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**CONTRACT LAW—INTERPRETATION OF “UNITED STATES”—EIGHTH CIRCUIT HOLDS THAT SETTLEMENT AGREEMENT FOR “UNITED STATES” TRAVEL AGENTS EXCLUDES AFFECTED AGENTS IN PUERTO RICO AND THE U.S. VIRGIN ISLANDS:
AMERICAN SOCIETY OF TRAVEL AGENTS
V. UNITED AIRLINES, INC.**

LINDSAY M. GERMANO*

WITH THE revolution of the Internet, we have quickly seen the death of the travel agent. The nostalgic time of contacting your travel agent to obtain discounted fares has been replaced with a variety of airline sponsored Internet specials. As a result, major airlines have virtually eliminated commissions paid to travel agents for travel within the continental United States, Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands, thereby obliterating the travel agency industry.¹ Consequently, the American Society of Travel Agents (ASTA) spearheaded a class action against the airlines alleging violations of antitrust principles.² The suit was settled just prior to trial, with an \$86 million settlement fund to be distributed to those class members affected by the commission reduction.³

During the disbursement of the funds, however, several issues arose regarding the class's definition and the proper allocation

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¹ Lisa Eckelbecker, *Ticket to Ruin; Travel Agents Miss Airlines' Commissions*, TELEGRAM & GAZETTE (Worcester, MA), Mar. 27, 2002, at E1; James Ott, *Travel Agents Gird for New Fee Caps*, AVIATION WK. & SPACE TECH., Sept. 3, 2001, at 82.

² Ott, *supra* note 1, at 82. Recently, ASTA also asked the U.S. Government to provide limited antitrust immunity to allow agents to conduct collective bargaining with the airlines. *Id.*

³ *In re Am. Soc'y of Travel Agents v. United Airlines, Inc.*, 268 F.3d 619, 621 (8th Cir. 2001) [hereinafter *Travel Agents*].

of the funds.⁴ Recently, the Eighth Circuit Court of Appeals upheld the exclusion of travel agents in Puerto Rico and the U.S. Virgin Islands from the class, despite both the agencies' and airlines' belief that they were included in the settlement.⁵ Accordingly, by excluding Puerto Rico and the U.S. Virgin Islands from the class action's definition of "United States," the court used a definition in direct contrast to the parties' intent and severely limited the extent to which a party can define the terms of its agreements.

Beginning in 1995, the major airlines⁶ reduced the commissions paid to travel agents for all travel that was "issued by U.S. travel agents for travel within and between the continental U.S., Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands."⁷ The reduction applied to travel agencies in the continental United States, Alaska, Hawaii, Puerto Rico, and the U.S. Virgin Islands.⁸ Because the airlines have essentially eliminated an agent's ability to function, numerous travel agencies brought antitrust class action suits against the airlines alleging violations of the Sherman Act.⁹ In addition, ASTA, an organization that represents over 16,000 independent travel agencies in the continental United States, Hawaii, Alaska, Puerto Rico, and the U.S. Virgin Islands, brought suit on behalf of its members.¹⁰ Due to the cases' similarity, the judicial panel on multi-district litigation consolidated the cases and transferred them to the United States District Court for the District of Minnesota.¹¹ The suits were certified as a class action, with the court defining the class as "[a]ll travel agencies in the United States who at any time from February 10, 1995, to the present, issues tickets. . . for any travel on any of the defendant airlines within and between the continental United States, Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands."¹²

Just prior to trial, the district court approved a settlement with the defendant airlines and created a settlement fund of approx-

⁴ *Id.*

⁵ *Id.* at 623.

⁶ The major airlines included were: Delta Airlines, United Airlines, Inc., American Airlines, Inc., Continental Airlines, Inc., Northwest Airlines, Inc., and USAir, Inc. *Id.* at 619.

⁷ *Id.* at 620.

⁸ *Id.*

⁹ 15 U.S.C. §§ 1, 2 (2002); *Travel Agents*, 268 F.3d at 621.

¹⁰ *Travel Agents*, 268 F.3d at 621.

¹¹ *Id.*

¹² *Id.*

imately \$86 million.¹³ To disburse the funds, ASTA provided the airlines with a list of travel agencies to inform them of the settlement and to discuss a method of disbursement.¹⁴ Unfortunately, the company that provided the list of agencies to ASTA only provided domestic data, and as a result, information regarding the suit was only mailed to travel agencies in the fifty states and the District of Columbia.¹⁵ However, "a summary notice of the settlement was posted electronically on the airlines computer reservation system and reprinted in several trade publications," thereby reaching agencies in Puerto Rico and the U.S. Virgin Islands.¹⁶ Despite the electronic notification to these agents, settlement checks were only mailed or wire transferred to travel agencies in the fifty states and the District of Columbia, and nearly \$600,000 was left unclaimed in the fund.¹⁷

Then, in February 1998, a Puerto Rican travel agency filed a class action antitrust suit against the airlines asserting additional violations of the Sherman Act.¹⁸ In this suit, the class members alleged that they were not included in the 1995 suit because they were international travel agencies and were governed by the International Travel Agents Network.¹⁹ Ironically, the airlines asserted that the Puerto Rican travel agents were, in fact, class members in the 1995 consolidated cases and in December 1998, the parties stipulated to a voluntary dismissal of the suit with prejudice.²⁰

In June 1999, ASTA, with the support of the airlines, filed a motion to clarify the class definition for the airlines' settlement agreement with the district court.²¹ ASTA asserted that the Puerto Rican and Virgin Islands agencies were involved in the original class definition.²² Liaison class counsel opposed ASTA's motion and asserted that the class definition specifically excluded those two areas.²³ The district court denied ASTA's mo-

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 622-23.

²⁰ *Id.* at 622.

²¹ *Id.*

²² *Id.*

²³ Liaison class counsel also requested a *cy pres* distribution of the unclaimed funds to several Minnesota charities and Minnesota law school scholarships. *Id.* at 623.

tion to clarify, holding that the plain and ordinary meaning of "United States" did not include Puerto Rico and the U.S. Virgin Islands, and that the plaintiffs did not intend for the class to include agents in those locations.²⁴ Since there were two references to the term "United States," the court found that the first reference to "United States" referred only to the location of the class members, while the second reference to "United States" was to the location of the affected travel.²⁵ Under this interpretation, the first reference did not include Puerto Rico and the Virgin Islands, but the second one did.²⁶ Furthermore, the court stated that the parties' course of conduct showed that they did not intend to include those travel agencies.²⁷ On appeal to the Eighth Circuit, the court affirmed the district court's holding defining "United States" as only *the* fifty states, thus excluding Puerto Rican and U.S. Virgin Islands travel agents from the distribution of funds.²⁸

The interpretation of the settlement agreement is reviewed *de novo* and is guided by the "general rules of contract construction."²⁹ Under the rules of contract construction, the court will presume that the parties intended all of the contract's language to have effect and thus will avoid an interpretation that would "render a provision meaningless."³⁰ Moreover, the court will attempt to harmonize all clauses of the contract and view it as a whole, giving effect to the parties' intent.³¹ The court will read the terms in the entire contract and will not construe them to "lead to a harsh and absurd result."³²

In ascertaining the parties' intent, the court gives language its natural, common sense meaning, considering the nature and purpose of the agreement.³³ If a written agreement is ambigu-

²⁴ The district court also ordered the *cy pres* distribution requested by liaison class counsel. *Id.* at 624.

²⁵ *Id.* at 622.

²⁶ *Id.*

²⁷ *Id.*

²⁸ However, the Eighth Circuit found that the district court abused its discretion in ordering the *cy pres* distribution and subsequently found that the "next best class" to receive the funds was the excluded agents in Puerto Rico and the U.S. Virgin Islands. *Id.* at 623.

²⁹ *Gilbert v. Monsanto Co.*, 216 F.3d 695, 700 (8th Cir. 2000).

³⁰ *Chergosky v. Crosstown Bell, Inc.*, 463 N.W.2d 522, 526 (Minn. 1990).

³¹ *Art Goebel, Inc. v. N. Suburban Agencies, Inc.*, 567 N.W.2d 511, 515 (Minn. 1997); *Chergosky*, 463 N.W.2d at 526.

³² *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 394 (Minn. 1998).

³³ *In re Popkin & Stern v. Blackwell*, 196 F.3d 933, 939 (8th Cir. 1999).

ous, the parties' intent becomes relevant in the agreement's interpretation.³⁴ A contract is ambiguous if it is "reasonably susceptible of more than one interpretation."³⁵ Determining whether a contract is ambiguous is a question of law and depends upon the meaning assigned to the "words or phrases in accordance with the apparent purpose of the contract."³⁶

The term "United States" has several different meanings and uses.³⁷ Under the Federal Aviation Act, "United States" is defined as "the States of the United States, the District of Columbia, and the territories and possessions of the United States."³⁸ Under certain sections of the United States Code, the term "United States" specifically means the continental United States, District of Columbia, Puerto Rico, Guam, and the U.S. Virgin Islands.³⁹ Additionally, the United States "may be merely the name of a sovereign occupying the position analogous to that of other sovereigns in the family of nations."⁴⁰ Moreover, it also may "designate the territory over which the sovereignty of the United States extends, or it may be the collective name of the states which are united by and under the Constitution."⁴¹ Although Puerto Rico has been cited for its unique status as a commonwealth, Puerto Rico has been defined as a state for purposes of the Sherman Antitrust Act.⁴²

³⁴ Michalski v. Bank of Am. Arizona, 66 F.3d 993, 996 (8th Cir. 1995).

³⁵ *Id.* at 996; *Brookfield Trade Ctr.*, 584 N.W.2d at 394; *Art Goebel*, 567 N.W.2d at 515.

³⁶ *Art Goebel*, 567 N.W.2d at 515.

³⁷ *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 671 (1945), *overruled on other grounds by* *Limbach v. Hooven & Allison Co.*, 466 U.S. 353 (1985).

³⁸ 49 U.S.C. § 40102(a)(41) (2002).

³⁹ 26 U.S.C. § 7701(b)(11) (2002); 8 U.S.C. § 1101(a)(38) (2002) ("continental United States, Alaska, Hawaii, Puerto Rico, Guam and the Virgin Islands of the United States"); 2 U.S.C. § 60(e) (2002) ("the term 'State' means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any other territory or possession of the United States"); 42 U.S.C. § 2000(e)(i) (2002) ("includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, the Canal Zone, and Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act"); 7 U.S.C. § 1561(a)(1) (2002) ("the several States, District of Columbia, and Puerto Rico"). See also Brief for Appellants at 21, In Re: Am. Soc'y of Travel Agents v. United Airlines, Inc., available at http://www.ca8.uscourts.gov/briefs/00/10/appellant/003086_1br.pdf?A1=view+Brief (last visited Mar. 1, 2004) [hereinafter Brief].

⁴⁰ *Hooven & Allison Co.*, 324 U.S. at 671.

⁴¹ *Id.*

⁴² *Romero v. United States*, 38 F.3d 1204, 1208 (Fed. Cir. 1994); *Cordova & Simonpietri Ins. Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 41 (1st Cir. 1981).

The Eighth Circuit's conclusion in *American Society of Travel Agents v. United Airlines, Inc.*, which upheld the district court's denial of clarification, was improper. Even though the settlement may ultimately render some benefit to the excluded agencies, the contract's interpretation was misguided.⁴³ The court should have held the definition to be ambiguous and thus relied on the parties' intent to clarify that Puerto Rico and the U.S. Virgin Islands were included, or if the court had found the definition was unambiguous, realized that an ordinary definition of "United States" does not exist and then, again, turned to the parties' intent.

The court's interpretation was misguided for several reasons. First, it would be reasonable to believe that the definition in the settlement agreement was ambiguous. Numerous definitions of "United States" have been found, reasonably allowing for more than one interpretation of the term.⁴⁴ Furthermore, the court only addresses one way to interpret the addition of "continental" to "United States" when there is clearly more than one way to do so while still giving effect to the entire contract.⁴⁵ For example, the additional reference to "United States" may have simply been for clarification, and was not necessarily made to exclude those locations not mentioned in the first reference. Therefore, the court was not limited to its determination that the first reference was to the location of class members while the second was simply to the location of the affected travel.⁴⁶ There is nothing the court cites which supports the holding that the location of the class members and the location of travel were not intended to be the same.

Even if the district court correctly identified the settlement as unambiguous, the court misinterpreted the nature of that clarity because the language of the agreement makes clear that the parties intended to be bound by another definition. The broad scope of the initial use of "United States" is noticeably contrasted with the addition of "continental" in the next sentence of the class definition. Clearly, the settlement did not mean to exclude Hawaii and Alaska from the definition of United States by singling them out in the next sentence. The second refer-

⁴³ See *Michalski*, 66 F.3d at 996.

⁴⁴ See *supra* notes 38 and 39.

⁴⁵ The class definition first uses only the "United States," but later refers to the "continental United States, Alaska, Hawaii, Puerto Rico and the U.S. Virgin Islands." See *Travel Agents*, 268 F.3d at 622.

⁴⁶ *Id.*

ence was simply drawing attention to the breadth of the first reference. The court's holding that the second definition is different from the first makes little sense and thus construes the contract without common sense, leading to a "harsh and absurd result."⁴⁷

Moreover, agents in Puerto Rico and the U.S. Virgin Islands were severely handicapped by the reduction in commissions, and to exclude them from settlement does not further the interests of justice. It seems extremely unlikely that an organization that represents Puerto Rican and U.S. Virgin Island travel agents would choose to exclude them in the requisite suit addressing their harm. It would be a non sequitur to hold that ASTA did not intend to include them, when ASTA represents them.⁴⁸ The inclusion of Puerto Rico and the U.S. Virgin Islands with the continental United States, Alaska, and Hawaii is implied in the definition, and the class certification unambiguously includes them.

Finally, the Supreme Court has long acknowledged numerous meanings for "United States."⁴⁹ To force a definition into a settlement agreement negotiated by parties who have a clear idea of what definition is to be used is both impossible and illogical. Here, the class definition was part of a settlement among air travel industry professionals, and there is no reason to doubt that the parties intended to use the definition under which their industry normally operates. If it was critical to use an "ordinary" definition, then the definition of United States under the Sherman Act should have been employed, which would have, at minimum, included the agents of Puerto Rico.⁵⁰

The court's exclusion of the affected agencies will be of great consequence. Reduction in travel agent commissions are occurring throughout the world, numerous agencies are being forced to close their doors, and any relief that could be offered by the courts in pursuit of the airlines' monopolistic ventures has been unyielding.⁵¹ Moreover, the holding of this court indicates that even when the parties intend for a term to be interpreted a certain way, such intent can be completely ignored by the court.

⁴⁷ *Brookfield Trade Ctr.*, 584 N.W.2d at 394. See also Brief, *supra* note 39.

⁴⁸ See Brief, *supra* note 39.

⁴⁹ *Hooven & Allison Co.*, 324 U.S. at 671.

⁵⁰ See *Romero*, 38 F.3d at 1208; *Cordova & Simonpietri Ins. Agency*, 649 F.2d at 41.

⁵¹ See *Travel Agents*, 268 F.3d at 621-22; *Turicentro, S.A. v. Am. Airlines, Inc.*, 2002 WL 31008819 (3d Cir. Pa. Sept. 9, 2002) (denying jurisdiction to Latin American agents on the basis of U.S. cuts).

While ultimately, the Puerto Rican and U.S. Virgin Island agencies will receive some portion of the settlement, to deny the intent of those that certified the class in the interpretation of the agreement is far from the purpose of the judicial system.

Although the ultimate outcome is nearly identical under either this note's reasoning or that of the court's since settlement funds were distributed to the excluded agents, the court's misinterpretation raises a broader concern of the definition of terms in class actions and the power of those included in the class to represent the rights of all those involved. There is no question that ASTA represented travel agents in Puerto Rico and the U.S. Virgin Islands, and by that representation, it clearly intended for them to be included when the class was certified. Both the language and underlying spirit of the class definition were expansive in an effort to reach all travel agencies affected by the commission caps, including those members of the ASTA in Puerto Rico and the U.S. Virgin Islands. Nevertheless, the court blatantly disregarded the parties' intent, and such an action undermines the ability for class action suits to adjudicate the rights of its members.