpretation of "service" undermines the "context of its use" and results in virtually unlimited preemption.[20] The court also followed the Ninth Circuit's en banc decision in *Charas v. Trans World Airlines* that the term "service" did not include so-called fringe benefits having nothing to do with schedules, origins, destinations, cargo, or mail[21] and that, therefore, frequent flyer programs did not constitute services under *Charas*. The court did not acknowledge the fact that "*Charas*'s approach . . . is inconsistent with" the Supreme Court's decision in *Rowe v. New Hampshire Motor Transport Association* (discussed below).[22]

Because of its finding that Ginsberg's claim was not related to prices or services in a sufficiently direct and substantial manner, the claim against Northwest was not preempted by the ADA.

Ginsberg Diverges from Supreme Court Precedent

The Ninth Circuit's holding in *Ginsberg* is contrary to the ADA because it allows a claim clearly intended to override an express contractual term and cannot be reconciled with *Wolens*. Under *Wolens*, whether a claim for breach of contract may proceed turns on the distinction between what the state dictated and what the airline expressly chose to undertake.[23] No state laws or policies external to the airline's bargains may enlarge or enhance the terms of an airline's bargain.[24] Instead, a party must prove that "an airline dishonored a term the airline itself stipulated."[25] Northwest told Ginsberg he could lose his World Perks privileges whenever Northwest deemed that to be in Northwest's interests. Ginsberg cannot undo that bargain by making a claim for breach of the implied covenant.

The Ninth Circuit's holding that frequent flyer program claims are not preempted because they bear no real relationship to airline prices and services also conflicts with the fact that in *Wolens*, the Court found that claims regarding frequent flyer programs clearly relate to airline prices and services.[26] The Court recognized there that changes to the frequent flyer program affect rates (i.e., prices) in the form of mileage credits, free tickets, and upgrades, and services in the form of flight access and class-of-service upgrades.[27] These benefits were sufficient to bring frequent flyer programs within the preemption provision under either the "rates" (now "prices") or "services" category of the ADA.

Further, *Wolens* did not provide support for the Ninth Circuit's interpretation of "service" as it distinguished between fringe and nonfringe benefits: the *Wolens* Court held that such separation of matters essential to and unessential to airline operations was untenable.[28] In *Wolens*, the Court argued that its prior decision in *Morales* was concerned only with whether the claim was related to rates, routes, or services and not with determining how centrally the claim would implicate these aspects of airline operations.[29] The Ninth Circuit's fringe distinction created the same kind of separation using only a slightly different characterization, which is unacceptable under *Wolens*.

The Ninth Circuit's holding in *Ginsberg* is contrary to the ADA because it allows a claim clearly intended to override an express contractual term.

Moreover, the limited definition of "services" in *Charas* is no longer good law in light of the subsequent decision of the U.S. Supreme Court in *Rowe v. New Hampshire Motor Transport Association*,[30] which dealt with the term "services" and its use in a statute to be interpreted in the same manner as the ADA. The Supreme Court underscored that that preemption should apply if application of state law will require the provision of services that are significantly different from what the market dictates.[31]

Rowe involved a Maine statute that forbade anyone other than a licensed tobacco retailer to accept an order for a delivery of tobacco, required tobacco delivery services to use recipient-verification services, and prohibited knowing transportation of tobacco unless either sender or receiver has a license.[32] Several transport carrier associations brought suit claiming that federal law deregulating trucking preempted the state statute.[33]

In striking down the Maine law, the Supreme Court relied on its ADA preemption decisions to determine that the law improperly encroached on an area subject to federal preemption. The Court reasoned that, although federal laws may not preempt state laws only tenuously related to pricing and services, "if federal law preempts state regulation of the details of an air carrier's frequent flyer program, a program that primarily

promotes carriage, it must preempt state regulation of the essential details of a motor carrier's system for picking up, sorting, and carrying goods—essential details of the carriage itself."[34] A contrary ruling would have allowed states to develop a range of regulations hampering the efficiency of interstate delivery systems.

The Court held that Maine's statute interfered sufficiently with the services provided by the trucking industry to qualify for preemption even though the statute only regulated one kind of carrier service. The Court's determination in *Rowe* strongly indicated that regulation of a single aspect of a carrier's service is sufficient to constitute regulation of a service under federal preemption law.

Ginsberg Conflicts with Other Courts' Rulings

The Ninth Circuit's ruling in *Ginsberg* also conflicts with a variety of decisions from other circuits as well as those of lower federal courts. Most importantly, the Ninth Circuit's case law leading up to and including *Ginsberg* fosters a circuit split among courts that have considered ADA preemption.

The Ninth Circuit's approach reflects an outlier view that other circuits have found untenable.

The Seventh Circuit has held that, though enforcement of private contracts may not amount to an enactment or enforcement of any law, some state-law principles of contract law might be preempted "to the extent they seek to effectuate the state's public policies, rather than the intent of the parties" so long as such claims relate to airline rates, routes, or services.[35]

Importantly, the Seventh Circuit more loosely construes the concept of state enforcement, preserving the policy of a broad scope for preemption and following the spirit of *Wolens*. Moreover, the Fifth Circuit expressly disagrees with Ninth Circuit precedent, concluding that a state tort claim for overbooking, which the Ninth Circuit allowed to proceed in one of its cases, clearly relates to airline services and is preempted under the ADA.[36]

In addition, the Eleventh Circuit, which considered the scope of ADA preemption after the divergence between circuits had begun to develop, explicitly rejected the Ninth Circuit's reasoning, following the broader reading of ADA preemption by the Seventh and Fifth Circuits.[37]

The Ninth Circuit's approach reflects an outlier view that other circuits have found untenable. Allowing the discrepancy between circuits to continue opens airlines to different kinds of suits in different jurisdictions depending on a particular circuit's narrow or broad reading of preemption. This is one of the outcomes that ADA preemption was designed to avoid.

The circuits also diverge from the Ninth Circuit's holding that claims for breach of the implied covenant of good faith and fair dealing are exempt from preemption. The First Circuit has found an implied covenant of good faith claim preempted by the ADA because implied contract provisions are not found in the parties' agreements and allowing such claims would invite litigants "to skirt the implied right of action doctrine."[38] The court's reasoning indicates that imposing state policies on airlines would be improper no matter the form in which such policies are embodied.

The Eighth Circuit has also found that "claims that are enlarged or enhanced, and indeed, are dependent upon, Missouri state laws and polices" are preempted and that it does not matter whether these claims depend on state statutory or common law.[39] Though neither of these circuits goes so far as to hold implied covenant of good faith and fair dealing claims preempted in all cases, their decisions show that that, at the very least, a complete and thorough examination of the claim and its imposition of state policy on the airlines is warranted before such a claim may be allowed to proceed.

Additionally, other lower courts have noted the circuit split and sided against the Ninth Circuit. The Northern District of Illinois recently noted the direct conflict between *Ginsberg* and Seventh Circuit law in their interpretations of whether a contract claim can relate to price depending on the facts alleged.[40] The Western District of Washington, meanwhile, denied a breach of contract claim for a refund of a baggage fee because the claim employed "external state law to enlarge an existing agreement regarding baggage transport," and allowing such a claim to proceed would frustrate the ADA by allowing inconsistency in substantive state law theories of liability to interfere with the uniform operation of airlines.[41]

Implications of Following *Ginsberg*

Allowing *Ginsberg* to stand would be contrary to the ADA and clear judicial precedent. Instead of only allowing state law claims of breach of contract to proceed, the categorical exception to preemption for breach of the implied covenant of good faith and fair dealing would provide litigants a road map as to how to circumvent ADA preemption. As long as the complaint includes a claim for breach of the implied covenant, the case may move forward—including as a class action, which would be very expensive for the airline to defend.

The Ninth Circuit exception would inflict an enormous burden on airlines because they would be required to consider their treatment of customers through a variety of state law lenses. Meeting these varying burdens would drain airline resources and expose airlines to claims varying from state to state that arise out of contracts containing exactly the same language.

The *Ginsberg* loophole undermines an airline's

ability to efficiently, innovatively, and cost-effectively provide services to consumers. In dedicating their limited time and resources to develop policies and contract terms that provide protections from the varieties of implied claims that could potentially arise from the various state laws, airlines would be required to redirect resources away from providing the goods and services that consumers most value.

Aligning the Ninth Circuit with the Other Circuits

The Supreme Court correctly granted certiorari to hear *Ginsberg* on appeal. The ADA is supposed to protect airlines from broad categories of state law claims that would vary from state to state and impose potentially enormous burdens on airlines. The Supreme Court's case law supports this broad ADA preemption protection with a narrow exception that allows state courts to bind airlines by the contract terms they voluntarily adopt.

The Ninth Circuit's case law, in contrast, exposes airlines to claims that may be implied under state law doctrine, inhibiting the ADA from effecting its stated goal of limited state law claims to which airlines are exposed. Further, the Ninth Circuit has continued to chart its own trajectory despite clear indications in both the Supreme Court and other circuits that its view of preemption is erroneous. Additionally, the Ninth Circuit's idiosyncratic interpretation of ADA preemption threatens to undermine airlines' ability to focus on the quality of services they provide and to meet market demands.

In conclusion, the Supreme Court should reject the Ninth Circuit's overly narrow view of ADA preemption. *Ginsberg* stands for an untenable principle: that airline-consumer agreements are not confined to what was actually agreed upon, but rather a dissatisfied consumer can drag the airline into an expensive court battle merely by contending that the airline's actions were lacking in good faith.

Endnotes

1. Airline Deregulation Act (ADA), Pub. L. No. 95-504, 92 Stat. 1705 (1978) (amending § 105(a) of the Federal Aviation Act of 1958), revised by Pub. L. No. 103-272, 108 Stat. 745 (1994) (codified as amended at 49 U.S.C. § 41713).

2. Nw. Airlines, Inc. v. Ginsberg, No. 12-462 (pet. granted May 20, 2013).

3. Petition for Writ of Certiorari at 5, Ginsberg v. Nw. Airlines, Inc., 695 F.3d 873 (2012) (No. 12-462) (quoting the General Terms and Conditions of Northwest's WorldPerks program).

4. Ginsberg v. Nw. Airlines, Inc., 695 F.3d 873, 875 (9th Cir. 2012).

5. *Id*. at 874.

6. 49 U.S.C. § 40101(a)(12).

7. Morales v. Trans World Airlines, 504 U.S. 374, 378 (1992).

8. 49 U.S.C. § 41713(b).

9. *Morales*, 504 U.S. at 384.

10. Respondent's Brief in Opposition at 9, Ginsberg v. Nw., Inc., 695 F.3d 873 (2012) (No. 12-462).

11. 513 U.S. 219, 222 (1995).

12. *Id*. at 233.

13. *Id*. at 229 n.5.

14. *Id*. at 230.

15. West v. Nw. Airlines, Inc., 995 F.2d 148, 151 (9th Cir. 1993).

16. Charas v. Trans World Airlines, Inc., 160 F.3d 1259, 1261 (9th Cir. 1998).

17. Ginsberg v. Nw., Inc., 695 F.3d 873, 880 (9th Cir. 2012).

18. *Id*.

19. *Id*. at 881.

20. Ginsberg v. Nw. Airlines, Inc., 653 F.3d 1033, 1042 (9th Cir. 2011), *op. withdrawn by and substituted op. at* 695 F.3d 873 (9th Cir. 2012).

21. 160 F.3d at 1261.

22. Air Transp. Ass'n v. Cuomo, 520 F.3d 218, 224 (2d Cir. 2008); Nat'l Fed. of the Blind v. United Air Lines, Inc., No. C10-04816, 2011 WL 1544524, at *5 (N.D. Cal. Apr. 25, 2008) ("While *Charas* defined service narrowly, *Rowe* put forth a more expansive view.").

23. Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 233 (1995).

24. *Id*.

25. *Id*. at 232–33.

26. *Id*. at 226.

27. *Id*.

28. *Id*.

29. *Id*.

30. 552 U.S. 364, 370 (2007).

31. *Id*. at 372.

32. *Id*. at 368–69.

33. *Id*. at 369.

34. *Id*. at 373.

35. Travel All Over the World, Inc. v. Kingdom of Saudi Arabia, 73 F.3d 1423, 1432 n.8 (7th Cir. 1996).

36. Hodges v. Delta Airlines, Inc., 44 F.3d 334, 339–40 (5th Cir. 1995).

37. Branche v. Airtran Airways, Inc., 342 F.3d 1248, 1256–57 (11th Cir. 2003).

38. Buck v. Am. Airlines, Inc., 476 F.3d 29, 37 (1st Cir. 2007).

39. Data Mfg., Inc. v. UPS, 557 F.3d 849, 853 (8th Cir. 2009).

40. Newman v. Spirit Airlines, Inc., No. 12-2897, 2012 WL 3134422, at *3–4 (N.D. Ill. July 27, 2012).

41. Schultz v. United Airlines, Inc., 797 F. Supp. 2d 1103, 1106 (W.D. Wash. 2011).