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## BUMPING PASSENGERS—AIRLINE SERVICE THAT JUST DOESN'T FLY

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**I**N THE WORLD of air travel today, long waits, lost bags, and botched connections are commonplace. Indeed, modern-day air travelers are no strangers to poor airline service. But what truly counts as an airline's "service" of its customers? Specifically, is the practice of bumping passengers from a flight a "service" provided by an airline when the passengers are never able to actually board and travel on that flight? In *Weiss v. El Al Israel Airlines*, the Second Circuit addressed this issue, holding that bumping does in fact constitute a "service."<sup>1</sup>

Tobias and Gertrude Weiss were ticketed and confirmed passengers on an El Al Israel Airlines (El Al) flight from John F. Kennedy International Airport in New York City to Jerusalem, Israel.<sup>2</sup> Upon arrival at JFK, the Weisses learned that El Al had "bumped" them from their flight, "i.e., refus[ed] to seat them because of a full aircraft."<sup>3</sup> El Al subsequently placed the Weisses on a stand-by list and asked that they remain nearby should seats on an alternate El Al flight become available.<sup>4</sup> The Weisses remained at JFK on stand-by for two days, but were never able to board an El Al flight.<sup>5</sup> Instead, the Weisses obtained transport via an alternate airline and consequently were unable to use their El Al tickets.<sup>6</sup>

The Weisses brought an action for breach of contract and for tort damages in the federal district court for the Southern Dis-

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<sup>1</sup> 309 F. App'x 483, 485 (2d Cir. 2009).

<sup>2</sup> *Id.* at 484.

<sup>3</sup> *Id.*

<sup>4</sup> *Weiss v. El Al Israel Airlines*, 433 F. Supp. 2d 361, 363 (S.D.N.Y. 2006).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

tract of New York.<sup>7</sup> The critical issue before the court was whether or not bumping constituted a “service” from the airline to its passengers because all “services” are governed by the Airline Deregulation Act (ADA) and not state law.<sup>8</sup> The district court upheld the contract claim, finding that contract claims are not preempted by the ADA.<sup>9</sup> The court found that the ADA did preempt the Weisses’ tort claim, however, because the ADA specifically preempts actions relating to the “price, route, or service of [the] air carrier;” the term “services,” the district court opined, includes bumping.<sup>10</sup> Therefore, the Weisses’ tort claim was preempted by the ADA and dismissed.<sup>11</sup>

The Weisses then moved for reconsideration on the tort issue, alleging that because they were never actually passengers on an El Al flight, El Al’s actions did not constitute a “service,” and thus the two days of mistreatment they suffered fell outside the services preempted by the ADA.<sup>12</sup> The district court, however, upheld its ruling, opining that the Weisses’ new argument failed for two reasons: first, the new argument was not included in the original motion to dismiss, and second, despite the fact that the Weisses never attained passage on an El Al flight, the mistreatment the Weisses suffered was in fact connected to El Al’s “service.”<sup>13</sup> The district court was left to its own devices to make this determination because “neither the Supreme Court nor the Second Circuit had provided a definition for just what sorts of activities constituted airline services.”<sup>14</sup> Because of this lack of guidance, the district court instead utilized two methodologies created by district courts to determine that bumping is a “service.”<sup>15</sup> The first method “employs an ad hoc approach,” under which “courts examine the totality of the circumstances and determine whether the action at issue is commonly related to air travel.”<sup>16</sup> Using this methodology, the court found that, because bumping is, unfortunately, a “common occurrence,” El Al’s actions did constitute a service preempted by the ADA.<sup>17</sup> The sec-

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<sup>7</sup> *Id.* at 361.

<sup>8</sup> *Id.* at 369.

<sup>9</sup> *Id.* at 369–70.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 370.

<sup>12</sup> *Weiss v. El Al Israel Airlines*, 471 F. Supp. 2d 356, 358 (S.D.N.Y. 2006).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 359.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 360.

ond method consists of a three-part test created by District Judge Sotomayor in *Rombom v. United Air Lines, Inc.*<sup>18</sup> Under this test, courts must: “first determine whether the activity at issue in the claim is a service;” then, if the activity is a service, “the court must . . . ascertain whether the claim affects the airline service directly or tenuously, remotely, or peripherally;” and last “the [c]ourt must determine whether the underlying tortious conduct was reasonably necessary to the provision of the service.”<sup>19</sup> If any of these inquiries fails, the state tort claim may proceed.<sup>20</sup> Applying this methodology, the district court found that the Weisses’ claim passed each inquiry: first, El Al’s actions “were common and ordinary, and were therefore a service;” second, the Weisses’ claim goes “directly—not remotely or tenuously—to the poor treatment they received while the airline was rendering that service;” and third, “El Al’s alleged conduct was not sufficiently unreasonable so as to exempt plaintiffs’ claim from ADA preemption.”<sup>21</sup> Therefore, the Weisses’ claim was preempted by the ADA and the Weisses’ state law tort claim failed.<sup>22</sup> The Weisses then appealed the district court’s decision to the Second Circuit Court of Appeals, which affirmed the decision of the district court.<sup>23</sup>

The central issue before the Second Circuit was “whether or not El Al’s treatment of the Weisses related to El Al’s ‘service.’”<sup>24</sup> The court upheld the decision of the district court, finding that bumping was a “service” falling within the jurisdiction of the ADA.<sup>25</sup> The court primarily relied on its recent decision, *Air Transport Association of America, Inc. v. Cuomo* (ATA), in which the court constructed a broad definition of “services.”<sup>26</sup> The term “service,” the court held, refers to “the provision or anticipated provision of labor from the airline to its passengers” and can include instances that occur on the ground before or after the actual flight.<sup>27</sup> The ATA court found support in the Supreme Court decision, *Rowe v. New Hampshire Motor Transportation Association*, in which “the Court necessarily defined ‘ser-

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<sup>18</sup> *Id.* at 359.

<sup>19</sup> *Id.* at 361.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 358.

<sup>23</sup> *Weiss v. El Al Israel Airlines*, 309 F. App’x 483, 485 (2d Cir. 2009).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Air Transp. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008).

vice' to extend beyond prices, schedules, origins, and destinations."<sup>28</sup> Using the ATA court's broad definition of "services," the Second Circuit in *Weiss* concluded that because El Al's actions related "to the provision or anticipated provision of labor from the airline," . . . El Al's actions related to the airline's 'service,'" and the Weisses' claim was preempted by the ADA.<sup>29</sup>

In determining that bumping constituted a "service," the Second Circuit examined both the term's legislative history and how the term has been applied in other circuits. The court began its analysis by examining the preemptive language in the ADA.<sup>30</sup> Congress enacted the ADA to lower airline fares and to ensure better airline service to passengers.<sup>31</sup> To prevent state interference with this congressional intent, § 105 of the ADA includes preemptive language mandating that a State "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" and places "exclusive legislative and regulatory authority in the aviation context in the hands of the federal government."<sup>32</sup> Because the ADA does not provide a definition of "services," courts have promulgated both broad and narrow definitions of the term.

The Second Circuit first examined the narrow definitions of "services," which the Weisses cited to support their argument that "services" means only air transportation, not instances that occur on the ground before or after a flight, like bumping.<sup>33</sup> First, the Ninth Circuit, in *Charas v. Trans World Airlines, Inc.*, held that the term "services" pertains only to "the provision of air transportation to and from various markets at various times," because a more broad definition of the term would "ignore the context of [the term's] use [and] effectively would result in the preemption of virtually everything an airline does."<sup>34</sup> Congress "intended to insulate the [airline] industry from possible *state* economic regulation," not to "immunize the airlines from liability for personal injuries caused by their tortious conduct," the

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<sup>28</sup> *Id.* (citing *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 376, 128 S. Ct. 989, 998 (2008)).

<sup>29</sup> *Weiss*, 309 F. App'x at 485 (citing ATA, 520 F.3d at 223).

<sup>30</sup> *Id.*

<sup>31</sup> *Rowe*, 552 U.S. 364, 367 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992)).

<sup>32</sup> *Weiss v. El Al Airlines*, 433 F. Supp. 2d 361, 369 (S.D.N.Y. 2006) (citing Airline Deregulation Act 49 U.S.C. § 41713(b)(1) (2006) (emphasis added)).

<sup>33</sup> *Weiss*, 309 F. App'x at 485.

<sup>34</sup> 160 F.3d 1259, 1266 (9th Cir. 1998).

court noted.<sup>35</sup> Second, the Third Circuit found merit in the Ninth Circuit's reasoning and determined, in *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, that the proper inquiry to establish whether tort claims are preempted by the ADA "is whether a common law tort remedy frustrates deregulation by interfering with competition through public utility-style regulation."<sup>36</sup> The *Weiss* court was not persuaded by this case law, however, reasoning that using a narrow definition of "services" would ignore "Congress's 'overarching goal' of 'assuring that transportation rates, routes, and services reflected maximum reliance on competitive market forces.'"<sup>37</sup>

Instead, the court believed that congressional intent was better served by a more broad definition of "services," recognizing that a majority of the circuits have broadly defined the term "to 'refer to the provision or anticipated provision of labor from the airline to its passengers . . .'"<sup>38</sup> For example, the Fifth Circuit, in *Hodges v. Delta Airlines, Inc.*, defined "services" to "generally represent a bargained-for or anticipated provision of labor from one party to another."<sup>39</sup> Additionally, the Seventh Circuit, using the Fifth Circuit's definition of "services," held that tort claims relating to "airline rates, routes, or services can be preempted by the ADA."<sup>40</sup> Likewise, the Eleventh Circuit found that a "broader reading of th[e] term ['services'] is preferable," because the court could "perceive no textual justification for a more truncated reading of 'services,'" because "the ADA's preemption clause is properly afforded an extremely broad scope," and because concerns regarding the preemptive language's misapplication are misplaced.<sup>41</sup> The *Weiss* court concluded by noting that "the El Al actions challenged by the plaintiffs related 'to the provision or anticipated provision of labor from the airline,'" and although the practice of bumping is "notoriously maddening to passengers, [it] is a practice subject to competitive market forces."<sup>42</sup> The *Weisses'* tort claim was "thus preempted by section 105 of the ADA so that any limitations on the

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<sup>35</sup> *Id.*

<sup>36</sup> 164 F.3d 186, 194 (3d Cir. 1998).

<sup>37</sup> *Weiss*, 309 F. App'x at 485 (quoting *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 222–23 (2d Cir. 2008)).

<sup>38</sup> *Id.* (quoting *ATA*, 520 F.3d at 223).

<sup>39</sup> *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995).

<sup>40</sup> *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996).

<sup>41</sup> *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1257–58 (11th Cir. 2003).

<sup>42</sup> *Weiss*, 309 F. App'x at 485.

practice of which the plaintiffs complain must be imposed by the federal government and not the state.”<sup>43</sup>

The Second Circuit was correct to determine that bumping falls within the definition of “services” that are preempted by the ADA. However, where the Second Circuit fails is in the reasoning behind its conclusion that bumping constitutes a service. Rather than clearly defining “services” and establishing that bumping falls within that definition, the court stopped short and only necessarily defined services as being related “‘to the provision or anticipated provision of labor from the airline.’”<sup>44</sup> The problem with this definition is two-fold: first, though the definition of “services” should be broad, the definition promulgated by the Second Circuit is too broad; and second, the court’s definition of services does nothing to alleviate the ambiguity that has plagued the term’s application previously. Rather than constructing another broad definition that is subject to misinterpretation, the court in *Weiss* should have clearly defined “services” and laid out a methodology that future courts could utilize when applying the ADA’s preemptive language.

The definition of “services” promulgated by the Second Circuit in *Weiss* is too broad. Specifically, defining “services” as being related “‘to the provision or anticipated provision of labor from the airline’” is so broad that it can be extended to encompass instances that should not be subject to the ADA’s preemptive language.<sup>45</sup> Other circuits have recognized this problem; for example, in *Hodges*, an airline passenger’s claim for damages against an airline based on injuries she sustained when a case of rum fell from an overhead compartment and severely cut her arm was preempted by the ADA under an overly broad definition of services that was constructed by the court in a previous case.<sup>46</sup> The Fifth Circuit, deciding *Hodges*, recognized the fault in the overly broad definition of “services” and held that the airline’s negligent conduct should not be immunized by the ADA.<sup>47</sup> Consequently, the court overruled the previous case.<sup>48</sup> The broad definition of “services” constructed by the court in *Weiss* incurs the same problem as the old Fifth Circuit definition

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (citing *Air Transp. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008)).

<sup>45</sup> *Id.* (citing *ATA*, 520 F.3d at 223).

<sup>46</sup> *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

of the term. Simply defining “services” as instances related “to the provision or anticipated provision of labor from the airline” opens the term up to a multitude of applications and subjects the term to misapplication.<sup>49</sup> Instead, the Second Circuit should have clearly defined the term.

In addition to the risk of future misapplication, the *Weiss* court’s definition of services is flawed because it does nothing to alleviate the ambiguity that has historically plagued the term’s use. Rather than simply adding another vague definition to the already long list of vague definitions, the Second Circuit should have instead seized the opportunity to construct a clear methodology for future courts to employ when applying the ADA’s preemptive language. Even the district court deciding the same case stressed the need for a clear methodology, noting the “absence of direct guidance from the Supreme Court [and] the Court of Appeals,” necessarily leaves district courts to their own devices.<sup>50</sup> The Second Circuit should have heeded the request of the district court by adopting the methodology laid out in *Rombom*. The *Rombom* test lists three clear factors to determine whether or not an instance constitutes a “service” for the purposes of the ADA: first, courts must determine “whether the activity at issue in the claim is an airline service;” second, if the activity is a service, “the court must then determine whether the claim affects the airline service directly or tenuously, remotely, or peripherally;” and third, the court must determine “whether the underlying tortious conduct was reasonably necessary to the provision of the service.”<sup>51</sup> By implementing this methodology, the Second Circuit could have alleviated the ambiguity that has hindered the term “service’s” use, established a clear and accurate way for future courts to interpret the ADA’s preemptive language, and prevented future misapplication of the term “services.” Therefore, rather than broadly defining “services,” the Second Circuit in *Weiss* should have precisely defined the term by adopting the *Rombom* test.

For now, the term “service” will continue to be plagued by ambiguity. Courts grappling with the term’s meaning have often applied the *Rombom* test. Most recently, a district court applied the *Rombom* test and determined that an instance re-

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<sup>49</sup> *Weiss*, 309 F. App’x at 485 (citing *ATA*, 520 F.3d at 223).

<sup>50</sup> *Weiss v. El Al Israel Airlines*, 471 F. Supp. 2d 356, 359 (S.D.N.Y. 2006).

<sup>51</sup> *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 221–22 (S.D.N.Y. 1996).



garding carry-on baggage fell within the preempted services of the ADA because all inquiries of the *Rombom* test were met.<sup>52</sup> The need for clear methodology to determine what constitutes “services” is obvious; the time has come for circuit courts to alleviate the ambiguity.

The Second Circuit, in *Weiss v. El Al Israel Airlines*, held that the airline’s practice of bumping passengers from a flight did constitute a “service” that fell within the ADA’s preemptive language.<sup>53</sup> The court erred, however, by constructing an overly broad definition of services that may now be subject to misinterpretation and by missing an opportunity to clarify a term that has been plagued by ambiguity.<sup>54</sup> For now, because of the Second Circuit’s missed opportunity, what constitutes a “service” for the purposes of the ADA remains a mystery.

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<sup>52</sup> *Bary v. Delta Airlines, Inc.*, No. CV-02-5202, 2009 WL 3260499, at \*11 (E.D.N.Y. Oct. 9, 2009).

<sup>53</sup> *Weiss*, 309 F. App’x at 485.

<sup>54</sup> *Id.*