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Fly To London For \$298: The Battle between Federal and State Regulation of Airfare Advertising Heats Up

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“FLY TO LONDON FOR \$298”: THE BATTLE BETWEEN FEDERAL AND STATE REGULATION OF AIRFARE ADVERTISING HEATS UP

JONATHAN BLACKER

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I. INTRODUCTION

PERHAPS NO other issue in American politics has been as controversial as federal preemption of state law. The Founding Fathers did not think it was a problem; on the contrary, they

thought it was a solution.¹ As most constitutional law classes teach, preemption of state law provided the solution the Framers were searching for to replace the weak Articles of Confederation, especially in the area of a conflict between federal and state law.² Through the Supremacy Clause of the Constitution,³ the Founding Fathers provided for the supremacy of federal law over state law and created the necessary constitutional authority for federal preemption.⁴

A supreme federal power was essential to a coherent national government.⁵ It was also essential that the Framers maintain state autonomy.⁶ By allowing Congress to choose whether to preempt state law with federal legislation, the Framers gave Congress "the authority to balance . . . the competing interests of federal power and states' rights."⁷ Though the Framers provided for constitutional guidance with respect to preemption of state laws, preemption remains as controversial today as it was when the doctrine was created.

In general, the Supremacy Clause is designated as the authority for Congress to preempt state law.⁸ The Supremacy Clause provides that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."⁹ The clause was a result of a compromise between the Framers and the competing values of both a national government and local state governments.¹⁰ Its language has been interpreted to mean that state laws that "interfere with, or are contrary to the laws of Congress . . . must yield to it [federal laws and treaties]."¹¹ Simi-

¹ Philip H. Corboy & Todd A. Smith, *Federal Preemption of Product Liability Law: Federalism and the Theory of Implied Preemption*, 15 AM. J. TRIAL ADVOC. 435, 439 (1992).

² *Id.* at 439-40.

³ U.S. CONST. art. VI, cl. 2.

⁴ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

⁵ Susan B. Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429, 1432 (1984).

⁶ *Id.* at 1433.

⁷ *Id.*

⁸ Sanjoy K. Bose et al., *The Role of Federal Preemption in Administrative Law*, 45 ADMIN. L. REV. 107, 111 (Paula A. Sinozich ed., 1993).

⁹ U.S. CONST. art. VI, cl. 2.

¹⁰ Bose et al., *supra* note 8, at 111.

¹¹ *Gibbons*, 22 U.S. (9 Wheat.) at 211.

larly, *McCulloch v. Maryland*¹² held that state law is without effect when state and federal law conflict.¹³

Despite over 200 years of case law, exactly when federal law preempts state law is still a controversial question. The Supreme Court has consistently maintained that “‘[t]he purpose of Congress is the ultimate touchstone’ in determining if a state action is pre-empted by federal law.”¹⁴ The Court has explicitly listed three circumstances that support congressional intent to preempt state law.¹⁵ First, Congress can explicitly provide for preemption of state law in the language of the statute.¹⁶ Second, state law may be preempted when “it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.”¹⁷ This congressional intent may be inferred; but when the field Congress has preempted includes an area traditionally occupied by the states, congressional intent to supersede state laws must be “clear and manifest.”¹⁸ Finally, “state law is preempted to the extent that it actually conflicts with federal law,” such as when it is impossible for a party to comply with both federal and state law, or where state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹

To supplement these categories, the Supreme Court has shown that express statements of congressional intent are preferred because express preemption makes the “courts’ task . . . an easy one.”²⁰ While preemption remains a useful congressional tool, however, the Supreme Court has resisted expansion

¹² 17 U.S. (4 Wheat.) 316 (1819).

¹³ *Id.* at 427.

¹⁴ Corboy & Smith, *supra* note 1, at 444 (citing *Ingersoll-Rand Co. v. McClen-don*, 498 U.S. 133, 138 (1990), *quoting* *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987), *quoting* *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963); *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284 (1987), *quoting* *Schermerhorn*, 375 U.S. at 103; *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985), *quoting* *Schermerhorn*, 375 U.S. at 103); *see also* Donald T. Bliss, *Supreme Court Preemption Analysis: Differentiating the Hamiltonians and Jeffersonians*, 40 FED. B. NEWS & J. 84 (1993).

¹⁵ Corboy & Smith, *supra* note 1, at 444-45.

¹⁶ *Id.* at 444 (citing *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)).

¹⁷ *Id.* (citing *English*, 496 U.S. at 72, *quoting* *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

¹⁸ *Id.* (citing *English*, 496 U.S. at 72, *quoting* *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

¹⁹ *Id.* (citing *English*, 496 U.S. at 72, *quoting* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²⁰ *Id.* (citing *English*, 496 U.S. at 79).

of the categories of preemption.²¹ In response, state regulations governing various activities have increased. Included among these state regulations are state consumer protection statutes.

In general, this Comment discusses federal preemption of state consumer protection laws in the area of airfare advertising. The evolution of this subject can generally be traced back to the "airfare wars" that began after the deregulation of the airline industry. With the airline industry wide open, many airlines began to advertise bargain fares in a number of national newspapers. In addition, frequent flyer programs came into existence, usually advertised as heavily as the discount fares.

In conjunction with the "consumer movement,"²² states began to monitor these airline advertisements closely after numerous complaints from consumers. For example, though it gives the "price" of the discount ticket, an airfare advertisement fails to mention various taxes, surcharges, and restrictions imposed on the "discount" ticket.²³

This tension between the airlines and consumers resulted in numerous lawsuits brought by various attorneys general against the airlines charging them with violations of the states' consumer protection laws.²⁴ The airlines responded by alleging that these actions were preempted by federal law.²⁵ Thus, the stage was set for the battle between the states and the airlines, with the question of federal preemption being the central issue.

This Comment examines the history of federal regulation of the airline industry and how federal regulation has progressed to the point of preempting state law. The next Part analyzes current statutory and case law that has impacted this area. Finally, this Comment concludes with a discussion of possible ramifications of the Supreme Court decisions as well as an analysis of the possible future of airline advertising regulations, the aviation industry, and federal preemption.

II. OVERVIEW OF STATE CONSUMER PROTECTION LAWS

Beginning in the 1960s, states realized that an increasingly sophisticated marketplace was going to cause problems for the av-

²¹ *English*, 496 U.S. at 72.

²² See generally *infra* Part II.

²³ See, e.g., *infra* notes 120 & 128 and accompanying text.

²⁴ See *infra* subpart IV.B and accompanying text.

²⁵ See *infra* subpart IV.B and accompanying text.

erage consumer.²⁶ Specifically, deceptive practices were becoming an increasing problem as sales transactions were becoming more impersonal and products were being perceived as being less reliable.²⁷ These problems led to the rise of the "consumer movement" with states passing statutes to protect consumers from unfair and deceptive practices.²⁸

To combat the problem, a number of generic "model" laws were proposed to equalize the consumer's position in the sales transaction.²⁹ These included the Uniform Deceptive Trade Practices Act (UDTPA), the Uniform Consumer Sales Practices Act (UCSPA), and the Unfair Trade Practices and Consumer Protection Act (UTP-CPA).³⁰

The UDTPA prohibited eleven specific trade practices, including "bait and switch" tactics, false or misleading price comparisons, and misrepresentations of the origins, standards, and quality of goods.³¹ Additionally, the Act had a "catch-all" provision for "conduct which similarly creates a likelihood of confusion or of misunderstanding."³² States that have used the UDTPA as the basis for their consumer protection laws³³ have generally expanded its scope.³⁴

The UCSPA was enacted to provide sellers with more predictable standards for their conduct and to protect consumers against deceptive and unconscionable sales practices.³⁵ The UCSPA was basically an attempt to "modernize" consumer sales practices, to require fairness in sales practices, to make state laws on consumer sales practice uniform, and to conform state requirements to Federal Trade Commission (FTC) policies.³⁶ Kansas, Ohio, and Utah have used the UCSPA as a basis for their consumer statutes.³⁷

²⁶ Albert N. Sheldon & Stephen Gardner, *A Truncated Overview of State Consumer Protection Laws*, C888 A.L.I.-A.B.A. 375, 380 (1994).

²⁷ *Id.* at 378, 380.

²⁸ Michael F. Brockmeyer, *State Consumer Protection Acts: An Overview*, C401 A.L.I.-A.B.A. 299 (1989).

²⁹ Sheldon & Gardner, *supra* note 26, at 380.

³⁰ *Id.* at 381.

³¹ Brockmeyer, *supra* note 28, at 302.

³² *Id.*

³³ These states include: Colorado, Delaware, Georgia, Hawaii, Illinois, Maine, Minnesota, Nebraska, Nevada, New Mexico, Oklahoma, and Oregon. *Id.*

³⁴ *Id.*

³⁵ Sheldon & Gardner, *supra* note 26, at 381.

³⁶ *Id.*

³⁷ Brockmeyer, *supra* note 28, at 303.

Perhaps the most influential of the model acts was the UTP-CPA. The UTP-CPA provides for three variations in its prohibition of deceptive practices.³⁸ First, the UTP-CPA follows the language of section 5 of the Federal Trade Commission Act that prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.³⁹ Approximately twelve states utilize this first alternative as a basis for their consumer protection laws.⁴⁰ The second alternative prohibits "false, misleading, or deceptive acts or practices in the conduct of any trade or commerce."⁴¹ Although no state law mirrors the second alternative, Alabama, Idaho, and Texas have statutes consisting of a hybrid of alternatives two and three.⁴² Finally, under alternative three, the definition of "unlawful conduct" includes twelve specific illegal acts relating primarily to false advertising and also prohibits any act that is unfair or deceptive to the consumer.⁴³ Approximately seven states utilize alternative three.⁴⁴

In recent years, states have begun to amend their consumer protection statutes to address specific problem areas. Problem areas that have been addressed by states include: "lemon laws,"⁴⁵ door-to-door solicitations,⁴⁶ health club contracts,⁴⁷ pyramid schemes,⁴⁸ and odometer fraud.⁴⁹

In addition to these problem-specific laws, states have begun to focus on advertising in an attempt to eliminate false and de-

³⁸ Shelden & Gardner, *supra* note 26, at 383.

³⁹ Brockmeyer, *supra* note 28, at 304.

⁴⁰ *Id.* These states include: Connecticut, Florida, Hawaii, Louisiana, Maine, Massachusetts, Montana, North Carolina, South Carolina, Vermont, Washington, and West Virginia.

⁴¹ *Id.*

⁴² *Id.* at 304-05.

⁴³ *Id.* at 305; *see also* Shelden & Gardner, *supra* note 26, at 383-84.

⁴⁴ These states include: Alaska, Maryland, Mississippi, New Hampshire, Pennsylvania, Rhode Island, and Tennessee. Brockmeyer, *supra* note 28, at 304.

⁴⁵ *See, e.g.*, MD. CODE ANN., COM. LAW II §§ 14-1501 to 14-1504 (1990 & Supp. 1994); MO. ANN. STAT. §§ 407.560-583 (Vernon 1990 & Supp. 1995).

⁴⁶ *See, e.g.*, FLA. STAT. ANN. §§ 501.021-022 (West 1988 & Supp. 1995); OR. REV. STAT. §§ 83.710-.750 (1993).

⁴⁷ *See, e.g.*, CAL. CIV. CODE §§ 1812.80-95 (West 1985); WIS. STAT. § 134.70 (1989 & Supp. 1994).

⁴⁸ *See, e.g.*, DEL. CODE ANN. tit. 6, §§ 2561-2564 (1993); MO. ANN. STAT. §§ 407.400-420 (Vernon 1990 & Supp. 1995); *see also* People *ex rel.* Fahner v. Walsh, 461 N.E.2d 78, 82 (1984) (holding pyramid scheme inherently violative of state consumer fraud law).

⁴⁹ *See, e.g.*, MINN. STAT. ANN. §§ 325E.13-.16 (West 1995); MO. ANN. STAT. § 407.511-.556 (Vernon 1990 & Supp. 1995).

ceptive advertising claims. General deceptive practices have also been targeted. Examples of categories of activity that violate states' consumer protection acts are: misrepresentations or non-disclosure of material facts,⁵⁰ unsubstantiated advertising claims,⁵¹ and deceptive advertising and pricing claims.⁵²

To supplement their laws, states have also begun to give their respective attorneys general "broad rule-making, investigatory, and prosecutorial authority."⁵³ Approximately thirty-five states give their attorneys general rule-making power by allowing them to promulgate rules and regulations.⁵⁴ Additionally, certain states provide that the regulations have the force of law,⁵⁵ and that a violation of a regulation is *prima facie* evidence of a violation of the act.⁵⁶ Further, as part of the investigatory powers given to the attorneys general, some states permit the attorney general to issue a civil investigative demand to gain access to documents or obtain relevant testimony.⁵⁷ Overall, these consumer protection acts have given the attorneys general powers to ensure that consumers are not being misled in transactions with sellers.

In conjunction with state regulation, federal "model" laws have been passed regulating seller-consumer transactions.⁵⁸ As mentioned above, many of these model laws target false and de-

⁵⁰ Brockmeyer, *supra* note 28, at 308 (citing *State ex rel. Ashcroft v. Marketing Unlimited of Am., Inc.*, 613 S.W.2d 440, 445-47 (Mo. Ct. App. 1981) (holding a violation occurred when a seller used a fictitious name)); *see also* Pennington v. Singleton, 606 S.W.2d 682, 687 (Tex. 1980) (misrepresentation of condition of boat violated state consumer protection law).

⁵¹ Brockmeyer, *supra* note 28, at 308 (citing *Consumer Protection Div. v. Consumer Publishing Co.*, 501 A.2d 48, 53 (1985) (ordering a company to cease selling diet pills with the claims that the user will lose weight merely by taking the pill and that the effectiveness of the pill had been scientifically and clinically tested when it had not)).

⁵² *Id.* at 309 (citing *State Kidwell v. Master Distrib., Inc.*, 615 P.2d 116, 121-22 (Idaho 1980) (holding that deception existed when an advertisement offered discount prices from reference prices at which no sales had occurred and when the "discount" prices were the seller's regular prices)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Shelden & Gardner, *supra* note 26, at 387; *see also* MD. CODE ANN., COM. LAW II §§ 13-205 (1990).

⁵⁶ Shelden & Gardner, *supra* note 26, at 387. *See also* ME. REV. STAT. ANN. tit. 5, § 207(2) (West 1989).

⁵⁷ *Id.*; *see also* MD. CODE ANN., COM. LAW II §§ 13-405 (1990); N.Y. EXEC. LAW § 63(12) (McKinney 1993); TEX. BUS. & COM. CODE ANN. §§ 17.60-.61 (Vernon 1987 & Supp. 1995).

⁵⁸ *See supra* notes 29-30 and accompanying text.

ceptive advertising.⁵⁹ Recently, however, many national advertisers have begun to attack state consumer laws and enforcement statutes using preemption as their sword. The advertisers' theory is that they are " 'national' advertisers and therefore not subject to state enforcement action, but only the rules and regulations of the federal government."⁶⁰ This argument, however, usually fails.⁶¹

The reason the argument by the advertisers usually fails is that protection of consumers from unfair and unlawful practices is an area traditionally regulated by the states under their police powers.⁶² The Supreme Court has recognized that " 'neither logic nor precedent' leads to a distinction between the state's ability to protect the health and safety of its citizens and the state's ability to 'prevent the deception of consumers.' "⁶³ Additionally, "[w]hen dealing with areas traditionally within a state's police powers, those arguing for preemption 'must overcome the presumption against finding preemption of state law in areas traditionally regulated by the states.' "⁶⁴

Actions against sellers are not being brought solely by the attorneys general of the states. There appears to be a rise in the number of suits brought by private litigants to enforce state consumer protection laws.⁶⁵ The reason appears to be that some of the new consumer statutes allow prevailing consumers to recover attorneys' fees and costs.⁶⁶ But to prevent the filing of an unmanageable number of private suits, some of the acts require that a consumer suffer actual damages before bringing an action.⁶⁷

The effect of the federal "model" laws and the state consumer protection laws is clear. Sellers must be careful of the practices they engage in because there are numerous watchdog groups who closely monitor the situation. Further, and on a much smaller level, advertising is now being examined with the prover-

⁵⁹ See, e.g., *supra* notes 39-45 and accompanying text.

⁶⁰ Shelden & Gardner, *supra* note 26, at 389.

⁶¹ *Id.*

⁶² *Id.*; see also *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 146 (1963).

⁶³ Shelden & Gardner, *supra* note 26, at 390 (citing *Florida Lime & Avocado Growers*, 373 U.S. at 146).

⁶⁴ *Id.* (citing *ARC Am. Corp.*, 490 U.S. at 101).

⁶⁵ *Id.* at 391.

⁶⁶ *Id.*; see CAL. CIV. CODE § 1780 (West 1985 & Supp. 1995); TEX. BUS. & COM. CODE § 17.50 (Vernon 1987 & Supp. 1995).

⁶⁷ Shelden & Gardner, *supra* note 26, at 391.

bial "fine tooth comb." Not only do watchdog groups monitor various advertisements, but consumers, aware of their respective state consumer protection laws, now have a private cause of action against companies and national advertisers.

III. HISTORICAL OVERVIEW OF FEDERAL REGULATION OF THE AIRLINE INDUSTRY

A. CIVIL AERONAUTICS ACT OF 1938

"Airplanes 'move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.'"⁶⁸ This complex system of federal controls over the aviation industry began when Congress passed the Air Commerce Act of 1926⁶⁹ (the 1926 Act). The 1926 Act authorized the Secretary of Commerce to regulate both the design of aircraft and the materials and methods used in their construction.⁷⁰

The 1926 Act was repealed by the Civil Aeronautics Act of 1938⁷¹ (the 1938 Act), which extended federal jurisdiction over air commerce primarily through the use of Congress' Commerce Clause powers. As part of the 1938 Act, the Civil Aeronautics Authority was created, which was later changed to the Civil Aeronautics Board (CAB) in 1940.⁷² In general, the CAB was charged with the "regulation of commercial aviation."⁷³ The 1938 Act also contained a savings clause which stated that the Act would not "abridge or alter the remedies now existing at

⁶⁸ Daniel Petroski, *Airlines' Response to the DTPA Section 1305 Preemption*, 56 J. AIR L. & COM. 125, 125 (1990) (citing *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 172 (1st Cir. 1989), quoting *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring)).

⁶⁹ Air Commerce Act of 1926, ch. 344, 44 Stat. 568, repealed by Civil Aeronautics Act of 1938, ch. 601, § 1107, 52 Stat. 973.

⁷⁰ *Id.* at 569.

⁷¹ Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973, repealed by Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1401(b), 72 Stat. 731 (codified at 49 U.S.C. §§ 1301-1557 (1988)); see also Lance M. Harvey, Note, *Cleveland v. Piper Aircraft Corp., The Tenth Circuit Holds that the Federal Aviation Act of 1958 Does Not Preempt State Common Law Claims for Negligent Design*, 46 BAYLOR L. REV. 485 (1994); Stuart J. Starry, *Torts at Twenty Thousand Feet: Federal Preemption in Commercial Aviation*, 23 FALL BRIEF—A.B.A. SEC. TORT & INS. PRAC. 8 (1993).

⁷² Harvey, *supra* note 71, at 485; see also *Hughes Air Corp. v. Public Utils. Comm'n*, 644 F.2d 1334, 1336 (9th Cir. 1981).

⁷³ Harvey, *supra* note 71, at 485.

common law or by statute, but that the provisions of this Act would be in addition to such remedies."⁷⁴ As used in the 1938 Act, the savings clause does not restrict common law or previously existing remedies available to a plaintiff. This savings clause is important because it is the authority the states rely on when regulating the conduct of airlines.

B. FEDERAL AVIATION ACT OF 1958

Subsequent to the 1938 Act, the Federal Aviation Act of 1958⁷⁵ (the 1958 Act) was passed. The 1958 Act repealed the 1938 Act, but it retained the CAB from the 1938 Act⁷⁶ and created the Federal Aviation Agency (FAA).⁷⁷ In addition, the 1958 Act divided the responsibility of regulating aviation into two components: the FAA was responsible for flight safety; the CAB was responsible for economic regulation.⁷⁸

With the creation of the FAA, the government finally had an agency whose sole responsibility was the governing of aviation safety.⁷⁹ Additional responsibilities of the FAA include: certification of airplanes, pilots, and mechanics; the establishment of aircraft maintenance requirements; and the establishment of a national system of airways for both civil and military aircraft.⁸⁰ Thus the federal government "bears virtually complete responsibility for the promotion and supervision of [the airline] industry in the public interest."⁸¹ Finally, the 1958 Act retained the savings clause from the 1938 Act, giving the states continued common law and statutory remedies for both airline negligence and false advertising claims.⁸²

⁷⁴ Civil Aeronautics Act of 1938, 49 U.S.C. § 1106, 52 Stat. 973, 1027; *see also* Harvey, *supra* note 71, at 8. In general, a savings clause is defined as "a clause in a statute restricting the scope of the repeal of prior statutes"; additionally, it is "language inserted in a statute to maintain the force of the law repealed as to existing rights." BARRON'S LAW DICTIONARY 432 (3d ed. 1991).

⁷⁵ Pub. L. No. 85-726, 72 Stat. 731 (codified at 49 U.S.C. §§ 1301-1557 (1988)).

⁷⁶ *See, e.g.*, 49 U.S.C. § 1324 (1988).

⁷⁷ *See, e.g.*, 49 U.S.C. § 1341 (1988).

⁷⁸ 49 U.S.C. app. §§ 1324, 1341-1359 (1988).

⁷⁹ Harvey, *supra* note 71, at 487.

⁸⁰ *Id.* at 487-88.

⁸¹ *Id.* at 488 (citing S. REP. NO. 1811, 85th Cong., 2d Sess. 5 (1958)).

⁸² Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1106, 72 Stat. 731 (codified at 49 U.S.C. app. § 1506 (1988 & Supp. V 1993)).

C. AIRLINE DEREGULATION ACT OF 1978

Twenty years after the passage of the 1958 Act, the economic conditions of the commercial airline industry dictated that the strict regulation of the industry needed to be lessened. Congress responded with the passage of the Airline Deregulation Act of 1978⁸³ (the ADA). The ADA was an attempt by Congress to develop an air transportation system that "relies on competitive market forces to determine the quality, variety, and price of airline services."⁸⁴

With Congress viewing the adoption of the ADA as "overhaul[ing] the aviation regulatory system,"⁸⁵ the commercial aviation industry was basically transformed overnight into a deregulated industry. Included in this transformation was the dismantling of the CAB and its oversight of the aviation industry.⁸⁶ Prior to the enactment of the ADA, the CAB possessed the authority to set interstate rates⁸⁷ and to take action against the airlines for deceptive trade practices.⁸⁸

With the airline industry now wide open due to deregulation, issues such as prices, routes, and services became extremely competitive. Commercial airlines were now free to set their own rates, and the competition to attract the flying public became intense. An offshoot of deregulation was the aptly named "airfare wars," the various frequent flyer programs, and the heavy advertising many of the airlines began to run.⁸⁹

With the airlines trying to attract more consumers, advertising became the primary means of attracting the target consumer.⁹⁰ In this battle to gain customers, many airlines began to use allegedly deceptive advertising techniques.⁹¹ It is these allegedly de-

⁸³ Pub. L. No. 95-504, 92 Stat. 1705.

⁸⁴ Stuart J. Starry, *Federal Preemption in Commercial Aviation: Tort Litigation Under 49 U.S.C. Section 1305*, 58 J. AIR L. & COM. 657 (1993) (citing Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705).

⁸⁵ H.R. CONF. REP. NO. 1779, 95th Cong., 2d Sess. 53 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3773, 3774.

⁸⁶ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

⁸⁷ *Id.*

⁸⁸ *Id.*; *see also* H.R. REP. NO. 793, 98th Cong. 2d Sess. 3-4 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2857, 2860.

⁸⁹ *See, e.g., infra* note 120.

⁹⁰ *See* Eric W. Maclure, *Morales v. Trans World Airlines, Inc.: Federal Preemption Provision Clips States' Wings On Regulation of Air Fare Advertising*, 71 N.C. L. REV. 905, 907-08 (1993) (discussing attempt by National Association of Attorneys General to enforce state laws relating to deceptive advertising).

⁹¹ *Id.*; *see also infra* note 128 and accompanying text.

ceptive practices and the states' response to them that is the focus of this Comment.

Although the ADA effectively dismantled the regulatory oversight previously enjoyed by the federal government, it did not repeal the savings clause promulgated in the 1938 and 1958 Acts.⁹² Congress, in order to prevent the states from stepping into the shoes of the federal government and "filling the regulatory void created by the [ADA],"⁹³ enacted a federal preemption provision at section 105 of the ADA.⁹⁴

The preemption provision reads, in pertinent part, "[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 that may provide air transportation under this subpart."⁹⁵ Because almost any type of lawsuit can have a regulatory effect on airline conduct, some courts have interpreted this preemption provision to mean that all state common law claims are preempted so long as they relate to the prices, routes, or services of an airline.⁹⁶

As demonstrated below, there is an inherent conflict between the preemption provision and the savings clause left untouched by the ADA. The savings clause allows for existing common law and statutory remedies, while the preemption provision of the ADA seemingly preempts claims that relate to prices, routes, or services of an airline. Further, because the language of the preemption provision has been interpreted so broadly,⁹⁷ states have had a difficult time trying to enforce their consumer protection laws against the airlines.⁹⁸

D. 1984 CAB SUNSET ACT

The final link in the chain of federal regulation of the airline industry is arguably the CAB Sunset Act of 1984⁹⁹ (Sunset Act). In general, the Sunset Act terminated or transferred the remain-

⁹² Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705.

⁹³ Starry, *supra* note 71, at 8.

⁹⁴ Airline Deregulation Act of 1978, 49 U.S.C. § 105, 92 Stat. 1705, 1708 (codified at 49 U.S.C. § 1305 (1988)).

⁹⁵ 49 U.S.C. § 41713 (1995). This provision was recodified in 1994 as part of the congressional revision of Title 49, dealing with transportation. See *infra* subpart III.E for a discussion of this recodification and its impact.

⁹⁶ Starry, *supra* note 84, at 657; see also *infra* Part IV.

⁹⁷ See generally Maclure, *supra* note 90; Starry, *supra* note 84.

⁹⁸ See *infra* Part IV.

⁹⁹ Pub. L. No. 98-443, 98 Stat. 1703 (1984).

ing functions of the CAB to the Department of Transportation (DOT).¹⁰⁰ The Sunset Act did not make substantive changes in either the savings clause or the preemption provision.¹⁰¹ The legislative history of the Sunset Act shows that the authority to protect consumers and to prevent unfair competitive practices should be exercised by the DOT.¹⁰²

Thus the structure of the agencies that govern the commercial aviation industry is as follows: the authority over the industry regarding unfair and deceptive practices generally belongs to the DOT; states are preempted by federal law if the regulation or lawsuit concerns prices, routes, or services; and while there is a savings clause that permits existing common law and statutory remedies, it does not seem to replace the preemption provision in the eyes of the various courts that have dealt with the conflict between the two provisions.

E. 1994 REVISION OF TITLE 49

In 1994, Congress undertook the daunting task of revising Title 49 of the United States Code, which primarily deals with transportation issues.¹⁰³ The purpose of this revision of Title 49 was to "revise, codify, and enact without substantive change certain general and permanent laws, related to transportation."¹⁰⁴ This recodification changed the section numbers from the previous acts. The preemption provision previously discussed has been changed from 49 U.S.C. section 1305 to 49 U.S.C. section 41713(b).¹⁰⁵ Additionally, the savings clause is now codified at 49 U.S.C. section 40120(c), changed from 49 U.S.C. section 1506.¹⁰⁶ It now provides that "a remedy under this part is in

¹⁰⁰ *Id.*; see also *TWA v. Mattox*, 897 F.2d 773, 777 (5th Cir. 1990), *aff'd*, 504 U.S. 374 (1992).

¹⁰¹ *Id.* at 778.

¹⁰² H.R. REP. NO. 793, 99th Cong., 2d Sess. 4-6 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2857, 2860-62. On the topic of federal regulations and preemption of state law, the report states that "federal regulation insures a uniform system of regulation by the states. If there was no Federal regulation . . . the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." *Id.* at 2860. Further, the report states that "the Department of Transportation is the most appropriate agency to administer CAB's consumer protection and unfair competitive practice authorities." *Id.* at 2862.

¹⁰³ Revision of Title 49 U.S.C., "Transportation", Pub. L. No. 103-272, 108 Stat. 745 (1994).

¹⁰⁴ *Id.*

¹⁰⁵ See disposition table at the beginning of revised Title 49.

¹⁰⁶ *Id.*

addition to any other remedies provided by law."¹⁰⁷ Other provisions have been changed as well.¹⁰⁸

IV. CURRENT STATUTORY AND CASE LAW INTERPRETING THE PREEMPTION LANGUAGE

A. STATUTORY LAW

1. 49 U.S.C. section 41713(b)

As mentioned above, the statutory grant of power to the federal government to preempt state law claims is located in Title 49, section 41713(b) of the United States Code.¹⁰⁹ This section gives the federal government the power to preempt state law claims relating to the prices, routes, or services of an air carrier.

2. 49 U.S.C. section 40120

Providing the needed authority for the state law claims (and thus giving rise to the tension discussed in this Comment) is the savings clause located in Title 49, section 40120 of the United States Code. This section provides for additional remedies along with those provided by common law.¹¹⁰ The savings clause is in direct conflict with the preemption clause because it provides for additional common law and statutory remedies other than those provided in the acts while the preemption clause preempts state claims granted by the savings clause. As discussed below, courts have had a difficult time reconciling these two sections.

B. CASE LAW

The case law that has interpreted the language of the preemption provision is perhaps an even better source for preemption than the actual statutes. The focus of many of the court deci-

¹⁰⁷ 49 U.S.C. § 40120(c) (1995).

¹⁰⁸ For a complete disposition of Title 49 sections and their new numbers, see the disposition table at the beginning of Title 49. For purposes of this Comment, the references to the provisions detailed above will be given in the revised section numbers. Nevertheless, in footnotes and to the extent needed in other areas, references will be given to both the revised section numbers and the section numbers as they existed before congressional recodification. Finally, because the codification was enacted "without substantive change," references to legislative history will be from both pre-codification and post-codification sources. *See supra* notes 103-07 and accompanying text.

¹⁰⁹ *See supra* notes 94-96 and accompanying text.

¹¹⁰ *See supra* note 74 and accompanying text.

sions has centered on the language of the preemption clause and just how broadly it should be interpreted.

1. *Pre-Morales Case Law*

*People v. Western Airlines, Inc.*¹¹¹ was decided prior to the termination of the Civil Aeronautics Board (CAB). In *Western Airlines* the state of California sued the defendant airlines for allegedly violating unfair competition and false advertising statutes¹¹² by making misleading statements implying fare savings in advertising fare promotions. In its defense the airline asserted that the state claim was preempted under Title 49, section 1305 (now section 41713) of the United States Code. In addition, the airline asserted that the claim violated the Commerce Clause of the United States Constitution, and that the Civil Aeronautics Board had primary jurisdiction over deceptive advertising complaints and, therefore, the court lacked subject matter jurisdiction.

The Superior Court of San Diego County, ruling in favor of the defendants, held that the complaint was preempted by federal law.¹¹³ After a discussion of the general language of sections 1305 (the preemption provision) and 1506 (the savings clause), the court went on to discuss whether the claim was preempted. The court stated that although the CAB had the power, in the public interest, to regulate unfair competition and deceptive practices by interstate air carriers, "nothing in the Federal Aviation Program suggests by granting the Board such authority Congress intended to prevent states from also regulating deceptive advertising practices by interstate air carriers."¹¹⁴

The court went further and found that California's enforcement of its false advertising statutes did not impede Congress' objectives in enforcing its Federal Aviation Program.¹¹⁵ Additionally, the court relied on the section 1506 savings clause (now 49 U.S.C.A. section 40120) and observed that, because the savings clause preserves existing common law and statutory remedies while providing additional remedies, "state regulation of interstate air carriers is preempted only where the federal and state regulatory schemes conflict irreconcilably."¹¹⁶ Finally, the

¹¹¹ 202 Cal. Rptr. 237 (Cal. Ct. App. 1984), *cert. denied*, 469 U.S. 1132 (1985).

¹¹² For a discussion of California's false advertising and unfair competition statutes, see *infra* notes 119-20 and accompanying text.

¹¹³ *Western Airlines*, 202 Cal. Rptr. at 238.

¹¹⁴ *Id.* at 239.

¹¹⁵ *Id.*

¹¹⁶ *Id.* (citing *Nader v. Allegheny Airlines, Inc.* 426 U.S. 290, 299 (1976)).

court addressed the defendant airline's Commerce Clause argument. It held that California's false advertising statute did not, as a matter of law, discriminate against air carriers engaged in interstate air commerce or impinge upon an area of commerce requiring uniform regulation.¹¹⁷

The *Western Airlines* case was the first in a series of cases addressing federal preemption of state consumer protection laws. The court relied on the strict language of the federal statute giving the CAB power to regulate air carrier deceptive practices. The court noted, however, that the federal power was not an exclusive power; rather, it was concurrent with the state's power to regulate air carriers. Thus, the groundwork was set for other courts to find that the state law claims are not preempted.

The next in the series of cases that dealt with the subject of federal preemption of state consumer protection laws was *California v. Trans World Airlines*.¹¹⁸ In this case, the state of California sued the defendant airline alleging that its advertising violated the state consumer protection law.¹¹⁹ The plaintiff alleged that, in the course of advertising and selling passenger travel, the defendant airline violated various sections of the California Business and Professional Code.¹²⁰ The plaintiff originally filed suit in state court; the defendant removed the case to federal court on the basis of federal question jurisdiction, and the federal court was to decide if the case was to be heard in the state or the federal court.

The court held that the plaintiff could not bring an action under the Federal Aviation Act to enjoin the airline advertising

¹¹⁷ *Id.* at 239-40.

¹¹⁸ 720 F. Supp. 826 (S.D. Cal. 1989).

¹¹⁹ California's consumer protection statute provides:

It is unlawful for any person, firm, corporation, or association . . . to induce the public to enter into any obligation . . . to make or disseminate or cause to be made or disseminated before the public . . . in any newspaper or other publication, or any advertising device . . . any statement . . . which is untrue or misleading

CAL. BUS. & PROF. CODE § 17500 (West 1994). The statute also provides that it is unlawful for any person, firm, corporation, or association "to make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme . . . not to sell such personal property or services . . . so advertised at the price stated therein, or as so advertised." *Id.*

¹²⁰ The defendant's ad advertised in large print a fare of \$219 to London. In much smaller print, the ad stated that the price was "each way based on round-trip purchase." *California*, 720 F. Supp. at 827. In addition, in even smaller print, the ad stated that the fare did "not include \$23 U.S. departure tax, security surcharges, federal inspection fees, and other gov't taxes." *Id.*

because only the administrator of the FAA may institute a civil action against an airline for a violation of the statute.¹²¹ The court additionally held that even if federal law did preempt state regulation of airline advertising, because the Federal Aviation Act gave the plaintiff no cause of action, the plaintiff could nevertheless bring suit to enforce its alleged right in state court.¹²² In finding that it did not have subject matter jurisdiction, the federal court remanded the case to the state court.¹²³

The key to whether federal law preempts state law has always been both statutory intent and the language used.¹²⁴ In holding that federal law did not preempt the state law claim, it appears that the federal court took a very narrow reading of the statutory language, similar to the reading taken in the *Western Airlines*.

In a case decided one month after *California v. Trans World Airlines*, a New York district court faced facts similar to *California* and reached a similar decision. In *New York v. Trans World Airlines*¹²⁵ the state of New York, in a suit related to the California case,¹²⁶ sued the defendant airlines alleging a violation of the state deceptive advertising laws.¹²⁷ The advertisement was similar to the *California* advertisement.¹²⁸

¹²¹ *Id.* at 828. The subsequently revised statute used by the court in its analysis is codified at 49 U.S.C. § 1471 (1988 & Supp. V 1993).

¹²² *California*, 720 F. Supp. at 828.

¹²³ *Id.* at 829.

¹²⁴ See *supra* notes 14-19 and accompanying text.

¹²⁵ 728 F. Supp. 162 (S.D.N.Y. 1989).

¹²⁶ The suits brought by both California and New York relate to a letter written by the Texas attorney general to various airlines alleging violations of the respective state consumer protection laws. For a full discussion of the actions initiated by the Texas attorney general, see *infra* subpart IV.B.2 and accompanying text.

¹²⁷ New York law gives the attorney general the power to apply for an order enjoining a person or business from continuing "fraudulent or illegal acts." N.Y. EXEC. LAW § 63(12) (McKinney 1993). The statute goes on to define fraud as including "any device, scheme or artifice to defraud and any deception, misrepresentation, concealment . . . false promise or unconscionable contractual provisions." *Id.* Additionally, "false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this state is hereby declared unlawful." N.Y. GEN. BUS. LAW § 350 (McKinney 1988). Finally, section 350-a of New York's General Business Law Code defines false advertising in great detail. The section states that "false advertising means advertising . . . misleading in a material respect." In determining if an advertisement is misleading, "the extent to which the advertising fails to reveal facts material . . . under such conditions as are customary or usual." *Id.*

¹²⁸ The advertisement at issue was dated September 14, 1988, and was located in the *New York Times*. It read: "London Roundtrip + Hotel + Car = \$298." This dollar figure implied that a consumer could travel to London, stay in a hotel, and have the use of a rental car for \$298. In small print and a footnote below the

In its opinion, the *New York* court took a narrow approach similar to the *California* court. The court held that the preemption clause of the Federal Aviation Act did not preempt New York's claim against the defendant airlines.¹²⁹ The court used a "remote and indirect" standard to support this conclusion. Specifically, the court stated that "any relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes and services is remote and indirect . . . [New York's] sole concern is with the manner in which Pan Am advertises . . . to New York consumers."¹³⁰

The court also addressed the "relate to" language and discussed the effects a broad reading could have on state law claims. In this discussion the court stated that "the interpretation of section [1305] Pan Am urges on this court stretches that section's 'relating to' phrase too far. To find that Congress intended section [1305] . . . to preempt New York's laws against deceptive advertising conceivably could doom every state regulation affecting airlines."¹³¹ In concluding its discussion on federal preemption of the New York action, the court describes deceptive advertising as an area that does not require an "exclusive federal presence."¹³² In light of the decision that the claim was not federally preempted, the court removed the action and remanded the case to the New York state court.

On remand, the case was decided in the supreme court of New York County.¹³³ In a short and rather surprising decision the court held that the state action was preempted, despite a contrary decision by the federal court that remanded the case. The court gave little explanation as to why the state claims were preempted. The court merely cited the legislative history and

headline, however, it was stated that the hotel was in the English countryside, not London, and was available only to those travelers who first paid for three consecutive nights in a London hotel. The rental car was free for only the first three days, after which it was "only \$17 a day." Additionally, the fare did not include U.S. departure tax, security surcharge, and the rental car charge omitted fuel surcharges, taxes, and various optional items. According to the state, the total additional charges increased the package's total cost to a minimum of \$721 and a maximum of \$1,418. Similar advertisements were run by both Trans World Airlines and Pan American Airlines throughout the next year. *New York*, 728 F. Supp. at 167.

¹²⁹ *Id.* at 176.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.* at 178.

¹³³ *People v. Trans World Airlines, Inc.*, 147 Misc. 2d 697, 556 N.Y.S.2d 803 (N.Y. Sup. Ct. 1990).

the practices of the Department of Transportation as authority for finding "that Congress intended to preempt and exclude state law in the field."¹³⁴

The final case in the series of cases leading up to the *Morales* decision is *Kansas v. Trans World Airlines, Inc.*¹³⁵ In a pattern similar to that in the previously discussed cases, the Kansas attorney general sued the defendant airline under the Kansas Consumer Protection Statute. This action asserted a violation of the statute in connection with various newspaper advertisements.¹³⁶ The case was removed to federal court and the plaintiff sought remand to the state court based on the ground that the federal court lacked subject matter jurisdiction.

At issue was the defendant's contention that the claim was preempted by federal law and thus remand was unwarranted. Consistent with the preceding cases, however, the judge held that the plaintiff's claim was not preempted by federal law and remanded the case back to state court.¹³⁷ Specifically, the court scrutinized the language of the preemption section and came up with the new idea that "the language of the preemption section precluding regulation 'relating to rates, routes or services' does not by its terms include advertising."¹³⁸ The court also took notice of the decisions of other federal courts that had remanded similar cases to state courts.¹³⁹

With the exception of the *New York* decision that federal law preempted state law, the conclusions running through the pre-*Morales* cases appear to be twofold. First, the courts appear to have taken a strict reading of the preemption provision and its language. Second, due to the strict reading of the statutes in favor of state regulation, the courts have held that federal law

¹³⁴ *Id.* at 702.

¹³⁵ 730 F. Supp. 366 (D. Kan. 1990).

¹³⁶ The Kansas consumer protection statute is located in Kansas Statutes Annotated (K.S.A.) section 50-623. It states that the Act "shall promote the following policies: (a) To simplify, clarify, and modernize the law governing consumer transactions; (b) to protect consumers from suppliers who commit deceptive and unconscionable practices. . . ." KAN. STAT. ANN. § 50-623 (1994). Further, K.S.A. section 50-626 describes various deceptive acts and practices and K.S.A. section 50-627 describes unconscionable acts and practices. These statutes, along with K.S.A. section 50-623, comprise the Kansas state consumer protection laws at issue in the *Kansas* case.

¹³⁷ *Kansas*, 730 F. Supp. at 368.

¹³⁸ *Id.* (citing *People v. Western Airlines, Inc.*, 202 Cal. Rptr. 237 (Cal. Ct. App. 1984), *cert. denied*, 469 U.S. 1132 (1985)).

¹³⁹ *Id.* at 368-69. The court noted that "federal district courts in New York, Illinois and California have remanded similar cases to state courts." *Id.*

did not preempt state law. Because state law was not preempted, the state claims relating to the violations of the consumer protection statutes were generally allowed to go forward in the state courts.

The essence of the pre-*Morales* jurisprudence can be captured in one word: confusing. Courts analyzing the same issue have come to diametrically opposed conclusions and, as seen in the *New York* cases, even courts within the same circuit have reached different results. This confusion between the courts as to exactly when federal law preempts state law in the field of air carriers led the Supreme Court to accept the *Morales* case and attempt to clear up the mess created by the lower courts.

2. *The Morales Trilogy*

One of the seminal cases dealing with the issue of federal preemption under the Federal Aviation Act is the *Morales* case. The case culminated with the Supreme Court's decision in 1992. As the case went up through the district court and the court of appeals, however, insight as to the courts' views of the preemption language was provided. This section examines each of the three cases in detail to reveal the needed insight of the preemption language as the courts understand it.

The original case in the *Morales* trilogy is *Trans World Airlines, Inc. v. Mattox*.¹⁴⁰ Before discussing the case, it is necessary to understand the background leading up to the suits.

In 1988, the National Association of Attorneys General (NAAG)¹⁴¹ adopted guidelines on advertising and marketing practices in the airline industry (the NAAG Guidelines).¹⁴² While the NAAG Guidelines did not have the force of law, they

¹⁴⁰ 712 F. Supp. 99 (W.D. Tex. 1989).

¹⁴¹ The National Association of Attorneys General (NAAG) is an association of approximately 50 attorneys general representing each of the 50 states and U.S. territories. NAAG was founded in 1907 and is currently run by an executive committee consisting of various elected attorneys general from different states. One of the major areas of emphasis in which NAAG has become involved is the regulation of advertising of air fares. NAAG has issued formal guidelines regulating these activities. While these guidelines do not create new laws or regulations, NAAG attorneys "clearly intended them to have the force of law." Luther C. McKinney & Dewey J. Caton, *What To Do When the Attorney General Calls: State Regulation Of National Advertising*, 3 DEPAUL BUS. L.J. 119 (1991).

¹⁴² Maclure, *supra* note 92, at 907 (citing NATIONAL ASSOCIATION OF ATTORNEYS GENERAL, TASK FORCE ON THE AIR TRAVEL INDUSTRY, REVISED GUIDELINES (1988) [hereinafter NAAG GUIDELINES], *reprinted in* *Morales v. TWA*, 504 U.S. 374, 391 app. (1992)).

did provide standards against which the airlines could assess whether a practice violated current state consumer protection statutes.¹⁴³ Subsequent to the issuance of these standards, the attorneys general of seven states¹⁴⁴ sent an advisory memorandum to major airlines cautioning that failure to disclose all fare surcharges conflicted with the NAAG Guidelines and represented a violation of state laws on deceptive advertising and unfair trade practices.¹⁴⁵ The memorandum was described as a possible precursor to judicial action and the attorneys general urged the airlines to immediately comply with the NAAG Guidelines.¹⁴⁶ Nine months later, the Texas attorney general sent a letter to several major airlines announcing an intent to sue.¹⁴⁷ Before the attorneys general could act, however, the airlines sued, claiming that the states were precluded from regulating airfare advertising by the preemption provision of the Airline Deregulation Act.¹⁴⁸ It is this suit by the airlines that begins the *Morales* trilogy.

As described above, the airlines¹⁴⁹ sued the attorneys general seeking a preliminary injunction preventing the Texas attorney general from bringing an enforcement action against them under the Texas Deceptive Trade Practices Act.¹⁵⁰ The airlines argued the state enforcement action was preempted by federal law—specifically, the preemption provision of the Airline Deregulation Act. Using this reasoning, the district court granted the airlines' motion for injunction preventing the attorneys general from taking enforcement action. The court reasoned that the "[p]laintiffs will prevail in establishing their claims that any state regulation of advertising of the [airlines'] rates, routes, and

¹⁴³ *Id.*

¹⁴⁴ The states included: Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin. *Id.* at 927.

¹⁴⁵ *Morales*, 504 U.S. at 379. Section 2.5 of the NAAG Guidelines, titled "Surcharges", provides that "[a]ny fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare." *Id.* at 405.

¹⁴⁶ Maclure, *supra* note 90, at 908 (citing *Morales*, 504 U.S. at 379-80).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ The airlines that originally brought suit were Trans World Airlines, Continental, and British Airways. *Trans World Airlines v. Mattox*, 712 F. Supp. 99, 102 (W.D. Tex. 1989).

¹⁵⁰ *Id.* at 99. The Texas Deceptive Trade Practices Act provides that "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division . . ." TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987 & Supp. 1995).

services has been preempted by the Federal Government."¹⁵¹ In addition to granting the injunction, the court broadened the injunction to include thirty-three other states.¹⁵²

The next case in the *Morales* trilogy is the appeal to the Fifth Circuit.¹⁵³ The question decided by the court of appeals was, at its simplest, whether state laws proscribing deceptive advertising are preempted by federal law when the state attempts to enforce such laws against the advertising of airline fares.¹⁵⁴

The arguments advanced by both the airlines and the Texas attorney general provide the base arguments at the center of this issue. The airlines contended that section 105(a)(1) of the ADA¹⁵⁵ expressly preempted state laws pertaining to the advertising of air fares by airlines.¹⁵⁶ To counter, the Texas attorney general, joined by the other state attorneys general, argued that the "state has the power to regulate the deceptive advertising of fares . . . [because] section 105 only preempts state regulations relating to the rates, routes, or services of airlines, but does not expressly preclude state regulations relating to all airline operations."¹⁵⁷ The Texas attorney general went on to cite the legislative history of the preemption section in arguing that there was no indication of congressional intent to preempt state regulation of deceptive fare advertising by airlines.¹⁵⁸ The airlines countered that the language of the preemption provision is clear and applies to all laws relating to rates, routes, or services of airlines, and that the advertising of fares by airlines "clearly relates to rates."¹⁵⁹

In addition to the foregoing argument, the attorneys general cited three decisions supporting their position.¹⁶⁰ The court of appeals, however, did not accept the State's arguments against preemption. The court expressly cited the legislative history of the preemption provision in showing congressional intent to expressly preempt state regulation of airfare advertising.¹⁶¹ The

¹⁵¹ *Trans World Airlines*, 712 F. Supp. at 101.

¹⁵² *Id.* at 105-06.

¹⁵³ *TWA v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, 498 U.S. 926 (1990).

¹⁵⁴ *Id.* at 775.

¹⁵⁵ Now 49 U.S.C. § 41713.

¹⁵⁶ *Mattox*, 897 F.2d at 779.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ See *supra* subpart IV.B.1 for a full discussion of the cases cited by the attorneys general to support state regulation.

¹⁶¹ *Id.* at 782.

court also gave a definition of "relates to" when it stated that "a law relates to a particular subject 'if it has a connection with or reference to' that subject."¹⁶² Using this definition, the court went on to hold that "such [state consumer protection] laws do 'relate to' rates when applied to airline fare advertising."¹⁶³

Perhaps believing they still had a chance to convince the court otherwise, the state attorneys general pointed to the savings clause that survived the Civil Aeronautics Board Sunset Act.¹⁶⁴ In general, the attorneys general pointed out that the savings clause preserved remedies existing at common law and that this provision allowed them to enforce their states' deceptive advertising laws as an additional remedy.¹⁶⁵ The court, however, did not agree and noted that the savings clause did not preserve state law remedies when there was express preemption under the preemption provision.¹⁶⁶

To summarize, the court felt that it was indeed Congress' intention to retain the exclusive authority to regulate the advertising of airfares. Thus, in affirming the district court's injunction, the court held that the state enforcement actions were preempted by federal law.

The Supreme Court originally denied certiorari of this case.¹⁶⁷ Nevertheless, in a later case, the district court made the injunction permanent and the Fifth Circuit again affirmed.¹⁶⁸ The case was appealed to the Supreme Court, and the decision that was rendered became a key decision in the field of federal preemption in the airline industry.

This final and most important case in the *Morales* trilogy is the seminal *Morales v. Trans World Airlines, Inc.*¹⁶⁹ The Supreme Court granted certiorari to address whether the preemption provision of the Airline Deregulation Act prohibits the states

¹⁶² *Id.* at 783 (footnote omitted).

¹⁶³ *Id.*

¹⁶⁴ *Id.* For a discussion of the definition of a savings clause, see *supra* note 74 and accompanying text. For a discussion of the savings clause cited by the state attorneys general, see *supra* note 94 and accompanying text.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Trans World Airlines, Inc. v. Mattox*, 498 U.S. 926 (1990).

¹⁶⁸ *Maclure*, *supra* note 90, at 927 (citing *Trans World Airlines, Inc. v. Morales*, 949 F.2d 141, 144-45 (5th Cir. 1991), *aff'd in part, rev'd in part*, 504 U.S. 374, 390 (1992)).

¹⁶⁹ 504 U.S. at 374. Dan Morales replaced Jim Mattox as Texas Attorney General in 1990, thus accounting for the change in names between the Fifth Circuit Court of Appeals and the Supreme Court.

from utilizing their consumer protection statutes to prevent allegedly deceptive airfare advertising.¹⁷⁰

As mentioned above,¹⁷¹ the airlines sued to enjoin state attorneys general from enforcing state deceptive practices laws against airline advertising. In a five-to-three decision, the Court held that the "fare advertising provisions of the NAAG Guidelines are preempted by the ADA."¹⁷² The majority opinion, authored by Justice Scalia,¹⁷³ can be broken down into two primary areas of discussion. First, the opinion discusses the scope of the "relate to" clause in the ADA. Second, after determining the scope of the "relate to" clause, the opinion looks at the NAAG Guidelines¹⁷⁴ in an attempt to determine if the guidelines fell within the scope of the ADA's "relate to" clause and therefore whether they should be preempted.¹⁷⁵

The first area of analysis concerns the "relate to" clause of the ADA.¹⁷⁶ To determine the proper scope of the clause, the majority looked to a line of cases in which the Court had interpreted a similarly worded clause in a preemption provision of the Employee Retirement Income Security Act of 1974¹⁷⁷ (ERISA). The clause in the ERISA statute states that the provisions of the law "supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan."¹⁷⁸ A brief analysis of select ERISA cases follows.

The first of the ERISA cases is *Alessi v. Raybestos-Manhattan, Inc.*,¹⁷⁹ a case involving a New Jersey statute. The Court realized its first chance to address whether ERISA preempts state law

¹⁷⁰ *Id.* at 378.

¹⁷¹ See *supra* subpart IV.B.2 and accompanying text.

¹⁷² Maclure, *supra* note 90, at 909 (citing *Morales*, 504 U.S. at 390-91).

¹⁷³ The majority opinion was written by Justice Scalia. He was joined by Justices White, O'Connor, Kennedy, and Thomas. Justice Souter took no part in the decision.

¹⁷⁴ For a discussion of the National Association of Attorneys General and the guidelines promulgated by them, see *supra* note 141 and accompanying text.

¹⁷⁵ Maclure, *supra* note 90, at 909-10.

¹⁷⁶ Section 105 of the ADA reads in pertinent part: "[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 that may provide air transportation . . ." (codified as amended at 49 U.S.C. §§ app. 1301-1592 (1988 & Supp. IV 1993)). It is this clause that the majority opinion focuses on in its attempt to determine if the NAAG guidelines are preempted.

¹⁷⁷ 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993).

¹⁷⁸ Maclure, *supra* note 90, at 910 (citing 29 U.S.C. § 1144(a) (1988 & Supp. V 1993)).

¹⁷⁹ 451 U.S. 504 (1981).

under the preemption provision. In a unanimous decision by eight Justices, the Court found federal preemption to be contingent upon a showing of congressional intent or upon a conclusion that the "nature of the regulated subject" allows for nothing but preemption.¹⁸⁰

In *Shaw v. Delta Airlines, Inc.*,¹⁸¹ the Court broadened its reading of the ERISA preemption provision. In holding that state law is again preempted, the unanimous opinion, written by Justice Blackmun, stated that a "law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan."¹⁸²

Two years later, the Court decided *Metropolitan Life Insurance Co. v. Massachusetts*.¹⁸³ In holding that the Massachusetts statute was preempted by ERISA, the Court implicitly affirmed the broad reading of the preemption provision taken in *Shaw*.¹⁸⁴ Additionally, this case pointed out the importance of congressional intent in the preemption analysis by stating that the key to determining if federal law preempts a state statute "is to ascertain Congress' intent in enacting the federal statute at issue."¹⁸⁵

The final case is *FMC Corp. v. Holliday*.¹⁸⁶ The Court again applied its broad "reference to" or "connection to" test to preempt state law. With this decision, the Court solidified the fact that it was taking a broad reading of the ERISA preemption clause.

As applied to the preemption provision of the ADA, Justice Scalia used the same standard as that used in the ERISA cases. Specifically, he stated that "the ordinary meaning of [relate to] is a broad one . . .," that since the Court has "held that a state law 'relates to' an employee benefit plan . . . 'if it has a connection with or reference to such a plan,'" and that "[s]ince the relevant language of the ADA is identical, we think it appropriate to adopt the same standard here: State enforcement actions having a connection with or reference to airline '[prices], routes, or

¹⁸⁰ Maclure, *supra* note 90, at 916 (citing *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981)).

¹⁸¹ 463 U.S. 85 (1983).

¹⁸² Maclure, *supra* note 90, at 916 (citing *Shaw*, 463 U.S. at 96-97).

¹⁸³ 471 U.S. 724 (1985).

¹⁸⁴ Maclure, *supra* note 90, at 917 (citing *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985)).

¹⁸⁵ *Metropolitan*, 471 U.S. at 738.

¹⁸⁶ 486 U.S. 825 (1988).

services' are preempted. . . ."¹⁸⁷ Thus, the Court took a broad reading of the ADA preemption provision similar to that taken in the ERISA cases.

Once the Court determined the broad scope of the "relate to" clause in the ADA, the second area of discussion for the Court was to determine if the NAAG Guidelines "related to" prices, rates or routes.¹⁸⁸ The Court appeared to have no trouble determining that the NAAG Guidelines indeed related to prices, rates, or routes due to the Guidelines' express language and potential impact on the airlines.¹⁸⁹ In analyzing the effect of the Guidelines, the Court focused on section 2.4,¹⁹⁰ which requires that advertised airline fares be available to meet reasonably foreseeable demand. In concluding that requirements such as section 2.4 clearly affect prices, routes, or services, Justice Scalia sums up his position by stating that "[a]ll in all, the obligations imposed by the guidelines would have a significant impact upon the airlines' ability to market their product, and hence a significant impact on the fares they charge."¹⁹¹

Perhaps realizing the impact this holding may have on other aspects of state regulation, the majority attempted to limit the scope of the decision by stating that the holding does not "address whether state regulation of the nonprice aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relat[e] to' rates."¹⁹² To further dilute the decision, the majority opinion states that its decision will not give the airlines "carte blanche to lie and deceive consumers; the [Department of Transportation] retains the power to prohibit advertisements which in its opinion do not further competitive pricing."¹⁹³ To summarize, the majority opinion held that the NAAG Guidelines "relate to" prices, routes, or services, and are thus preempted by the Airline Deregulation Act.

¹⁸⁷ *Morales*, 504 U.S. at 384 (citations omitted).

¹⁸⁸ *Maclure*, *supra* note 90, at 910.

¹⁸⁹ *Id.* The complete NAAG Guidelines are reprinted in an appendix to the *Morales* opinion.

¹⁹⁰ Section 2.4 of the NAAG Guidelines states that "[a]ny advertised fare must be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears" NAAG GUIDELINES, *supra* note 142, at 391 app.

¹⁹¹ *Morales*, 504 U.S. at 390.

¹⁹² *Id.*

¹⁹³ *Id.* (citation omitted).

The dissenting opinion¹⁹⁴ criticizes the majority on various aspects of its decision, including its reading of both the "relate to" clause and congressional intent. Specifically, the dissent stated that "the Court disregards established canons of statutory construction that is neither compelled by its text nor supported by its legislative history."¹⁹⁵

In his dissent, Justice Stevens stated that a fault with the majority opinion was that it focused too much on the "relate to" clause while ignoring congressional intent available through examination of the Act's history.¹⁹⁶ Further, Justice Stevens seemed to rely heavily on congressional intent. First, he states that preemption questions must be approached from the view that Congress did not intend to preempt areas traditionally within the states' regulatory powers.¹⁹⁷ Next, Justice Stevens asserts that even if congressional intent can be found, it must be clearly displayed.¹⁹⁸ Finally, the dissent points to the legislative history of the ADA and states that it "does not reflect congressional intent to exercise broad preemptive power over state action."¹⁹⁹

In concluding, the dissent flatly disagrees with the majority's finding that the airlines would be adversely affected by compliance with the NAAG Guidelines.²⁰⁰ In essence, Justice Stevens believed that the airlines did not show that the effect of compliance with the Guidelines would be significant.²⁰¹

Morales represents a significant case in the area of federal and state regulation of airfare advertising. In taking a broad reading of the ADA's "relate to" clause, the Court effectively brought the area of airfare advertising under federal control. In addition, the Court effectively prohibited the states from regulating an industry over which it has exercised considerable control in the past. However, the next section examines another significant Supreme Court case that may have an even greater impact than *Morales*.

¹⁹⁴ Justice Stevens authored the dissenting opinion. He was joined by Chief Justice Rehnquist and Justice Blackmun.

¹⁹⁵ Maclure, *supra* note 90, at 912 (citing *Morales*, 504 U.S. at 419).

¹⁹⁶ *Id.*

¹⁹⁷ *Morales*, 504 U.S. at 419.

¹⁹⁸ Maclure, *supra* note 90, at 912.

¹⁹⁹ *Id.*

²⁰⁰ *Morales*, 504 U.S. at 426-27.

²⁰¹ *Id.* at 427.

3. Wolens v. American Airlines, Inc.

As mentioned above, the *Wolens* case will probably have an even bigger impact on the regulation of airfare advertising and airline practices than *Morales*. *Morales* may be limited by the fact that the decision prevented the implementation of the NAAG Guidelines. *Wolens*, however, deals directly with the 'airlines' handling of the ever-popular frequent flyer miles. The decision could impact not only the frequent flyer programs on which many people rely but also the advertising methods the airlines use when advertising discount fares.

Before discussing the specifics of the cases as well as the courts' holdings, it is necessary to discuss the background and the origin of the frequent flyer programs. In 1981, American Airlines began what is known today as a frequent flyer program. Called "AAdvantage," the program today has more than 24 million participants from all 50 states as well as numerous foreign countries.²⁰² In 1993, 11 million certificates were awarded for frequent flyer miles.²⁰³ With approximately 400 million passengers traveling on U.S. airlines every year,²⁰⁴ the number of frequent flyer certificates awarded on all of the airlines combined is significant. The costs of the programs have hit the financially pressed airlines especially hard. For example, on flights of 100 passengers, the airlines claim an average of six passengers fly for free.²⁰⁵ In 1988, American Airlines, which had "reserved the right to restrict, suspend or otherwise alter aspects of the program," reduced the program's benefits retroactively.²⁰⁶ American cut the number of seats available to free flyers, listed various "blackout dates," and shut frequent flyers out of all flights during holidays and peak travel times.²⁰⁷ The airlines claim they had no choice—the frequent flyer programs turned out to be much more popular and expensive than the airlines ever imagined.²⁰⁸ In essence, the airlines did not want to be in a situ-

²⁰² Aaron Epstein & Brigid Schulte, *Fight for Fliers Passengers Say Airlines Shouldn't be Able to Reduce Benefits on Frequent Flier Miles They've Already Earned the Supreme Court Will Decide*, DETROIT FREE PRESS, Dec. 19, 1994, at A5.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Aaron Epstein & Brigid Schulte, *U.S. Supreme Court to Rule on Frequent Flier Benefit Case: At Issue is Whether Members Can Seek Damages in State Court if Awards are Changed. The Airlines Say No*, PHILA. INQUIRER, Dec. 16, 1994, at A4.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Epstein & Schulte, *supra* note 202, at A5.

ation where the holiday flights (traditionally the heaviest travel period) were being filled by people using frequent flyer miles.²⁰⁹ Nevertheless, the real reason given as to why the airlines blacked out certain dates was the financial tail-spin of Pan-American World Airways in the late 1980s.²¹⁰ According to Rolfe Shellenberger, the developer of American's frequent flyer program, Pan Am "was approaching bankruptcy and literally filling up its airplanes with people cashing in on free tickets . . . [i]t hastened their demise—and it really caused the airlines to be a lot more circumspect."²¹¹ As a result of the frequent flyer changes made by American Airlines, a lawsuit was brought under Illinois law, giving rise to the important *Wolens* case discussed below.

The first case discussed is the first in the series of *Wolens v. American Airlines*²¹² cases. Following the retroactive modifications to the frequent flyer program by American Airlines in 1988, plaintiff Myron Wolens, along with three other plaintiffs, filed a class action lawsuit²¹³ against American Airlines in the Cook County Circuit Court. The complaint alleged that in 1981 or 1982, the defendant created the American Airlines AAdvantage frequent flyer program and solicited public membership through advertisement and national mailings. The plaintiffs alleged that this constituted a unilateral contract offer that they accepted upon joining the program. The plaintiffs also alleged that they accumulated both miles and credits by using the airline, and that the value of their credits was substantially and adversely affected when, on May 18, 1988, the defendant unilaterally instituted a retroactive reduction in the benefits available in exchange for the credits. The plaintiffs alleged that this retroactive reduction constituted a breach of contract by the defendant and further violated Illinois' Consumer Fraud and Deceptive Business Practices Act²¹⁴ (Consumer Fraud Act).

The defendant removed the action to the United States District Court for the Northern District of Illinois on grounds that the lawsuit raised a federal question. The district court re-

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Epstein & Schulte, *supra* note 205, at A4.

²¹² 565 N.E.2d 258 (1990).

²¹³ The class action lawsuit was filed on behalf of approximately four million AAdvantage members. Epstein & Schulte, *supra* note 202, at A5.

²¹⁴ ILL. ANN. STAT. ch. 815, paras. 505/1-/12 (Smith-Hurd 1993 & Supp. 1995).

manded the case to the circuit court holding that the plaintiffs' complaint was grounded in state law.

The primary issue before the court was whether the plaintiffs' claims were preempted by the Federal Aviation Act of 1958 (the FAA Act) and the federal regulations promulgated thereunder.²¹⁵ The court began its opinion with a brief discussion of the three instances in which state law is preempted: (1) express preemption; (2) congressional intent to preempt inferred from the pervasiveness of the regulatory scheme; and (3) when state law conflicts with federal law.²¹⁶ The defendant's main argument was that the plaintiffs' claims were expressly preempted.

Following the express language of the statute, the court held that "any attempt to enjoin [the] defendant's application of its new program rules would be an attempt to regulate the services of an airline and thus a violation of section [41713]."²¹⁷ Thus, the plaintiffs' attempt to obtain an injunction to prevent the defendant from implementing the retroactive changes was expressly preempted by federal law as an injunction directly relates to the services of an airline.

The court, however, ultimately held that the plaintiffs' action for damages for breach of contract and consumer fraud was not preempted by the FAA Act.²¹⁸ In holding that the plaintiffs' breach of contract action could indeed be tried under state law, the court announced a new "tangential relation" test to determine if federal preemption applied. The court pointed out that the plaintiffs' claim arises out of the contracts between the plaintiff and the defendant.²¹⁹ The court further held that "[t]he claims bear only a tangential relation to [the] defendant's rates and services and any effect that an award of damages would have on [the] defendant's rates and services would be remote and indirect."²²⁰ It is interesting to note that the court held that federal preemption did not apply because of a "tangential relation" that was "remote and indirect," especially in light of the fact that the preemption section of the FAA Act made no mention of the degree that a state action had to "relate to" an airline's prices, routes, or services.

²¹⁵ *Wolens*, 565 N.E.2d at 261.

²¹⁶ *Id.* (citing *West v. Northwest Airlines*, 923 F.2d 657 (9th Cir. 1990)).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* (citing *New York v. Trans World Airlines, Inc.*, 728 F. Supp. 162, 176 (S.D.N.Y. 1989)).

In addition to finding that the plaintiffs' action was not preempted by federal law, the court also refused to accept the defendant's other arguments. Specifically, the circuit court held that Congress' and the Department of Transportation's extensive regulation of the field of aviation did not show any intent to occupy the entire field of aviation.²²¹ In addition, the defendant's Commerce Clause argument (that forcing the defendant to adhere to its frequent flyer program was an attempt by the plaintiffs to regulate interstate commerce) was rejected.²²²

Following the decision by the circuit court, the defendant appealed to the Illinois Supreme Court.²²³ The issue on appeal was the same as the issue decided by the circuit court: whether the plaintiffs' claims were preempted by the Federal Aviation Act of 1958.²²⁴ The Illinois Supreme Court affirmed the lower court decision while adding very little to the analysis provided by the circuit court.

The court affirmed the lower court's finding that the plaintiffs' request for injunctive relief to halt the defendant's application of its new AAdvantage rules involve an attempt to regulate the services of the airline, a direct violation of the preemption provision. Similar to the circuit court, however, the appellate court allowed the claims for breach of contract and consumer fraud to proceed. Citing precedent, the Illinois Supreme Court held that "section [41713] preempts claims only when the underlying statute or regulation itself relates to airline services, regardless of whether the claim arises from a factual setting involving airline services."²²⁵ The court then went on to affirm the lower court's holding that the plaintiffs' claims bear only a tangential relation to the defendant's rates and services.²²⁶ Finally, the court rejected the defendant's implied preemption and Commerce Clause arguments.²²⁷

Following the first decision of the Illinois Supreme Court,²²⁸ the defendant airline appealed to the United States Supreme Court.²²⁹ Following remand from the Supreme Court, the Illi-

²²¹ *Id.* at 263.

²²² *Id.*

²²³ 589 N.E.2d 533 (1993).

²²⁴ *Id.* at 535.

²²⁵ *Id.* (quoting *West*, 923 F.2d at 660).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ See *supra* subpart IV.B.3 and accompanying text.

²²⁹ *Wolens v. American Airlines, Inc.*, 113 S. Ct. 32 (1992). At the same time the Illinois Supreme Court was deciding *Wolens*, the United State Supreme Court

nois Supreme Court rendered the decision that was recently examined by the United States Supreme Court.²³⁰

On remand from the United States Supreme Court, the Illinois Supreme Court essentially reached the same conclusion, albeit with two new reasons for its holding. First, the court undertook a review of the *Morales* decision, with its focus on the statement by the Supreme Court that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have pre-emptive effect."²³¹ Thus, the Illinois Supreme Court read *Morales* to stand for the proposition that some state actions and regulations, though relating to airlines' prices, routes, or services, are permissible. Specifically, the Illinois court felt that "the Morales Court intended to leave open the possibility that certain [s]tate law actions that had only a slight connection to an airline's rates, routes, or services, would not be preempted by section [41713]."²³² This statement left the door open for the Illinois Supreme Court to find against federal preemption, and that is exactly what it did. The court, as it had done previously, held that the plaintiffs' claims did not relate to the rates, routes, or services of an airline and that "[a] frequent flyer program is not an essential element to the operation of an airline."²³³

Next, the court determined that, because the plaintiffs were only seeking monetary damages,²³⁴ their claims did "not seek to 'establish the rates airlines must charge, or determine the routes airlines must fly, or dictate the services airlines must provide.'"²³⁵ To strengthen its ruling the court discussed the contractual implications of the frequent flyer programs. The court noted that when a passenger earns miles by flying on an airline

was deciding *Morales*. See *supra* subpart IV.B.2 and accompanying text. The Supreme Court granted the defendant's writ of certiorari, vacated judgment, and remanded the case to the Illinois Supreme Court in light of the *Morales* decision. For a discussion of the Supreme Court's decision in *Morales*, see *supra* subpart IV.B.2 and accompanying text.

²³⁰ *Wolens v. American Airlines, Inc.*, 626 N.E.2d 205 (Ill. 1993).

²³¹ *Id.* at 207 (quotation and citations omitted).

²³² *Id.* at 208.

²³³ *Id.* This statement by the court seems rather odd, especially in light of the fact that frequent flyer programs have become an integral part of the airlines' advertising scheme as well as an "essential" tool that many passengers count on in choosing which airline to fly.

²³⁴ The court did not disturb the ruling that injunctive relief for the plaintiff would be a regulation of the defendant's services, a violation of the preemption provision.

²³⁵ *Id.* (citation omitted).

or does business with an airline's affiliates, a contractual relationship is formed which vests the frequent flyer with the right to earn specific travel awards.²³⁶ Because the defendant had chosen to retroactively alter the terms of its frequent flyer program, the court held that this constituted a breach of contract for which the plaintiff may recover.²³⁷ The court went on to hold that the finding that the plaintiffs' claims for money damages was merely a tangential relation to the defendant's rates comports with the decision in *Morales*.²³⁸

The dissent, however, provided an interesting counterview to the majority opinion. To begin, the dissent pointed out that the *Morales* Court took an "expansive" view of the preemption provision's "relate to" clause.²³⁹ It appears that the dissent believed that the majority was taking too narrow a view of the "relate to" clause, precisely the opposite view taken in the *Morales* dissent.²⁴⁰ Further, the dissent flatly disagreed with the majority opinion that the plaintiffs' claims bear only a tangential, tenuous, or remote relation to the defendant's rates, routes, or services. The dissent explained that because the plaintiff was seeking a "[s]tate-court ruling that American violated the [Illinois] Consumer Fraud Act through deceptive and unfair advertising . . ." and "also [was seeking] a [ruling] that American has a contractual obligation to provide . . . certain specific fares, flights and seats . . .," then under the *Morales* rationale, this would certainly have "a connection with and relation to American's rates and services."²⁴¹

As previously mentioned, the Illinois Supreme Court's second ruling was appealed to the United States Supreme Court. On November 1, 1994, the Court heard oral arguments from the parties,²⁴² and the decision was handed down on January 18, 1995.²⁴³

In its decision, the Court essentially bifurcated its holding into two separate parts. The Court held that the Airline Deregulation Act (Act) preempted the plaintiffs' claims based on the

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 212.

²⁴⁰ See *supra* notes 194-201 and accompanying text for a discussion of the *Morales* dissent.

²⁴¹ *Id.*

²⁴² Epstein & Schulte, *supra* note 205, at A4.

²⁴³ *American Airlines, Inc. v. Wolens*, 115 S. Ct. 817 (1995).

Illinois Consumer Fraud and Deceptive Business Practices Act.²⁴⁴ The Court, however, held that the Act did not preempt the plaintiffs' state law breach of contract action.²⁴⁵

The Court begins by undertaking an analysis of the ADA and its preemption clause.²⁴⁶ The Court describes the Illinois statute as "a means to guide and police the marketing practices of the airlines."²⁴⁷ This interpretation seemingly conflicts directly with the stated goal of the ADA, which is to allow the airlines greater freedom within their market. Based on its interpretation of the Illinois statute, the Court goes on to summarize its preemption argument when it states that in light of "the full text of the preemption clause, and of the ADA's purpose to leave largely to the airlines themselves . . . the selection and design of marketing mechanisms appropriate to the furnishing of air transportation . . . [the ADA] preempts plaintiffs' claims."²⁴⁸

After announcing its broad preemption holding, the next step the Court undertakes is to try to limit this holding. The Court recognizes that the states should not have the power to overly restrict airline competition through the use of restrictive state laws.²⁴⁹ Still, the Court does "not read the ADA's preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings."²⁵⁰ This statement opens the door for the Court to allow the plaintiffs' contract claims. In terms of preemption issues, however, the case does not appear to break new ground.

As previously discussed, the Court sets up its breach of contract holding through the limiting language applied to its preemption analysis.²⁵¹ The Court focuses on the fact that the terms and conditions offered by the airlines are essentially private in nature; thus, the Court reasons that the terms and condi-

²⁴⁴ *Id.* at 824.

²⁴⁵ *Id.*

²⁴⁶ See *supra* note 95 and accompanying text for excerpts of the ADA preemption clause.

²⁴⁷ *Id.* at 823.

²⁴⁸ *Id.* at 823-24. The Court, however, recognized the Department of Transportation's authority to investigate unfair and deceptive practices and unfair methods of competition by airlines. *Id.* at 823-24 n.4. In fact, the Court seems content to leave the job of policing the competitive practices of the airline industry to the DOT, rather than to the states.

²⁴⁹ *Id.* at 824.

²⁵⁰ *Id.*

²⁵¹ See *supra* notes 246-50 and accompanying text.

tions of a contract do not amount to a state enactment or enforcement of any "law, rule, regulation, standard, or other provision having the force and effect of law within the meaning of the [preemption clause.]"²⁵² Because the terms and conditions of a contract do not amount to state laws or regulations affecting airlines prices, routes, or services, the Court essentially reasons that the preemption clause was not intended to apply to contract disputes.

American Airlines' primary argument is that the DOT is the exclusive monitor of the airline's undertakings.²⁵³ Presumably, American argues, this DOT authority also includes the authority to monitor and resolve airline contract disputes. The Court, however, strongly disagrees with this position, stating that "neither the DOT nor its predecessor, the CAB, has ever construed or applied this provision to displace courts as adjudicators in air carrier contract disputes."²⁵⁴

The final, and perhaps the Court's most persuasive, argument for allowing the plaintiffs' contract claims is based on the savings clause.²⁵⁵ The Court states that the "ADA's preemption clause . . . read together with the FAA's savings clause, stops states from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term that the airline itself stipulated."²⁵⁶ The Court is essentially saying that if a plaintiff pleads a breach of contract claim against an airline, this claim should not be preempted by the ADA. Even though it may relate to prices, routes, or services, the contract claim is a common law cause of action that the Court believes is separate from the claims covered by the ADA preemption clause.

The two dissenting opinions in the *Wolens* case²⁵⁷ are provided by Justices Stevens and O'Connor, with each providing diametrically opposed reasons for dissenting. Justice Stevens essentially believes that none of the plaintiffs' claims should be preempted,

²⁵² *Id.* In her dissent, Justice O'Connor compares the terms and conditions of a contract to the NAAG Guidelines the Court held were preempted in *Morales*.

²⁵³ *Id.* at 825.

²⁵⁴ *Id.*

²⁵⁵ See *supra* note 74 and accompanying text for a discussion of the savings clause. Essentially, it allows ("saves") common law causes of action remedies in addition to the prescribed statutory causes of action.

²⁵⁶ *Id.*

²⁵⁷ Both Justices concurred in part and dissented in part. For purposes of this analysis, only the dissenting opinions are discussed.

while Justice O'Connor believes that all of the plaintiffs' claims should be preempted.

Justice Stevens believes that the private claims asserted by the plaintiffs in this case should not be preempted. The key to his dissent is that he analogizes the Illinois Consumer Fraud Act to a codification of common law negligence rules.²⁵⁸ Because the plaintiffs' claims are grounded in negligence, Justice Stevens believes that they should be determined using "ordinary tort principles."²⁵⁹ As the ADA does not preempt common law negligence claims, the logical conclusion he reaches is that the plaintiffs' claims in this case should not be preempted by the ADA, because they are essentially common law negligence claims. In addition, Justice Stevens is concerned by the "alarming enlargement" of the *Morales* holding.²⁶⁰ He essentially reads the Illinois statute as prohibiting fraud; because the *Morales* holding did not address preemption of general state laws prohibiting fraud, Justice Stevens is concerned with the "majority's extension of the ADA's pre-emptive reach from airline-specific advertising standards to a general background rule of private conduct."²⁶¹

Justice O'Connor takes an opposite approach in her dissent. She believes that all of the plaintiffs' claims should be preempted. Justice O'Connor agrees with the majority that the plaintiffs' consumer fraud claim is preempted because it is a state law claim relating to rates, routes, or services. It is with the majority's contract discussion that Justice O'Connor disagrees. She believes that *Wolens* is indistinguishable from *Morales*.²⁶² The subject matter of both cases deals with an airline's rates and services. Additionally, the NAAG Guidelines at issue in *Morales* were not "laws"; however, the Court in that case had no trouble finding that they were preempted.²⁶³ The key to her argument seems to be that "where the terms of a private contract relate to airline rates and services, and those terms can only be enforced through state law, *Morales* is indistinguishable."²⁶⁴ Thus, Justice O'Connor relies on *Morales* to support preemption of the plaintiffs' claims. She believes that the plaintiffs' claims do relate to

²⁵⁸ *Id.* at 827.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 829.

²⁶³ *Morales*, 504 U.S. at 390-91.

²⁶⁴ *Wolens*, 115 S. Ct. at 830 (emphasis added).

American's rates and services, and, just as the NAAG Guidelines were not "laws," neither are the terms and conditions of the contracts. Just as the NAAG Guidelines were preempted by federal law, Justice O'Connor believes the contract claims in *Wolens* should also be preempted. With respect to the majority's savings clause argument, she dismisses it by stating that "a general 'remedies' savings clause cannot be allowed to supersede the specific substantive pre-emption provision."²⁶⁵

4. *Summary of Current Statutory and Case Law*

Section 41713 of 49 U.S.C., also known as the preemption provision, explicitly preempts state actions relating to "prices, routes, or services" of an airline. Although this statement seems innocent enough, it has provided numerous opportunities for interpretation through litigation.

Interpretation of the statute has come primarily through two cases. In *Morales*, the Supreme Court preempted the use of the NAAG Guidelines, stating that they related to the prices, routes, or services of an airline. In addition, the Court took a very broad and expansive interpretation of the key "relate to" language found in the statute. In *Wolens*, the Supreme Court held that the plaintiffs' claims for consumer fraud were preempted by the ADA preemption clause. Nevertheless, the plaintiffs' breach of contract claims were allowed, as the Court determined that the common law claims were not intended to be preempted. The Court also relied on the savings clause to support its holding allowing the contract claims to stand.

V. CONCLUSION

Beginning with the *Morales* decision, it is apparent that the Supreme Court intends to take a broad reading of the statutory language found in the preemption provision of the Airline Deregulation Act of 1978. This broad reading may have further negative implications for the states in the form of limited power over industries such as aviation. Specifically, a state's regulatory powers may be limited, a development that the Founding Fathers may have found unnerving.

The key to this area is undoubtedly the decisions in both *Wolens* and *Morales*. As both cases demonstrate, the Supreme Court has taken a very broad reading of the preemption clause.

²⁶⁵ *Id.* at 832 (citing *Morales*, 504 U.S. at 385).

It is clear that the Court will not hesitate to hold that a plaintiff's claim is preempted if it is based on state law that relates to prices, routes, or services of an airline. The Court's preemption holding in *Wolens* should prevent expansive and highly restrictive state regulation. Thus, in the future it is unlikely the airlines will be subject "to all kinds of regulation by state governments that airlines are currently not subject to."²⁶⁶ Consequently, Congress' goal of deregulation is achieved while preventing fifty different state regulations governing the same program.²⁶⁷

As *Wolens* showed, however, the Court will not preempt all plaintiff claims against an airline. The Court will allow a plaintiff's breach of contract claim against an airline to stand, regardless of whether the claim directly affects the prices, routes, or services of the airline. The obvious conclusion to draw from this is that plaintiffs should try to structure a claim against an airline in breach of contract terms.

The Court's preemption rulings could have an ominous effect on the states. The Court may use its broad reading of the ADA preemption provision as a model for interpreting other preemption provisions in other acts. Language such as that found in ERISA and the ADA will give the federal government power to regulate industries, such as aviation, that operate entirely within the states. If that is the case, states may see their regulatory powers diminished.

Regardless of the Court's holdings, it is clear that airline deregulation will continue. As a result, the "airfare wars" that allow many passengers to buy highly discounted tickets are likely to continue. Along with deregulation comes competition, and it seems likely that competition for passengers among the airlines will be fierce, resulting in lower overall fares for consumers. Although lower fares seem like good news, along with those fares comes the advertising by the airlines, and possibly more changes in frequent flyer programs. The ultimate losers may turn out to be consumers as they may continue to be fooled by allegedly deceptive airline advertising, and may be faced with more restrictive frequent flyer programs, upon which many consumers depend.

²⁶⁶ Epstein & Schulte, *supra* note 205, at A4.

²⁶⁷ *Id.*