Journal of Air Law and Commerce

Volume 80 | Issue 1 Article 16

2015

Breadth of the ADA Preemption Provision - Morales and Wolens Reaffirmed and the Extension to the Common Law

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BREADTH OF THE ADA PREEMPTION PROVISION—*MORALES* AND *WOLENS* REAFFIRMED AND THE EXTENSION TO THE COMMON LAW

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IN *NORTHWEST, INC. V. GINSBERG*, the Supreme Court held that (1) the ADA preemption provision does apply to the common law; (2) the respondent's breach of implied covenant, the breach of the duty of good faith and fair dealing, related to "rates, routes, or services"; and (3) the implied covenant claim was a state-imposed obligation and therefore preempted under the ADA preemption provision.[1] The Court correctly applied the previous precedent set forth under *Morales v. Trans World Airlines, Inc.* and *American Airlines, Inc. v. Wolens.* While this case did not change the legal analysis and application of previous precedent, it did reaffirm the breadth of the ADA preemption provision through the extension of the provision to the common law and solidify the authority of the preemption provision through the newfound united front of the Court's unanimous decision.

The respondent, a member of Northwest's WorldPerks Program, "[a]lleging that Northwest had ended his membership as a cost-cutting measure tied to Northwest's merger with Delta Air Lines," filed a class action lawsuit on behalf of himself and all other members situated similarly in the U.S. District Court for the Southern District of California.[2] Under the WorldPerks program members can earn "miles" by flying with Northwest and its "partner" airlines and then redeem these "miles" for tickets and services upgrades.[3] The respondent became a member of North-

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[1] Northwest, Inc. v. Ginsberg, 134 S. Ct. 1422, 1430–35 (2014).

[2] *Id.* at 1427.

[3] *Id.* at 1426.

west's WorldPerks program in 1999 and achieved "Platinum Elite" status in 2005.[4]

In 2008, Northwest terminated the respondent's membership, claiming he had abused the WorldPerks program.[5] The airline relied on a provision of the WorldPerks agreement that stated, "[a]buse of the . . . program (including . . . improper conduct as determined by [Northwest] in its sole judgment[ )] . . . may result in cancellation of the member's account."[6] The respondent was informed by phone and letter that his "Platinum Elite" status was being revoked.[7] The letter included the following ways that the respondent had abused the program: (1) contacting the office twenty-four times since December 3, 2007, regarding travel problems (nine incidents of late luggage); (2) continually asking for compensation over and above the program guidelines; and (3) awards of $1,925.00 in travel credit vouchers, 78,500 WorldPerks bonus miles, a voucher extension for respondent's son, and $491.00 in cash reimbursements.[8] After asking for a clarification of his status, the respondent filed the class action suit.[9]

The respondent's complaint asserted four separate claims: (1) Northwest breached its contract by revoking his status "without valid cause"; (2) Northwest violated the duty of good faith and fair dealing "because it terminated his membership in a way that contravened his reasonable expectations with respect to the manner in which Northwest would exercise its discretion"; (3) negligent misrepresentation; and (4) intentional misrepresentation.[10] The district court held that the claims two through four, breach of the covenant of good faith and fair dealing and negligent and intentional misrepresentation, were all preempted by the Airline Deregulation Act of 1978 (ADA).[11] The court stated that these three claims "relate[d] to" Northwest's rates and services and therefore fell under the ADA's preemption clause.[12] The breach of contract claim was dismissed under Rule 12(b)(6) of the Federal Rules of Civil Procedure because the

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[4] *Id.*

[5] *Id.*

[6] *Id.* (alterations in original) (citation omitted).

[7] *Id.* at 1426–27.

[8] *Id.* at 1427.

[9] *Id.*

[10] *Id.*

[11] *Id.* (citing 49 U.S.C. § 41713 (2012)).

[12] *Id.* (alterations in original) (citation omitted).

respondent "had failed to identify any material breach because the frequent flyer agreement gave Northwest sole discretion to determine whether a participant had abused the program."[13]

The respondent appealed the dismissal of claim two, the breach of the duty of good faith and fair dealing claim, only.[14] The Ninth Circuit reversed the district court, holding that the breach of implied covenant claim was "too tenuously connected to airline regulation to trigger preemption under the ADA."[15] The court went on to state that this type of claim "does not interfere with the [Act's] deregulatory mandate" and does not "force the Airlines to adopt or change their prices, routes or services—the prerequisite for . . . preemption."[16] Finally, the Ninth Circuit also stated that the covenant did not fall within the ADA's preemption provision because the covenant did not have a "direct effect on either 'prices' or 'services.'"[17]

The Supreme Court set out three issues, two sub-issues and one main issue: (1) whether the ADA preemption provision applies to common law rules; (2) whether the breach of implied covenant claim relates to "rates, routes, or services"; and (3) whether the implied covenant claim is a state-imposed obligation or a voluntary agreement between the parties.[18] Relying chiefly on the precedent set forth by the two prior Supreme Court cases that address the ADA preemption provision, *Morales v. Trans World Airlines, Inc.* and *American Airlines, Inc. v. Wolens,* the Court held that the ADA preemption provision does apply to the common law; the respondent's breach of implied covenant claim relates to airlines' "rates," which is a part of the language requirement set forth under the ADA preemption provision; and that based on Minnesota law, the controlling law in this case, the covenant is a state obligation and therefore preempted by the ADA.[19]

The first sub-issue the Court addressed was the application of the ADA preemption provision to the common law.[20] The Court held that the common law fell within the language of the pre-

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[13] *Id.*

[14] *Id.*

[15] Ginsberg v. Northwest, Inc., 695 F.3d 873, 879 (9th Cir. 2012) (internal quotation marks omitted).

[16] *Id.* at 880.

[17] *Id.* at 880–81.

[18] *Ginsberg,* 134 S. Ct. at 1429–31.

[19] *Id.* at 1429–33.

[20] *Id.* at 1429.

emption provision by looking at (1) the actual wording of the statute in comparison with the original wording of the statute, previous precedent, and similar government statutes; (2) the relationship to the savings clause; and (3) the central purpose of the ADA preemption provision as well as the motivation of Congress to adopt the ADA as a whole.[21] Looking first to the language of the statute, the current version of the preemption provision applies to state "law[s], regulation[s], or other provision[s] having the force and effect of law."[22] The Court relied on previous precedent that states it is routine to call common law rules "provisions,"[23] and that the above mentioned phrase is most naturally read "to refe[r] to binding standards of conduct that operate irrespective of any private agreement."[24] The Court went on to compare the original wording of the statute to the identical language of the preemption provision and savings clause of the Federal Railroad Safety Act, which has been held to include the common law, and stated that even though the original language is no longer included, it was deleted during a recodification that was not meant to cause a substantive change.[25] Therefore, the language of the ADA should be treated in a similar fashion as the Federal Railroad Safety Act, thus including the common law.[26] Finally, the Court held that if the common law was allowed to be exempted from the preemption provision, the purpose of the ADA regulation, to allow aspects of air travel to be set by market forces, would be frustrated.[27] All in all, the Court found no trouble in applying the preemption provision language to the common law implied covenant claim.[28]

The second sub-issue that the Court addressed was the relation of the respondent's breach of implied covenant claim to the "rates, routes, or services" language set forth in the preemption provision.[29] The claim relates to the provision if it has a "connection with or reference to airline" prices, routes, or ser-

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[21] *Id.* at 1429–30.

[22] 49 U.S.C. § 41713(b)(1) (2012).

[23] *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 765 n.3 (1994); United States v. Barnett, 376 U.S. 681, 700 (1964).

[24] Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 229 n.5 (1995) (alteration in original).

[25] *Ginsberg*, 134 S. Ct. at 1429.

[26] *Id.*

[27] *Id.* at 1430.

[28] *Id.*

[29] *Id.*

vices.[30] The Court looked to *Wolens* for the standard to evaluate the relation because the case included a similar frequent flyer mile contract.[31] "[T]he Northwest program is connected to the airline's 'rates' because the program awards mileage credits that can be redeemed for tickets and upgrades."[32] The use of miles in this manner affects the rates that customers pay because the price of a particular ticket is either "eliminated or reduced."[33] The Court found that this program, as had its predecessor in *Wolens*, related to airline rates and therefore fell under the language of the preemption provision.[34]

Lastly, the Court turned to the main issue of the case, whether the implied covenant claim was based on a state-imposed obligation or voluntarily entered into by the parties.[35] The Court once again looked to precedent established by *Wolens*, which held that when state law does not allow parties to "free themselves" from the covenant, the claim is preempted under the ADA because the covenant is a state obligation.[36] The controlling Minnesota law established that the covenant was in fact a state-imposed obligation because parties within the jurisdiction may not contract out of the covenant and Minnesota law holds that the implied covenant applies to "every contract."[37] The Court concluded by reversing the Ninth Circuit opinion, holding that the implied covenant claim, the duty of good faith and fair dealing, was preempted under the ADA preemption provision.[38]

The Supreme Court correctly interpreted the precedent set forth in the two previous preemption holdings, *Morales* and *Wolens*. In both of these cases, the Court focused on the wording of the statute and the original purpose of the ADA.[39] The original purpose and Congress's motivation for enacting the ADA was "to encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the

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[30] Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

[31] *Ginsberg*, 134 S. Ct. at 1431 (citing Am. Airlines v. Wolens, 513 U.S. 219, 226 (1995)).

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 1431–32; *see also Wolens*, 513 U.S. at 232–33.

[37] *Ginsberg*, 134 S. Ct. at 1432.

[38] *Id.* at 1433–34.

[39] *Wolens*, 513 U.S. at 226–35; *Morales*, 504 U.S. at 380–91.

quality, variety, and price of air services."[40] This motivation was key to the expansion to the common law.[41] The first two sub-issues, the application to the common law and the relation to "rates, routes, or services," followed the same legal analysis set forth under *Morales* and *Wolens*.[42] In applying the preemption provision to the common law, the Court relied on a language determinations made in *Wolens* in addition to the purpose of the ADA, stating that the preemption provision is "most naturally read to 'refe[r] to binding standards of conduct that operate irrespective of any private agreement.'"[43] The Court went on to state that there was no reason to hold that the "standards must be based on statute or regulation as opposed to the common law."[44] Issue two relied heavily on the broad language set forth under *Morales* and affirmed by *Wolens*, once again holding that the key phrase "related to" expresses a "broad pre-emptive purpose."[45]

The third issue especially related to *Wolens* and was properly resolved under the precedent because the facts of the cases were exceptionally similar; both cases dealt with a frequent flyer contract dispute that was related to a state law obligation.[46] The Court based its decision on the main issue of the case, whether the implied covenant claim was based on state-imposed obligation or voluntarily entered into by the parties, upon the two options set forth under *Wolens*.[47] The Court followed the appropriate application determining that the state law governed the application of the ADA preemption clause; therefore, the implied covenant claim was preempted as a state-imposed obligation.[48] The Court continued to follow the "middle course" adopted by the holding in *Wolens*.[49] The Court focused on this somewhat artificial line set forth under previous precedent that

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[40] H.R. REP. NO. 95-1779, at 53 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.C.A.N. 3773, 3773 (capitilization omitted).

[41] *Ginsberg*, 134 S. Ct. at 1429–30.

[42] *See id.* at 1429–31; *Wolens*, 513 U.S. at 226–35; *Morales*, 504 U.S. at 383–91.

[43] *Ginsberg*, 134 S. Ct. at 1429 (quoting *Wolens*, 513 U.S. at 229).

[44] *Id.*

[45] *Id.* at 1428, 1430–31 (citing *Wolens*, 513 U.S. at 228–29; *Morales*, 504 U.S. at 383).

[46] *Ginsberg*, 134 S. Ct. at 1426–27; *Wolens*, 513 U.S. at 224–26.

[47] *Ginsberg*, 134 S. Ct. at 1431–33; *Wolens*, 513 U.S. at 228.

[48] *Ginsberg*, 134 S. Ct. at 1432; *Wolens*, 513 U.S. at 232–33.

[49] *Ginsberg*, 134 S. Ct. at 1433; *Wolens*, 513 U.S. at 234 (considered the "middle course" because Justice Stevens interpreted *Morales* to "demand only minimal preemption, but Justice O'Connor read the same case to mandate total preemption," so the Court in *Wolens* adopted a holding between the two).

appeases both the airlines and the states while actually making a significant expansion in the breadth of the ADA preemption provision.[50]

The true importance of this case does not rest in the legal analysis of the ADA preemption precedent but in the extension of the preemption provision to the common law and the unanimous decision made by the Court. While the Supreme Court had "little difficulty" applying the preemption provision to the common law, it is significant to note that this was the first time that the preemption provision was officially held to include the common law.[51] This decision was played down by the Court through labeling the common law issue as a sub-issue and instead focusing on the "central issue," whether the implied covenant claim was based on state-imposed obligation or voluntarily entered into by the parties. However, it is significant to note that the Ninth Circuit focused heavily on the application to the common law when making its decision.[52] Additionally, unlike the decisions in *Morales* and *Wolens*, the Supreme Court was unanimous in its holding of this case.[53] The unanimity of this holding is significant because the previous two cases were not only split decisions, but they also included long scathing dissents by more than one Justice as well as a concurrence in *Wolens*.[54] In conclusion, this case not only reaffirmed the breadth of the preemption provision unanimously but also extended it to the common law, which is a significant triumph for the airlines that rely on the protection of the ADA preemption provision.

The Court made three other statements that are also worth noting. First, the respondent in this case alleged that *Wolens* was not controlling because frequent flyer programs have "fundamentally changed" since the time of that decision, and the Court went on to acknowledge that most miles are now received through non-airline services and redeemed for services and

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[50] *See generally* Ann Morales Olazábal et al., *Frequent Flyer Programs: Empirically Assessing Consumers' Reasonable Expectations*, 51 AM. BUS. L.J. 175, 199 (2014) (discussing the "middle path" established by the ruling in *Wolens*).

[51] *See Ginsberg*, 134 S. Ct. at 1429; *see also* Ronald Mann, *Opinion Analysis: Justices Hold "Good Faith and Fair Dealing" Claim About Frequent-Flyer Program Preempted*, SCOTUSBLOG (Apr. 3, 2014, 5:30 PM), http://www.scotusblog.com/2014/04/argument-analysis-justices-hold-good-faith-and-fair-dealing-claim-about-frequent-flyer-program-preempted/.

[52] Ginsberg v. Northwest, Inc., 695 F.3d 873, 881–82 (9th Cir. 2012).

[53] *Ginsberg*, 134 S. Ct. at 1426; *Wolens*, 513 U.S. at 221; *Morales*, 504 U.S. at 375.

[54] *Wolens*, 513 U.S. at 235–51; *Morales*, 504 U.S. at 419–28.

products other than airline tickets, flights, and services.[55] The Court stated that while this was not the case in *Ginsberg* (so the Court did not address the issue), this change has the potential to impact future cases.[56] Second, and more noteworthy, the Court emphasized the general authority given to the Department of Transportation (DOT) to prohibit and punish unfair practices in air transportation and in the sale of air transportation, stating that the holding did "not leave participants in frequent flyer programs without protection."[57] This was in sharp contrast to the statement made in *Wolens* that "DOT has neither the authority nor the apparatus required to superintend a contract dispute resolution regime."[58] This difference highlights the change in DOT authority in the past twenty years since the *Wolens* holding in 1995. Lastly, the Court indicated that the respondent should have appealed his breach of contract claim because he could have presented the argument that his membership was ended for an "ulterior reason"; the Court implied that this claim would not have been preempted and he could have possibly prevailed.[59]

By focusing on and correctly applying the previous Supreme Court precedent in the area of ADA preemption, the Court attempted to draw attention away from the fact that this decision is noteworthy. While this case did not change the legal analysis set forth under *Morales* and *Wolens*, it did reaffirm the breadth of the ADA preemption provision. The extension to the common law and the newfound united front of the opinion are critical expansions of the authority of the ADA preemption provision and a tremendous setback to the autonomy of the states. This expansion is critical because ADA preemption has broad sweeping effects on the airline industry as a whole and will therefore affect the future of aviation law.

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[55] *Ginsberg*, 134 S. Ct. at 1431.
[56] *Id.*
[57] *Id.* at 1433; *see also* 49 U.S.C. § 41712(a) (2012)..
[58] *Wolens*, 513 U.S. at 232.
[59] *Ginsberg*, 134 S. Ct. at 1433.