

1990

## Frequent Flyer Coupon Brokering: A Valid Trade

Katherine Ann Braden

---

### Recommended Citation

Katherine Ann Braden, *Frequent Flyer Coupon Brokering: A Valid Trade*, 55 J. AIR L. & COM. 727 (1990)  
<https://scholar.smu.edu/jalc/vol55/iss3/5>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

## FREQUENT FLYER COUPON BROKERING: A VALID TRADE?

KATHERINE ANN BRADEN

### I. INTRODUCTION

**Y**OU PLANNED A trip to Hong Kong for years. Prior to purchasing your ticket, you noticed an advertisement in the paper that offered airline tickets to Hong Kong for half the price of the regular fare. These tickets were "second hand." Passengers who earned frequent flyer mileage contacted a broker to sell their unwanted tickets. You contact the broker, purchase the "second hand" ticket, and take-off for Hong Kong without incident.

The flight home from Hong Kong, however, is not such a memorable experience. The airline agent at the boarding gate questions your relationship to the passenger who earned the frequent flyer pass. You hedge and finally say that you are his "distant cousin." The agent asks you for identification to establish your relationship with the frequent flyer earner. You cannot produce any identification to establish the relationship. The agent revokes your ticket and you are left in Hong Kong with only the alternative of buying yet another ticket home at full price.

This scenario is happening more frequently to purchasers of brokered tickets.<sup>1</sup> In the past, the brokering of such tickets took place on a small scale.<sup>2</sup> In recent years, how-

---

<sup>1</sup> See Allen, *Coupon d'etat*, CAL. LAW., Feb. 1987, at 11, 12, for a discussion of the enforcement of airline tariffs regarding illegally brokered tickets.

<sup>2</sup> See Lezin, *Call of the Wild Blue Yonder, Airlines Offer a Dizzying Array of Mileage*

ever, the frequent flyer black market has grown to a fifty million dollar a year industry.<sup>3</sup> The airlines are retaliating against the brokering of the frequent flyer coupons by filing suit against the brokers as well as applying stricter scrutiny to those who attempt to use such passes.<sup>4</sup> The airlines claim that brokers violate tariffs<sup>5</sup> regulating the use of frequent flyer coupons and interfere with business relations.<sup>6</sup> The brokers are responding with antitrust counterclaims against the airlines.<sup>7</sup>

Section II of this comment discusses the airline industry subsequent to deregulation and the emergence of the frequent flyer brokering trade; Section III deals with the areas of tariff validity; Section IV pertains to interference with business relations; and Section V discusses antitrust actions regarding the brokering of frequent flyer coupons.

## II. BACKGROUND

### A. *The Deregulation of the Airline Industry*

The airline industry, prior to January 1, 1978, operated under a regulatory system in which airlines were required to file tariffs with the Civil Aeronautics Board (Board).<sup>8</sup> Tariffs inconsistent with Board regulations were void.<sup>9</sup>

---

*Bonus Programs*, L.A. LAW., Mar. 1985, at 45, 48, for a discussion of the growth of the frequent flyer coupon brokering business.

<sup>3</sup> See Allen, *supra* note 1, at 12.

<sup>4</sup> *Id.* at 11-12 (discussing the pending suits concerning the brokering of frequent flyer coupons and the enforcement of tariff regulations precluding passenger use of brokered tickets); see also *infra* note 33 for a discussion of cases concerning the brokering of coupons.

<sup>5</sup> A tariff is defined as "[a] public document setting forth services of common carrier being offered, . . . and governing rules, regulations and practices relating to those services." BLACK'S LAW DICTIONARY 1306 (5th ed. 1979) (emphasis added).

<sup>6</sup> See *American Airlines, Inc. v. Platinum World Travel*, 717 F. Supp. 1454 (D. Utah 1989) (tortious interference with program contract); *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1480-83, (C.D. Cal. 1988) (interference with business relations).

<sup>7</sup> See *Trans World Airlines*, 682 F. Supp. at 1484-88.

<sup>8</sup> 49 U.S.C. app. § 1373 (1982). Section 403 of the Federal Aviation Act required airlines, under section 1373, to file tariffs with the Board pertaining to their "classifications, rules, regulations, practices and services in connection with such air transportation." *Id.*

<sup>9</sup> See 49 U.S.C. app. § 1373(a) (1982).

Ticket agents<sup>10</sup> could not collect or charge amounts for air transportation different from those which the airlines filed with the Board in their tariffs.<sup>11</sup> The Board governed the relationship between the airlines and their passengers and had primary jurisdiction over cases relating to violations of tariff regulations.<sup>12</sup>

The deregulation of the airline industry began in 1976 when the Board eased rate requirements and entry into the airline industry.<sup>13</sup> The purpose of deregulating the airline industry was not only to promote competition among the airlines but also to promote safety procedures, fair wages, and equitable working conditions within the air transport industry.<sup>14</sup> The Airline Deregulation Act of 1978 (Act)<sup>15</sup> culminated the Board's efforts to deregulate the airline industry and forced airlines to be competitive in the market in order to survive.<sup>16</sup> The Act, by eliminat-

---

<sup>10</sup> 49 U.S.C. app. § 1301(40) (1982). Section 1301 defines a ticket agent as "any person . . . who, as principal or agent, sells or offers for sale any air transportation, or negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, . . . or arranges for such, transportation." *Id.*

<sup>11</sup> 49 U.S.C. app. § 1373(b) (1982).

<sup>12</sup> Davison & Solomon, *Air Carrier Liability Under Deregulation*, 49 J. AIR L. & COM. 31, 32-33 (1983). Additionally, the regulatory system enabled the Board to regulate air carrier practices that were unjust, unreasonable or discriminatory pursuant to section 1482 of the Federal Aviation Act. *Id.* at 33; see also 49 U.S.C. app. § 1482 (1982).

<sup>13</sup> Hardaway, *Transportation Deregulation (1976-1984): Turning the Tide*, 14 TRANSP. L.J. 101, 136 (1984). The Board paved the way for the deregulation of the airline industry by allowing some automatic entry into the industry and establishing a means for airlines to form unregulated price adjustments through tariffs. *Id.* at 137. The tariffs allowed individual airlines, rather than the Board, to establish their prices. The relaxed requirements increased competition among the airlines. See *id.* at 144-45.

<sup>14</sup> LEGISLATIVE HISTORY OF THE AIRLINE DEREGULATION ACT OF 1978, H.R. REP. NO. 1211, 95th Cong., 2nd Sess. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS, 3737.

<sup>15</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, 1978 U.S. CODE CONG. & ADMIN. NEWS (92 Stat.) 1705 (codified as amended in scattered sections of 49 U.S.C.).

<sup>16</sup> See Hardaway, *supra* note 13, at 137. Deregulation spurred airlines to formulate competitive measures which were not needed under the previous regulatory system. The result of these measures was a fifty percent increase in operating profits just one year after the Airline Deregulation Act was enacted. The increase in operating profits was due to more passengers flying and taking advantage of reasonable air fares. *Id.* at 140. The competitive measures included a decline in

ing the domestic rate tariff system, removed the Board's authority to determine what constituted just and reasonable rates and airline practices and eliminated the doctrine of primary jurisdiction.<sup>17</sup> Further, the Department of Transportation (DOT) assumed the role of the Board in accepting the airlines' tariffs.<sup>18</sup> The Board, however, retained control in certain traditional regulatory areas of the aviation field.<sup>19</sup> Without the Board's primary jurisdiction to settle tariff disputes, courts now must look to common law<sup>20</sup> or statutory remedies<sup>21</sup> to fill in the gaps created by the deregulation.<sup>22</sup>

### B. *The Emergence of Frequent Flyer Coupon Brokering*

With the advent of airline deregulation, airlines sought

---

fare rates for "no frills" flights to enable airlines to increase flight capacity and operate more efficiently. *Id.* at 144.

<sup>17</sup> Davison & Solomon, *supra* note 12, at 34. In addition to the Board's loss of authority, the airlines lost the ability to disclaim their liability from, for example, physical injuries to passengers by merely filing a tariff with the Board. *Id.* The area of primary jurisdiction of the Board to determine what practices by airlines were just or reasonable became a judicial question and required the application of federal common law. *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1480 (C.D. Cal. 1988).

<sup>18</sup> 49 U.S.C. app. § 1551(b) (1982 & Supp. VI 1988). Airlines are now required to file with the DOT "tariffs showing all rates, fares, and charges for air transportation . . . and all classifications, rules, . . . practices, and services in connection with such air transportation." 14 C.F.R. § 221.3 (1989). The tariffs are required to put the public on notice of each airline's rules, regulations and practices. *See id.* If a person disagrees with a tariff provision, the individual is free to choose an airline with different tariff terms.

<sup>19</sup> Davison & Solomon, *supra* note 12, at 35. The Board retained regulatory authority over such areas as "smoking" and "adequate service" provided by carriers. *Id.*

<sup>20</sup> *First Pa. Bank v. Eastern Airlines, Inc.*, 731 F.2d 1113, 1122 (3d Cir. 1984) (loss of shipper limited to value specified in tariffs of carrier and deregulation had no effect on interpretation of tariff provision which is purely judicial determination). After deregulation, the validity of Eastern's tariff, limiting its liability for items lost in shipping, became a purely judicial question to be determined by the application of common law remedies. *Id.*

<sup>21</sup> *See Trans World Airlines*, 682 F. Supp. at 1485-88 (case involving airline's suit against coupon broker selling frequent flyer coupons and counterclaim of broker). The court in *Trans World Airlines* applied provisions of the respective statute (the Sherman Act) to the broker's antitrust claim. *Id.* (discussing how the common law will fill gaps encountered after deregulation).

<sup>22</sup> *See Davison & Solomon, supra* note 12, at 46-47.

new marketing techniques to attract passengers and combat competition within the industry.<sup>23</sup> One such marketing technique was the frequent flyer bonus (FFB) program which enabled passengers, upon flying a certain number of miles or flights, to receive awards in the form of free, discounted or upgraded travel.<sup>24</sup> Initially, airlines did not anticipate the continuance of the FFB programs. The airlines anticipated that, once "brand loyalty" was established, the programs would be discontinued.<sup>25</sup> Due to the increased competition in the airline industry and the entrance of cut-rate airlines, however, the FFB programs continued.<sup>26</sup>

Almost all of the major airlines offer some variation of an FFB program.<sup>27</sup> The airlines regulate the programs through tariffs, filed with the DOT, which specify the manner in which passengers may earn and use the FFB coupons. Tariffs are guidelines which set forth an airline's rules and regulations governing the relationship between the passenger and the airline.<sup>28</sup> To accomplish the goal of establishing "brand loyalty," most airlines will not redeem the coupons for cash nor transfer the coupons to

---

<sup>23</sup> Hall, *Frequent Flyer Benefits, Substantive and Procedural Tax Consequences*, 20 IND. L. REV. 823, 825 (1987). Marketing techniques, designed to "create brand loyalty," enabled patrons to "earn" free trips by flying on a specific airline and accruing mileage. *Id.* at 824-25.

<sup>24</sup> *Id.* at 825.

<sup>25</sup> *Id.* The frequent flyer patronage would increase business in the long run for airlines. *Id.*

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

<sup>27</sup> Lezin, *supra* note 2, at 45-46, 48. Airlines offer FFB plans with various rules and regulations on entry into the program and use of the FFB coupons when earned. Such regulations specify what days the coupons can be used during the week, specify upgrade ticket requirements, specify mileage credit for flights taken, and specify limitation of the use of the coupons to only the FFB earner's family. *Id.*

<sup>28</sup> See 14 C.F.R. § 221.3(a) (1989). Section 221.3(a) requires airlines to file tariffs disclosing the rules and regulations imposed by the FFB coupons to put passengers on notice of the limitations on the use of the coupons. *Id.*; see also *Trans World Airlines Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1479 (C.D. Cal. 1988); *infra* notes 33-76 and accompanying text for a discussion of the role of tariffs in the airline industry.

other travelers.<sup>29</sup>

Passengers who earn the coupons, however, have found an alternative means for their use. If a passenger prefers cash, as opposed to a free or discounted air fare, the passenger can sell the coupon to an independent ticket broker. The broker, in turn, sells the coupon to another passenger at a discounted price.<sup>30</sup> Airlines, in response to the phenomenal growth of the coupon brokerage business, began policing the FFB programs for invalidly issued tickets.<sup>31</sup> If an airline determines that a coupon is invalidly issued, the coupon will be taken from the passenger prior to boarding.<sup>32</sup>

### III. VALIDITY OF TARIFFS SUBSEQUENT TO DEREGULATION

All airlines are required to file tariffs, open to public inspection, which set forth all of the practices and services offered by the individual airline. This section will explore the history and impact that tariffs have on carriers and passengers and the public policy ramifications of the tariffs.

#### A. *Tariffs Imposed by Law*

Airlines, due to the magnitude of coupon brokering, initiated suits against coupon brokers claiming violations of the tariffs filed with the DOT.<sup>33</sup> Deregulation of the air-

---

<sup>29</sup> Lezin, *supra* note 2, at 48. Many airlines stipulate in their tariffs that coupons are only transferable to immediate family members. *Id.*

<sup>30</sup> *Id.* Brokering is accomplished by purchasing the coupon (usually containing only limited transferability to the earner's family) from the passenger, contacting a buyer for the coupon, and then registering the coupon, with the airline in the buyer's name. In effect, the frequent flier earner designates a "distant cousin" to appear on the coupon certificate. *Id.*

<sup>31</sup> See Allen, *supra* note 1, at 11-12. At the start of the FFB programs, airlines did not patrol the illegal brokering of tickets because such transferring was done on a small scale. Due to the magnitude of brokering and the fact that some brokers made between \$15 and \$20 million per year (and others averaged \$40 million per year), airlines are enforcing the tariffs pertaining to the transferability of FFB coupons. *Id.* at 11.

<sup>32</sup> See *id.*; *infra* notes 33-95 for a discussion regarding tariffs.

<sup>33</sup> *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp.

line industry, however, resulted in disputes over the validity of these tariffs due to the fact that deregulation precluded the Board from making a determination of whether a tariff is reasonable.

The first question that arises in addressing the validity of these tariffs is whether the deregulation of the airline industry nullified the regulatory effects of the airline tariffs. For years, courts viewed a tariff set by a carrier not merely as a contract between the carrier and its customer, but also as a rate imposed by law.<sup>34</sup> The carrier was bound to charge only those rates set forth in the tariff and in turn, was liable up to the specified transport rates contained in the tariffs.<sup>35</sup> Regardless of the external contracts and agreements that surrounded a carrier's agreement with its customer, the tariff was deemed conclusive and exclusive, having the force and effect of a statute.<sup>36</sup> Thus, the tariffs governed the terms of the agreements between the airline and their customers and could not be altered by reference to outside contracts or agreements.<sup>37</sup>

---

1476, 1479-80 (C.D. Cal. 1988) (airline filed suit against coupon broker for violating tariffs pursuant to 14 C.F.R. § 221.3, for fraud and interference with business relations); *see also* Allen, *supra* note 1, at 12; *supra* notes 17-18 and accompanying text. Cases involving coupon brokering are pending before the U.S. District Court for the Southern District of California. Allen, *supra* note 1, at 12. *But see* American Airlines, Inc. v. Platinum World Travel, 717 F. Supp. 1454, 1461-62 n.21 (D. Utah 1989) (court declined to follow the *Trans World Airlines* court regarding the interference with business relations claim).

<sup>34</sup> *United States v. Associated Air Transp., Inc.*, 275 F.2d 827, 833 (5th Cir. 1960) (carrier recovered against the government in a suit based on specific terms contained in tariffs, properly filed by the carrier with the Board); *Louisville & N.R. Co. v. Dickerson*, 191 F. 705, 709 (6th Cir. 1911) (tariffs set by railroads governing price of shipments enforced).

<sup>35</sup> *Louisville & N.R. Co.*, 191 F. at 709.

<sup>36</sup> *See* *Davis v. Cornwell*, 264 U.S. 560, 561 (1924) (tariffs contained implied obligations that shipper use due diligence thus shipper held liable for failure to abide by tariff terms); *Southern Ry. v. Prescott*, 240 U.S. 632, 637-38 (1916) (tariff rules governing shipment terms bound customer to pay stipulated transport charges); *Armour Packing Co. v. United States*, 209 U.S. 56, 74-76 (1908) (shippers of goods bound to conduct business according to tariffs required for regulating commerce); *Associated Air Transp.*, 275 F.2d at 833; *Jones v. Northwest Airlines*, 22 Wash. 2d 863, 157 P.2d 728, 729 (1945) (passenger bound by tariff regulations printed on ticket when ticket purchased).

<sup>37</sup> *Associated Air Transp.*, 275 F.2d at 833.



In *United States v. Associated Air Transport, Inc.*,<sup>38</sup> the Court of Appeals for the Fifth Circuit addressed the issue of whether tariffs set by air carriers had the force and effect of statutes.<sup>39</sup> Associated filed with the Board mandatory tariffs regarding specific mileage rates charged to individual customers.<sup>40</sup> The United States contracted with Associated to provide air transport for military personnel pursuant to a bidding process.<sup>41</sup> The bidding process required Associated to submit to the government a bid specifying the points of origin, destination, respective mileage of the chartered trip and the estimated dollar cost of the bid based on that mileage.<sup>42</sup> Associated's tariffs, however, set a fixed charge based upon actual miles flown.<sup>43</sup> The government refused to pay for the mileage flown in excess of the bid because the charges were not set forth in the charter bid.<sup>44</sup> The Fifth Circuit determined that the tariffs were the sole standard for the charges, regardless of the charter bidding process, and held that the tariffs had the "force and effect of statutes."<sup>45</sup> Thus, the government had to pay for actual mileage flown based on the rates set forth in Associated's tariffs.<sup>46</sup>

Subsequent to the holding in *Associated Air Transport, Inc.*,<sup>47</sup> the Second Circuit Court of Appeals upheld the va-

---

<sup>38</sup> 275 F.2d 827 (5th Cir. 1960).

<sup>39</sup> *Id.* at 833.

<sup>40</sup> *Id.* at 832 n.9. The tariffs defined miles to be computed according to actual miles flown. *Id.*

<sup>41</sup> *Id.* at 831.

<sup>42</sup> *Id.* The government took the position that if miles actually flown exceeded the bid, the bid controlled. If the miles flown were less than the bid, however, the bid was disregarded and actual mileage costs controlled. *Id.*

<sup>43</sup> *Id.* at 832.

<sup>44</sup> *Id.* at 831. Because the bid limited the cost of the contract with Associated, the government disregarded the excess mileage actually flown. *Id.*

<sup>45</sup> *Id.* at 833. Once the carrier sets forth rate changes in tariffs, the rates are imposed by law. *Id.*

<sup>46</sup> *Id.* at 844.

<sup>47</sup> *Id.*; see also *American Ry. Express v. American Trust Co.*, 47 F.2d 16, 18 (7th Cir.), cert. denied, 284 U.S. 629 (1931) (bank's tariffs specifying what constituted delivery of currency to bank customer governed the liability of the bank, and the tariffs had the force and effect of statutes).

lidity of tariffs in *North American Phillips Corp. v. Emery Air Freight Corp.*<sup>48</sup> This case involved a claim by Emery against North American, an air cargo shipper, for the cost of cargo stolen in route.<sup>49</sup> Tariffs, established by North American, limited liability for negligence in shipping to fifty cents (U.S.) per pound unless a customer declared a higher value for the cargo.<sup>50</sup> The court held that the tariffs set by North American determined North American's liability to Emery in light of Emery's failure to declare a higher value for the cargo.<sup>51</sup>

The court also acknowledged the various ways in which previous courts determined that tariffs were binding.<sup>52</sup> Some courts, for example, determined that tariffs were binding as a matter of law regardless of any terms specified by an outside contract.<sup>53</sup> Other courts determined that the tariffs were binding as part of a contractual relationship between the airline and the passenger.<sup>54</sup> Thus, even if there was a contract between a passenger and an airline regarding FFB coupons in addition to the tariff provisions, the tariff would govern the terms of the FFB relationship.<sup>55</sup> Accordingly, regardless of the rationale a court might use, the federal tariffs seem to govern the relationship between the shipper and its customer, irrespec-

---

<sup>48</sup> 579 F.2d 229, 233 (2d Cir. 1978).

<sup>49</sup> *Id.* at 231.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 233.

<sup>52</sup> *Id.*

<sup>53</sup> See *Western Union Tel. Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 572 (1921) (telephone tariffs, limiting liability for mistakes in transmitting, held binding as a matter of law); *Blair v. Delta Air Lines, Inc.*, 344 F. Supp. 360, 365 (S.D. Fla. 1972), *aff'd*, 477 F.2d 564 (5th Cir. 1973) (airline tariff regarding the loss of baggage constituted the governing law, thus limiting liability for damage of articles shipped as cargo).

<sup>54</sup> See *Tishman & Lipp Inc. v. Delta Air Lines*, 413 F.2d 1401, 1405 (2d Cir. 1969) (airline tariffs regulating liability for loss of luggage constituted a contract of carriage between parties); *Rosch v. United Air Lines*, 146 F. Supp. 266, 267 (S.D.N.Y. 1956) (airline tariff constituted a contract of carriage between airline and passenger limiting liability for death of animal during shipping).

<sup>55</sup> See *American Airlines, Inc. v. Platinum World Travel*, 717 F. Supp. 1454, 1460 (D. Utah 1989) ("A validly filed and approved tariff 'exclusively and conclusively' controls contractual relations between the parties.").

tive of the terms set forth or included in the transportation agreements.<sup>56</sup>

The court of appeals in the *North American Phillips* case also recognized that deregulation of the airline industry eliminated the Board's ability to suspend "unjust or unreasonable" rates.<sup>57</sup> The court delineated the suspension of the Board's power as a separate issue, however, and determined that such suspension did not effect the validity of tariffs which are either imposed by law or included in a binding contract provision.<sup>58</sup>

The recent United States district court decision in *American Airlines, Inc. v. Platinum World Travel* and *Trans World Airlines, Inc. v. American Coupon Exchange, Inc.* affirmed the validity of the tariffs as controlling, for example, price, liability of carriers, or transferability.<sup>59</sup> Both *American Airlines* and *Trans World Airlines* directly addressed the issue of whether airline tariffs, pertaining to the regulation of FFB coupons, are valid and control the relationship between the airlines and their customers.<sup>60</sup> American Airlines and Trans World specified in their tariffs, filed with the DOT pursuant to section 221.3, of Title 14 of the Code of Federal Regulations,<sup>61</sup> the rules and regulations of the FFB plan coupons.<sup>62</sup> Due to the emergence of a

---

<sup>56</sup> *North Am. Phillips Corp.*, 579 F.2d at 233; see also *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966) (tariffs establishing rates filed by telephone companies are binding upon customers and not subject to alteration), *cert. denied*, 385 U.S. 1008 (1967); *Vogelsang v. Delta Air Lines, Inc.*, 302 F.2d 709, 712 (2d Cir.) (liability limitations set forth in tariffs are binding on shippers and passengers regardless of whether terms are set forth in transportation documents), *cert. denied*, 371 U.S. 826 (1962).

<sup>57</sup> *North Am. Phillips Corp.*, 579 F.2d at 234.

<sup>58</sup> *Id.*

<sup>59</sup> *American Airlines*, 717 F. Supp. at 1461; *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1481 (C.D. Cal. 1988).

<sup>60</sup> *American Airlines*, 717 F. Supp. at 1460; *Trans World Airlines*, 682 F. Supp. at 1481.

<sup>61</sup> 14 C.F.R. § 221.3 (1989).

<sup>62</sup> *American Airlines*, 717 F. Supp. at 1459; *Trans World Airlines*, 682 F. Supp. at 1479. The tariffs set forth regulations governing the use of such coupons and specifically stated that FFB awards "are non-transferable, may not be bartered, sold, or assigned, and may be used only by the designated parties [the earner or a designated family member, legal dependent, or relative]." *Trans World Airlines*,

secondary market for the coupons, the airlines filed suit against brokers of the coupons for violating the tariffs regulating the FFB programs.<sup>63</sup>

The initial step the *Trans World Airlines* court took was to determine the validity of the tariffs as imposed by law or as a binding contract between the airline and their passengers regardless of the airline deregulation.<sup>64</sup> The court looked to *United States v. Edwards*,<sup>65</sup> which involved a tariff specifying an airline's right to inspect shipments prior to carriage, to determine whether the tariffs controlled the relationship between the airline and its passengers.<sup>66</sup> The *Edwards* court held the tariffs to represent "conclusive and exclusive . . . rights and liabilities between airlines and their passengers."<sup>67</sup> Thus, the tariffs had the force and effect of law.<sup>68</sup> Additionally, the *Edwards* court cited *Tishman & Lipp, Inc. v. Delta Air Lines*<sup>69</sup> to establish the validity of tariffs on an alternative ground.<sup>70</sup> Both the *Tishman* and *Edwards* courts held that the tariffs represent a contractual relationship between the airline and its passengers.<sup>71</sup> Although both of these holdings were prior to the deregulation of the airline industry, the *Trans World Airlines* court made no distinction based upon the intervening legislation.<sup>72</sup>

In sum, both the *Trans World Airlines* and the *American Airlines* courts held that the tariffs established guidelines

---

682 F. Supp. at 1479. *Trans World* also retained the right to disqualify the use of coupons if a violation of the tariff regulations occurred. *Id.*; see also *American Airlines*, 717 F. Supp. at 1461.

<sup>63</sup> *American Airlines*, 717 F. Supp. at 1458; *Trans World Airlines*, 682 F. Supp. at 1480.

<sup>64</sup> See *supra* notes 48-53, 56-58 and accompanying text for a discussion of the validity of tariffs concerning FFB coupons.

<sup>65</sup> 602 F.2d 458, 462-63 (1st Cir. 1979).

<sup>66</sup> *Id.* at 462.

<sup>67</sup> *Id.* (emphasis added); *Tishman & Lipp, Inc.*, 413 F.2d at 1403 (tariff pertaining to an airline's liability for lost baggage upheld as regulating the rights and liabilities between airlines and their passengers).

<sup>68</sup> *Trans World Airlines*, 682 F. Supp. at 1481.

<sup>69</sup> 413 F.2d 1401 (2d Cir. 1969).

<sup>70</sup> *Edwards*, 602 F.2d at 462.

<sup>71</sup> *Id.* at 463; *Tishman & Lipp, Inc.*, 413 F.2d at 1405.

<sup>72</sup> *Trans World Airlines*, 682 F. Supp. at 1481.

regarding the use of the FFB coupons and provided for the FFB coupon's cancellation if any violation of the tariffs occurred.<sup>73</sup> The deregulation of the airline industry resulted in the elimination of set rates industry-wide.<sup>74</sup> In contrast, FFB terms defined within the tariffs filed by individual airlines are valid under the federal filing statute.<sup>75</sup> Hence, case law, prior and subsequent to the Airline Deregulation Act of 1978, has upheld the validity of tariffs regulating the FFB coupons.<sup>76</sup>

### B. *Validity of a Tariff in Terms of Public Policy*

Even though tariffs are valid as imposed by law or on the basis of a contractual relationship, the tariff will be invalidated if it is against public policy.<sup>77</sup> For example, tariffs which exempt a common carrier from all liability for the negligence of the carrier are against public policy and are void.<sup>78</sup> Another concern is whether the application of primary jurisdiction,<sup>79</sup> which gives deference to tariffs instead of applying applicable state law, is against public policy.<sup>80</sup> This question arises in the FFB coupon context

---

<sup>73</sup> *American Airlines*, 717 F. Supp. at 1459-61 (case remanded for further proceedings); *Trans World Airlines*, 682 F. Supp. at 1481.

<sup>74</sup> See *supra* notes 8-22 and accompanying text for a discussion of the deregulation of the airline industry.

<sup>75</sup> See *supra* notes 18 and 28 and accompanying text specifying the tariff reporting requirements imposed on airlines.

<sup>76</sup> *First Pa. Bank v. Eastern Airlines, Inc.*, 731 F.2d 1113, 1122 (3d Cir. 1984) (deregulation of airline industry merely deprived Board of its power to determine the reasonableness of tariffs (doctrine of primary jurisdiction)); see *supra* notes 33-75 and accompanying text for a discussion of case law regulation of the airline/passenger relationship.

<sup>77</sup> *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1481 (C.D. Cal. 1988).

<sup>78</sup> *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1312 (9th Cir. 1977). The validity of the tariff limiting liability for the death of an animal during transport was a question of public policy. The public policy determination of the validity of a tariff ultimately is a judicial question requiring the application of federal common law. *Id.* at 1313.

<sup>79</sup> *Id.* Primary jurisdiction, in the context of airline tariffs required to be filed with the DOT under federal statute, furthers the rationale of public disclosure of individual airline regulations rather than burden judicial resources with dispute settlements. *Id.*; see also *supra* notes 17-18 and accompanying text.

<sup>80</sup> *Trans World Airlines*, 682 F. Supp. at 1481.

because airline tariffs, which prevent the transfer of the coupons, preclude the assignment of a contract right which is a matter of state law.<sup>81</sup>

Coupon brokers claim that a passenger contracts with the airline for the frequent flyer miles when purchasing regular fare tickets.<sup>82</sup> The passenger, upon earning the miles necessary to receive the FFB coupons, performs one hundred percent of his contract, thus gaining the right to assign the coupons regardless of the tariffs on file with the DOT prohibiting such acts.<sup>83</sup> This argument assumes that brokers rely on state law, which often provides that non-negotiable instruments (such as FFB coupons) are assignable.<sup>84</sup> The question then becomes whether the tariffs, required under federal statute, preempt state law and whether such preemption violates public policy?

On one hand, airline tariffs, assuming they are just and reasonable, are required to be filed under federal law and represent not a mere contract right but have the force of law.<sup>85</sup> Section 1305 of the Federal Aviation Act protects tariffs by preempting state law.<sup>86</sup> Courts interpreting section 1305 have held that Congressional intent was to preempt both state statutes and all common law rules

---

<sup>81</sup> *Id.*

<sup>82</sup> Allen, *supra* note 1, at 12.

<sup>83</sup> *Id.*

<sup>84</sup> See, e.g., *Trans World Airlines*, 682 F. Supp. at 1481. The brokers relied on the California Civil Code section 1459, which provides that non-negotiable instruments such as the FFB coupons are assignable, to argue that the preclusion of the FFB coupon transfer was a violation of public policy and, thus, the tariffs were invalid. *Id.*

<sup>85</sup> *Carter v. American Tel. & Tel. Co.*, 365 F.2d 486, 496 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967); see also *supra* notes 18-22, 28 and accompanying text for a discussion of the tariff requirements imposed on individual airlines.

<sup>86</sup> 49 U.S.C. § 1305(a)(1) (1982 & Supp. III 1985). Section 1305 states:

[N]o State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter [49 U.S.C. § 1371] to provide air transportation.

*Id.*

affecting rates and services of air travel.<sup>87</sup> They hold that Congress intended to preempt both state law and common law in order to do away with "uncertainties and conflicts [in air travel], including situations in which carriers have been required to charge different fares for passengers traveling between two cities . . . ."<sup>88</sup> Thus, Congress regulates the aviation industry extensively. Through tariffs filed with the DOT, and under section 1305(a), it preempts any state statute causing a variation of airline rates from one state to another.<sup>89</sup>

Even though the passenger earns the right to use the frequent flyer coupon, section 1305(a) preempts any state law allowing for the assignment of such coupons.<sup>90</sup> Hence, the tariffs filed pursuant to this Act do not violate public policy, as evidenced by the legislative history<sup>91</sup> and case law.<sup>92</sup> The tariffs are a valid means by which the airlines can regulate the FFB plans.<sup>93</sup>

In addition to section 1305, the Commerce Clause may provide grounds for federal preemption of state law.<sup>94</sup> The Commerce Clause will be addressed in Section V of

<sup>87</sup> See *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987) (failure of airline to seat a blind person near emergency exit did not give rise to a state law action because section 1305 preempts all laws relating to service); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415-16 (9th Cir. 1984) (state law regarding discrimination claim of passenger preempted by section 1305 even if the state law in question does not conflict with federal law); *New York Airlines, Inc. v. Dukes County*, 623 F. Supp. 1435, 1441-43 (D. Mass. 1985) (refusal of airport to allow airline access was preempted by section 1305 in order to assure uniformity in the federal regulation of the airline industry).

<sup>88</sup> H.R. REP. NO. 1211, 95th Cong., 2d Sess. 1, reprinted in 1978 U.S. CODE CONG. & ADMIN. NEWS 3737, 3751-52.

<sup>89</sup> *Illinois Corporate Travel v. American Airlines*, 682 F. Supp. 378, 379 (N.D. Ill. 1988) (Illinois statute and common law pertaining to ability of travel agent to charge rates different than prescribed in airline tariffs were preempted by section 1305(a) of the Federal Aviation Act).

<sup>90</sup> See *Trans World Airlines*, 682 F. Supp. at 1481.

<sup>91</sup> See *supra* note 88 and accompanying text for a discussion of the legislative history regarding tariff preemption of state law.

<sup>92</sup> See *supra* note 87 and accompanying text for a discussion of the preemption of both state law and common law regarding tariffs.

<sup>93</sup> *Trans World Airlines*, 682 F. Supp. at 1481.

<sup>94</sup> Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001, 1003-04 (1980). Congress, through the Commerce Clause, Article I, section 8 of the Constitution, places maximum reliance on the antitrust laws to insure

this comment, which pertains to the antitrust impact of precluding the brokering of FFB coupons.<sup>95</sup>

#### IV. BROKER'S INTERFERENCE WITH BUSINESS RELATIONS

This section will discuss the scope of the tort of interference with business relations, and the elements of the tort as provided for under various state laws. The tort of interference with business relations (also called interference with contractual relations) is a developing tort, the elements of which are vague and the applications of which are difficult to predict.<sup>96</sup>

##### A. *Scope of Interference with Business Relations*

Although tariffs are one valid means of precluding the brokering of FFB coupons,<sup>97</sup> as an additional tactic the airlines can also bring suit against FFB coupon brokers for the tort of interference with business relations.<sup>98</sup> In an action for interference with business relations, a plaintiff brings suit against a person or entity for interfering with a contract or business relationship between the plaintiff and

---

competitive market, provide safe and efficient transportation, and prevent unfair practices in the air transport industry. *Id.*

<sup>95</sup> See *infra* notes 139-223 and accompanying text for a discussion of the antitrust claims regarding FFB coupons.

<sup>96</sup> *A.F. Arnold & Co. v. Pacific Professional Ins., Inc.*, 27 Cal. App. 3d 710, 714, 104 Cal. Rptr. 96, 99 (1972) (broker's claim of wrongful interference with business relations stated a prima facie cause of action against the insurance company); see also *Buckaloo v. Johnson*, 14 Cal. App. 3d 815, 122 Cal. Rptr. 745, 748, 537 P.2d 865, 868 (1975). The tort of interference with contractual relations dates back to 1853 but is infrequently invoked in tort actions. *Id.*; *Idlehour Dev. Co. v. City of St. Charles*, 88 Ill. App. 3d 47, 409 N.E.2d 544, 548 (1980) (cause of action for interference with contractor's business relations against city sufficient to state claim in field of new tort); RESTATEMENT (SECOND) OF TORTS § 767 comment b (1977). This tort is not defined by specific rules and often depends on whether the particular interests at issue merit a cause of action. The decision as to whether the interference was improper, therefore, depends upon a factual analysis and "choice of values in each situation." RESTATEMENT (SECOND) OF TORTS § 767 comment b (1977).

<sup>97</sup> See *supra* notes 33-93 and accompanying text for a discussion concerning the validity of tariffs set by individual airlines.

<sup>98</sup> *Trans World Airlines, Inc. v. American Coupon Exch., Inc.* 682 F. Supp. 1476, 1482-83 (D.C. Cal. 1988). But see *American Airlines, Inc. v. Platinum World Travel*, 717 F. Supp. 1454, 1461-62 n.21 (D. Utah 1989).



a third party.<sup>99</sup> In some cases, a valid cognizable relationship need not even exist to bring a claim, but only an agreement in principle.<sup>100</sup> A claimant may prevail by showing that a party interfered with prospective or potential business relations.<sup>101</sup>

Interference with business relations<sup>102</sup> is recognized by many courts and commentators and is often supported by public policy arguments.<sup>103</sup> The public policy arguments regarding the tort generally recognize the economic value of contractual and business relationships and seek to discourage deceptive and underhanded competition.<sup>104</sup> The tort is a state specific tort requiring analysis of the ration-

---

<sup>99</sup> See F. HARPER, F. JAMES & O. GRAY, *THE LAW OF TORTS* § 6.5, at 300-02 (2d ed. 1986) [hereinafter *LAW OF TORTS*]. The tort of interference of contractual relations protects the integrity of contractual relations into which the plaintiff entered with the contracting party. *Id.* at 302.

<sup>100</sup> See *Buckaloo*, 14 Cal. App. 3d at 815, 122 Cal. Rptr. at 749, 537 P.2d at 868-69. A valid contract is not a requirement to bring a claim of interference with business relations because the essence of the claim is a disruption of a relationship and not the breach of a contract. *Id.* at 749, 537 P.2d at 869.

<sup>101</sup> *Id.*

<sup>102</sup> See *RESTATEMENT (SECOND) OF TORTS* § 766 (1977). Section 766 states:

One who intentionally and improperly interferes with the performance of a contract . . . between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

*Id.*; see also *id.* § 767 comment a. Further, the interference must be intentional and improper in order to substantiate a claim of interference with business relations. See *id.*

<sup>103</sup> See *Buckaloo*, 14 Cal. App. 3d at 815, 122 Cal. Rptr. at 751-52, 537 P.2d at 871; *A.F. Arnold*, 27 Cal. App. 3d at 716, 104 Cal. Rptr. at 100; *Venturini v. Afatato*, 84 Ill. App. 3d 547, 405 N.E.2d 1093, 1098 (1980) (interference with real estate purchase sufficient to substantiate interference with business relations claim); *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631, 633-34 (1941) (purchaser prevailed on a claim of interference with a noncompetition contract on the grounds that the interference was against public policy and that such acts were unlawful); *Champion v. Wright*, 740 S.W.2d 848, 853 (Tex. Ct. App. 1987) (interference with employee relations by outside employer was sufficient to establish an interference with business relations claim).

<sup>104</sup> *RESTATEMENT (SECOND) OF TORTS* § 767 comment f (1977). To determine if the interference was improper, the social interests advanced by the interference must be taken into consideration. If the motivation behind the interference was to promote a public interest, such as precluding a contract agreement which would pollute the environment, the interference would probably not constitute a tort in violation of section 766. *Id.*

ale applicable to the respective state law where the claim is brought.<sup>105</sup> For example, both California and Illinois recognize that competition in the market place is needed<sup>106</sup> but that the tort of interference with business relations acts as a check on dealings which ultimately disrupt contractual or prospective relationships.<sup>107</sup> Courts in Illinois weigh the contractual interest at stake against the challenged conduct to determine whether the acts in question should be prohibited.<sup>108</sup>

New York courts, on the other hand, view the business or contractual agreement as a "property right."<sup>109</sup> Courts weigh the public gain against the harm incurred from the interference to determine whether an interference with business relations is merited.<sup>110</sup> If improper means, such as dishonest, unfair, or harmful actions, are not used in the interference, an actionable claim does not exist.<sup>111</sup>

Finally, Texas courts suggest that parties should induce breach or interference of a contractual relationship when the contracts are no longer economically optimal.<sup>112</sup> The

---

<sup>105</sup> See generally LAW OF TORTS, *supra* note 99, at 304-08.

<sup>106</sup> See *DeVoto v. Pacific Fidelity Life Ins. Co.*, 618 F.2d 1340, 1347 n.3 (9th Cir.) (broker's suit for tortious interference with business relations failed because of failure on broker's part to establish an economic or business relationship), *cert. denied*, 499 U.S. 869 (1980); *Mitchell v. Weiger*, 56 Ill. App. 3d 236, 371 N.E.2d 888, 892 (1977) (innocent contracting party, to protect his rights in contract, has right of action in tort against interfering party).

<sup>107</sup> See *Imperial Ice Co.*, 18 Cal. 2d at 33, 112 P.2d at 633; *Idlehour Dev. Co.*, 88 Ill. App. 3d at 47, 409 N.E.2d at 548.

<sup>108</sup> *Idlehour Dev. Co.*, 88 Ill. App. 3d at 47, 409 N.E.2d at 548.

<sup>109</sup> *Strapex Corp. v. Metaverpa N.V.*, 607 F. Supp. 1047, 1050 (S.D.N.Y. 1985) (distributor suit against salesman and manufacturer for tortious interference with prospective economic advantage); *Sommer v. Kaufman*, 59 A.D.2d 843, 844, 399 N.Y.S.2d 7, 8 (App. Div. 1977) (interference with one's business relations is not actionable unless unlawful means are implemented).

<sup>110</sup> *Strapex Corp.*, 607 F. Supp. at 1050; *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 459, 368 N.E.2d 1230, 1232, 398 N.Y.S.2d 864, 867 (1977) (court weighed packager's harm from interference with business sales against public need to be informed about harmful products).

<sup>111</sup> *Sommer*, 59 A.D.2d at 844, 399 N.Y.S.2d at 8; see also *Royal Soc'y of Medicine v. International Soc'y for Preventive Oncology, Inc.*, 602 F. Supp. 794, 797 (S.D.N.Y. 1985) (tort of malicious interference involving a "wrongful threat precluding the exercise of free will" constitutes improper conduct to establish liability from tort).

<sup>112</sup> See *State Nat'l Bank of El Paso v. Farah Mfg. Co.*, 678 S.W.2d 661, 688 (Tex.

courts allow interference provided that some legitimate interest is furthered and that no unlawful means are used to advance such interests.<sup>113</sup>

### B. *Elements of Interference with Business Relations*

The determination of whether a broker is in fact guilty of interfering with the relationship between an airline and its passengers requires analysis of each element in light of the broker's purpose, motive, and intent for brokering the coupons.

The elements of interference with business relations vary from state to state. In New York and California, a contract need not be present for an interference, only an economic relationship.<sup>114</sup> Texas and Illinois, however, require an existing contract to be present.<sup>115</sup> A contractual relationship could be presumed between an airline and its passengers when the passenger purchases a ticket from the airline.<sup>116</sup> Passenger agreement to the tariff provisions, which represents an offer, is assumed under California law, and possibly in New York, upon acceptance of the ticket or the earned FFB coupon.<sup>117</sup> Courts in Texas and Illinois, however, might not recognize such an agreement as equating to an existing contract between an airline and its passengers. Thus, the initial question of the existence of a contract might preclude an interference with business relations claim against an FFB broker if the state where the claim is brought does not recognize an

---

Ct. App. 1984) (evidence sufficient to establish unlawful means used to interfere with business relations and a cause of action).

<sup>113</sup> *Id.* One is entitled to interfere with business relations if one has bona fide rights in or possesses an equal or superior interest to that of the plaintiff. The interest, financial or otherwise, must be of the interfering party and the interfering party may not violate definite legal rights of others.

<sup>114</sup> *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1482 (C.D. Cal. 1988); *Sommer v. Kaufman*, 59 A.D.2d 843, 844, 399 N.Y.S.2d 7, 8 (App. Div. 1977).

<sup>115</sup> *Venturini v. Affatato*, 84 Ill. App. 3d 547, 405 N.E.2d 1093, 1098 (1980); *Champion v. Wright*, 740 S.W.2d 848, 853 (Tex. Ct. App. 1987).

<sup>116</sup> See Allen, *supra* note 1, at 12.

<sup>117</sup> See *United States v. Edwards*, 602 F.2d 458, 462 (1st Cir. 1979); *Trans World Airlines*, 682 F. Supp. at 1479; *Sommer*, 59 A.D.2d at 844, 399 N.Y.S.2d at 8.

implied contractual relationship as an existing contract.<sup>118</sup>

The second element of the interference tort in both California and Illinois is the broker's knowledge of the relationship between the airline and its passenger (assuming Illinois recognizes that a contractual relationship is present).<sup>119</sup> Such knowledge on the part of the broker is evidenced when the broker, upon procuring an FFB coupon from a passenger, instructs the client purchasing the coupon to instruct the airline that the client is a "distant cousin" of the passenger who earned the coupon.<sup>120</sup> Such evidence should easily establish the second element: knowledge of the relationship between the airline and its customers.

New York, Illinois, Texas, and California all recognize as an element of the tort either: (1) intentional interference or inducement to breach a contract or (2) an agreement resulting in damages.<sup>121</sup> The intentional interference could be shown by establishing that the brokers, upon selling the coupons, preclude paying customers from a seat on the plane, thus damaging the airlines by procuring revenue indirectly and interfering with the tariff relationship that prohibits coupon transfers.<sup>122</sup> Additional elements required to establish a tort claim in New York include interference (1) without excuse and (2) by an unlawful act.<sup>123</sup> Texas requires that the interference proximately cause the airlines' damages.<sup>124</sup>

---

<sup>118</sup> See *Venturini*, 84 Ill. App. 3d at 547, 405 N.E.2d at 1098; *Champion*, 740 S.W.2d at 853.

<sup>119</sup> *Trans World Airlines*, 682 F. Supp. at 1483; *Venturini*, 84 Ill. App. 3d at 547, 405 N.E.2d at 1098.

<sup>120</sup> See *supra* note 30 and accompanying text for a discussion of the coupon broker's procedure for selling FFB coupons.

<sup>121</sup> *Trans World Airlines*, 682 F. Supp. at 1483; *Venturini*, 84 Ill. App. 3d at 547, 405 N.E.2d at 1098; *Sommer*, 59 A.D.2d at 844, 399 N.Y.S.2d at 8; *Champion*, 740 S.W.2d at 853.

<sup>122</sup> A valid agreement, in this case the airline tariffs precluding the sale or transfer of FFB coupons, must be in force in order to claim interference with a business or contractual relationship. RESTATEMENT (SECOND) OF TORTS § 766 comment f (1977).

<sup>123</sup> *Sommer*, 59 A.D.2d at 844, 399 N.Y.S.2d at 8.

<sup>124</sup> *Champion*, 740 S.W.2d at 853.

This interference might not warrant a tort claim in courts similar to New York's which might take the view that the interference is not unlawful since the airline tariff agreement is not a "property right" meriting protection.<sup>125</sup> Furthermore, courts could view the passenger as having a "property right" to sell the earned FFB coupons to the brokers.<sup>126</sup> Under this view, the passenger performs one hundred percent of his contractual obligations to the airline when the passenger purchases and pays for the tickets.<sup>127</sup> The passenger could then assign the coupon rights earned from the tickets to the broker.<sup>128</sup> Courts, however, rejected this line of reasoning in light of the airline tariff's continued validity subsequent to deregulation and the preemption of state law or common law under section 1305 of the Federal Aviation Act.<sup>129</sup>

Courts following the Texas approach might allow the interference if the selling of FFB coupons was beneficial in promoting the economic interest of the brokers and the public gain of inexpensive air fare with only incidental harm to the airlines.<sup>130</sup> The airlines, however, could try to establish that the resulting loss of revenues, increased necessity to police the coupon program, and loss of passenger loyalty result in more costs than benefits and, thus, merit an interference with business relations claim.<sup>131</sup>

The recent California case of *Trans World Airlines v. American Coupon Exchange, Inc.*, discussed previously, addressed the issue of whether a broker interfered with the contractual relations between the airlines and their cus-

---

<sup>125</sup> Cf. *ATI, Inc. v. Ruder & Finn, Inc.*, 42 N.Y.2d 454, 459, 368 N.E.2d 1230, 1233, 398 N.Y.S.2d 864, 867 (1977). New York courts might conclude that the public gain of inexpensive fares obtained from brokered tickets outweighs the harm incurred by the airlines. *Id.*

<sup>126</sup> See *Allen*, *supra* note 1, at 12.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> See *supra* notes 33-93 and accompanying text for a discussion on the validity of airline tariffs.

<sup>130</sup> See *State Nat'l Bank of El Paso v. Farah Mfg. Co.*, 678 S.W.2d 661, 688 (Tex. Ct. App. 1984).

<sup>131</sup> See RESTATEMENT (SECOND) OF TORTS § 766 comments j, k (1977).

tomers by brokering FFB coupons.<sup>132</sup> The court held that a contractual relationship existed between the airlines and their passengers with respect to the FFB coupons.<sup>133</sup> Additionally, the court found that American Coupon Exchange knew of this relationship and intended to interfere by brokering the coupons.<sup>134</sup> The profit derived from the sale of the coupons motivated the brokers to interfere with Trans World's relationship with their customers.<sup>135</sup> The court did not accept American Coupon Exchange's only defense that the brokering of the coupons, in violation of Trans World's tariffs, was not wrongful and that no actionable claim existed.<sup>136</sup> The court determined that American Coupon Exchange acted intentionally and for pecuniary gains which did not promote any goals except its own.<sup>137</sup>

In light of the *Trans World Airlines* holding, it appears that a broker who violates an airline's tariff precluding the sale or transfer of FFB coupons will be liable under California law for interfering with the business relations of the airline.<sup>138</sup> Other jurisdictions, however, might not reach the same result as the *Trans World Airlines* court due to state differences regarding the elements of the tort and analyses of these elements.

#### V. THE ANTITRUST IMPLICATIONS OF FREQUENT FLYER COUPON BROKERING

The airlines' recent success in the interference with business relations claims and the validity of tariffs against FFB coupon brokers have provided a steady deterrent precluding brokers from selling the coupons. The bro-

---

<sup>132</sup> *Trans World Airlines*, 682 F. Supp. at 1482.

<sup>133</sup> *Id.* at 1481.

<sup>134</sup> *Id.* at 1483. The broker admitted to knowledge of the relationship between the airline and passenger set forth in the tariffs precluding the transfer of coupons. *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* The court held the broker's activity of selling the FFB coupons disrupted the airline/passenger relationship. *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

kers, however, have also attempted to defend the sale of the coupons by asserting antitrust claims against the airlines.<sup>139</sup> Section A will discuss the effect of airline deregulation on antitrust claims; Section B will explore Section One of the Sherman Act pertaining to the brokering of FFB coupons; and Section C will discuss Section Two of the Sherman Act and the coupon brokerage business.

### A. *The Antitrust Claim Subsequent to Deregulation*

Prior to deregulation, the Board reviewed the activities of airlines to ensure that competition was not carried to an extreme and that the safety of air transportation was not jeopardized.<sup>140</sup> The Board allowed competition only to the extent necessary for developing a financially sound airline industry and even precluded antitrust claims for specific types of transactions.<sup>141</sup> This antitrust immunity, however, was illusory, as evidenced by the 1945 decision in *Georgia v. Pennsylvania Railroad* which subjected carrier activity in the railroad industry to the scrutiny of antitrust laws.<sup>142</sup> This early holding recognized that regulated industries, such as the airline industry, are not *per se* exempt from antitrust laws.<sup>143</sup> Whether a regulated industry is free from an antitrust claim depends on the presence of one of the following conditions: (1) an express statutory exemption specifically excluding a particular activity from antitrust scrutiny; (2) implied immunity inferred from a regulatory statute when those competitive activities are

<sup>139</sup> See *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1484-88 (C.D. Cal. 1988); Allen, *supra* note 1, at 11-12.

<sup>140</sup> Beane, *supra* note 94, at 1002. The Board was also supposed to insure certainty in the airline industry by regulating fares and entry into the air transportation service industrywide. *Id.*

<sup>141</sup> *Id.* at 1002-03. The immunity granted by the Board from antitrust claims lessened competition among airlines in order to assure the sound development of the airline industry. *Id.* at 1003. An example of the immunity granted from the Board might have been the allowance of two airlines to enter into a contract that precluded another airline from participating in a certain area of the aviation industry.

<sup>142</sup> *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 456 (1945) (regulated railroad industry subject to antitrust laws for rate-fixing combinations).

<sup>143</sup> See *id.*

consistent with the statute in question; (3) immunity under the filed tariff doctrine evidenced by Congress's intent to preclude antitrust action in conjunction with the mandated tariffs; or (4) state action immunity prescribed when states are allowed to regulate antitrust claims in certain areas.<sup>144</sup>

Subsequent to the deregulation of the airline industry,<sup>145</sup> the availability of antitrust immunity was severely limited, if not extinguished.<sup>146</sup> Under deregulation, airlines are forced to compete in the market place and satisfy consumer needs in order to retain a share of the market.<sup>147</sup> The public, after airline deregulation, expected greater affordability and improved convenient airline service. This public expectation forced airlines to adopt new competitive rates and services without Board approval.<sup>148</sup> Thus, airlines incorporated aggressive rate structures and entered into vertical agreements with ticket agents to implement the competitive rates.<sup>149</sup> Additionally, airline reporting agencies, which act as clearing houses between the airlines and ticket agents, were incorporated to facilitate the reporting and remitting of airline fares between individual airlines and prospective travel agencies who were permitted to sell the airline tickets.<sup>150</sup>

---

<sup>144</sup> Joseph, *Private Antitrust Litigation Involving Regulated Industries*, 53 ANTITRUST L.J. 193, 193-200 (1984). Even though courts do not favor antitrust immunity, there are areas in which immunity does exist. *Id.* at 193.

<sup>145</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, 1978 U.S. CODE CONG. ADMIN. NEWS (92 Stat.) 1705 (codified as amended in scattered sections of 49 U.S.C. § 1301).

<sup>146</sup> See Joseph, *supra* note 144, at 203.

<sup>147</sup> See Bois, *Deregulation in Practice*, 55 ANTITRUST L.J. 185, 189 (1986). Regulation of industry activities seemed to foster decreased emphasis on competition and innovation in order to retain and promote customer satisfaction. *Id.*

<sup>148</sup> See Cohen, *Emerging Problems for Future Deregulators*, 53 ANTITRUST L.J. 185, 186-87 (1984); see also Joseph, *supra* note 144, at 203.

<sup>149</sup> DeMuth, *Deregulation Review*, 53 ANTITRUST L.J. 189, 191 (1984). Since deregulation, the Board removed the barrier between airline and ticket agents creating vertical relationships subject to antitrust claims. *Id.*

<sup>150</sup> See T. DICKERSON, TRAVEL INDUSTRY PROBLEMS TRAVEL LITIGATION, TERRORISM DEREGULATION AND THE PUBLIC INTEREST 190-91 (1987). The reporting agency business initially emerged to ward off antitrust claims. The reporting agency supervises travel agencies nationwide regarding weekly sales reporting and acts as a clearing house between the airline and travel agency in the collection



In sum, the deregulation of the airline industry put maximum emphasis on competition between airlines to encourage quality service at a reasonable price.<sup>151</sup> Competition must be in the public interest, however, and the antitrust statutes ensure that the airlines do not monopolize the market and restrain trade.<sup>152</sup> Moreover, the airlines' defense of immunity from antitrust claims is virtually nonexistent due to the deregulation of the industry.<sup>153</sup>

## B. Section One Violations of the Sherman Act Regarding the Brokering of FFB Coupons

### 1. Background of Section One of the Sherman Act

Section One of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." is illegal and constitutes a violation of the Act.<sup>154</sup> Although every contract restrains trade in some fashion, only unreasonable restraints violate the Act.<sup>155</sup> The anticompetitive effects must harm not only the plaintiff claiming a Section One antitrust violation but also the relevant market.<sup>156</sup>

---

process of fares booked through the travel agency. Instead of the airlines dealing directly with the travel agents, the reporting agencies act as a buffer between the airlines and ticket agents, thus diminishing the possibility for a conspiracy claim under the Sherman Act. *Id.*

<sup>151</sup> See Beane, *supra* note 94, at 1003-04.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 1009. The Board retains authority to decide whether foreign pooling and transport agreements are adverse to public interests. *Id.*; see *supra* note 146 and accompanying text for a discussion of airline immunity from antitrust actions subsequent to deregulation.

<sup>154</sup> 15 U.S.C. § 1 (1988). The Act further states that: "[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, . . . in the discretion of the court." *Id.*

<sup>155</sup> See *Ron Tonkin Gran Turismo v. Fiat Distrib.*, 637 F.2d 1376 (9th Cir.) (automobile dealer's claim alleging antitrust violations dismissed for lack of establishing anticompetitive practices on the part of automotive distributor and other dealer), *cert. denied*, 454 U.S. 831 (1981).

<sup>156</sup> See *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir. 1984) (antitrust violation involving a car manufacturer's termination of a car transport company's contract), *cert. denied*, 470 U.S. 1054 (1985).

Certain types of activities are considered so anticompetitive that courts presume the acts to be *per se* illegal.<sup>157</sup> Examples of *per se* illegal activities include horizontal or vertical price fixing, horizontal market division, horizontal or vertical group boycotts or concerted refusals to deal, and tying arrangements.<sup>158</sup>

If the activity in question does not fall within these *per se* illegal categories, courts evaluate the Section One claims under the rule of reason test.<sup>159</sup> The elements required to establish a rule of reason claim are: (1) an agreement between two or more people or businesses; (2) the agreement intends to harm or to unreasonably restrain trade; and (3) the agreement actually harms competition in the "relevant market."<sup>160</sup> Under the rule of reason test, the plaintiff must establish the relevant market in which competition is unreasonably restrained or harmed in order to make an actionable antitrust claim.<sup>161</sup>

## 2. *Horizontal per se Restraints on FFB Coupon Trade*

Horizontal agreements among airline carriers are unlikely due to the fact that individual airlines establish frequent flyer programs to develop their own "brand loyalty" and that the tariffs pertaining to the terms of the FFB coupons dispell the need for carriers to conspire on the horizontal level. Additionally, any restraint of trade, whether on a horizontal or vertical level, that fixes, raises,

---

<sup>157</sup> *Cascade Cabinet Co. v. Western Cabinet & Millwork Inc.*, 710 F.2d 1366, 1370 (9th Cir. 1983). The *per se* illegal activities are deemed to restrain competition unreasonably and lack any redeeming virtues for the court to consider. *Id.*; see also *Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977) (activities which are *per se* illegal do not merit inquiry of harm caused or business justification).

<sup>158</sup> *Car Carriers, Inc.*, 745 F.2d at 1108; *Cascade Cabinet Co.*, 710 F.2d at 1370; *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 290 (9th Cir. 1979) (antitrust claim against computer manufacturer dismissed for failure to establish a relevant market), *cert. denied*, 447 U.S. 924 (1980).

<sup>159</sup> *Cascade Cabinet Co.*, 710 F.2d at 1373. Under the rule of reason approach, the factfinder must decide whether, considering all of the circumstances of the case, the restrictive practice unreasonably restrains competition. *Id.* at 1370.

<sup>160</sup> *Id.*; *Kaplan*, 611 F.2d at 290.

<sup>161</sup> *Kaplan*, 611 F.2d at 291.

lowers or stabilizes prices is illegal *per se*.<sup>162</sup> Since FFB coupons are not priced, and thus cannot be fixed, a claim of price fixing is inapplicable. Further, individual airlines distribute FFB coupons nationally and internationally. Thus, the airlines do not participate in horizontal market division agreements.<sup>163</sup>

A claim that the airlines establish tying arrangements<sup>164</sup> is also inapplicable because the airlines do not coerce passengers to purchase regular priced tickets in order to receive the FFB coupons.<sup>165</sup> The coupons are gratuitously given to the passenger for patronizing the airline. The passengers individually decide if the coupons are to be used for future air travel.

A group boycott, however, either horizontally among competing airlines or vertically between an individual airline and its respective reporting agency, could constitute a valid antitrust claim.<sup>166</sup> Although airlines have the right to deal with travel agents of their choice,<sup>167</sup> they cannot agree or conspire among themselves to suppress competition between travel agents or brokers of FFB coupons.<sup>168</sup> The brokers, however, have the burden of defining a rele-

<sup>162</sup> Beane, *supra* note 94, at 1015. A horizontal relationship is one in which competitors are at the same level such as competing manufacturers. A vertical relationship exists between two entities at different levels of the market structure such as a manufacturer and a retailer. *Ron Tonkin Gran Turismo v. Fiat Distrib.*, 637 F.2d 1376, 1383 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981).

<sup>163</sup> See Beane, *supra* note 94, at 1015. A horizontal market division occurs when competitors agree among themselves to restrain trade by dividing their respective market among themselves. *Id.*

<sup>164</sup> Beane, *supra* note 94, at 1015-16. A tying arrangement exists when a seller conditions a sale of a product or service (tying product) on the purchase of a separate product or service (tied product) and assuming the seller has sufficient economic power to restrain or raise the price of the tied product. *Id.*

<sup>165</sup> Distributors of goods or services have the prerogative to deal and distribute their goods or services as they see fit absent anticompetitive motives. See *Ron Tonkin Gran Turismo*, 637 F.2d at 1383-84; see also *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1485-86 (C.D. Cal. 1988).

<sup>166</sup> See *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 641-42 (10th Cir. 1987); *Ron Tonkin Gran Turismo*, 637 F.2d at 1383-84.

<sup>167</sup> See *Ron Tonkin Gran Turismo*, 637 F.2d at 1383.

<sup>168</sup> See *Key Fin. Planning Corp.*, 828 F.2d at 640.

vant market<sup>169</sup> and to prove a conspiracy among competing airlines to establish a viable claim.<sup>170</sup>

Proving the existence of an agreement between two or more competing airlines to expel the FFB brokers from the coupon market would be a difficult endeavor for the brokers. Each airline establishes its own FFB program in order to promote "brand loyalty" for its airline services.<sup>171</sup> The incentive for airlines to conspire regarding their FFB coupon program is minimal because the programs are targeted at passenger retention, and not at competitive pricing.<sup>172</sup> In the alternative, however, the brokers could claim that the airlines conspired to prevent the brokers from selling the frequent flyer coupons in secondary markets. The incentive for the airlines to conspire on this basis is, once again, also low because the airline tariffs preclude the sale or transfer of the coupons.<sup>173</sup>

In sum, the claim of a group boycott between competing airlines is the most plausible *per se* violation.<sup>174</sup> If a broker can establish (1) a relevant market for the brokering of frequent flyer coupons (the difficulties of which will be discussed in more detail in a claim under Section Two of the Sherman Act<sup>175</sup>), (2) the existence of an agreement between the airlines precluding the brokers from selling the coupons, and (3) the purpose for such an agreement, a Section One *per se* violation might prevail.<sup>176</sup> Applying a *per se* rule to a group boycott claim regarding the brokering of FFB coupons might be unwarranted, however, because courts have not had sufficient experience to address

---

<sup>169</sup> See *infra* notes 200-205 and accompanying text for a discussion of the establishment of a relevant market.

<sup>170</sup> See *Ron Tonkin Gran Turismo*, 637 F.2d at 1383-84.

<sup>171</sup> See *supra* notes 16, 23 and accompanying text for a discussion of the purpose of FFB plan programs.

<sup>172</sup> *Id.*

<sup>173</sup> See *supra* notes 18, 27-28 and accompanying text for a discussion of tariff filing requirements and the regulations pertaining to the FFB coupons.

<sup>174</sup> See *supra* notes 166-173 and accompanying text for a discussion regarding horizontal group boycotts of FFB coupons.

<sup>175</sup> See *infra* notes 200-205 and accompanying text for a discussion regarding the difficulties of establishing a relevant market.

<sup>176</sup> *Id.*

the effect of the relationship between the airlines and the brokers.<sup>177</sup>

### 3. *Vertical Restraints of the FFB Coupon Trade*

A vertical restraint of trade can be either a *per se* violation, such as price fixing, group boycotts, or concerted refusals to deal, or a violation that is analyzed under the rule of reason approach. The rule of reason approach requires the factfinder to decide whether, under all circumstances of the case, the alleged practice imposes an unreasonable restraint on competition. This approach should be used in vertical relationships because intrabrand restraints (restraints within a brand of products) might have a competitive effect on interbrand competition (restraints between brands of products). Since airlines and reporting agencies maintain a vertical relationship, and the *per se* offenses of price fixing or group boycotts between the airlines and their reporting agent is unlikely in light of the reporting agencies' regulatory nature, the relationship would most likely be analyzed under the rule of reason approach.<sup>178</sup>

*Association of Retail Travel Agents, Ltd. v. Air Transport Association of America*<sup>179</sup> addressed the issue of whether the relationship between an airline and its reporting agency warranted a rule of reason analysis for an antitrust violation of Section One of the Sherman Act.<sup>180</sup> The Airlines Reporting Corporation (ARC), the reporting agency, facilitated the sale of tickets between the airline and travel agents.<sup>181</sup> Travel agents applied to ARC in order to be

<sup>177</sup> *Trans World Airlines*, 682 F. Supp. at 1486. A *per se* illegality rule is applied only after courts have had considerable experience with the relationship in question. *Id.*

<sup>178</sup> *See id.* The *per se* illegality rule should not automatically be applied to a group boycott when the relationship is vertical in nature. *Id.*; *see also* *Ron Tonkin Gran Turismo v. Fiat Distrib.*, 637 F.2d 1376, 1383-84, 1386-87 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981).

<sup>179</sup> 623 F. Supp. 893 (D.D.C. 1985).

<sup>180</sup> Sherman Act, 15 U.S.C. § 1 (1988).

<sup>181</sup> *Association of Retail Travel Agents Ltd.*, 623 F. Supp. at 894. ARC calculates the

"listed" as a recognized travel agent.<sup>182</sup> Upon listing, the travel agents then became authorized to deal with airlines which employed ARC; however, an airline could technically refuse to deal with a travel agent.<sup>183</sup> ARC collected airline fares sold by the travel agents and remitted the proceeds to the respective airline.<sup>184</sup>

The travel agents in *Association of Retail Travel* claimed that ARC's payment terms, which required weekly documentation of airline ticket sales in order to assess the amount of sales due to each respective airline, was a *per se* violation of Section One of the Sherman Act because the terms had the effect of fixing prices paid for ticket sales.<sup>185</sup> The court determined that ARC did in fact have a uniform pricing and reporting program with which the travel agents were required to comply.<sup>186</sup> The court did not apply the *per se* rule to the uniform pricing requirements of ARC, however, because ARC's function was to collect airline fares from the agents and to protect the airlines from the risk of nonpayment by the travel agencies.<sup>187</sup> The program of ARC was anticompetitive but had redeeming values facilitating the efficient sale of airline tickets.<sup>188</sup>

Even though *Association of Retail Travel* involved a claim of monopolization, the role of ARC is analogous to the vertical relationship between an airline and its reporting agency. The reporting agency, in a vertical relationship with an airline, promotes efficiency by training travel agents to competently sell air transportation and by designing a computerized reporting system for travel agents

---

amount due from each travel agent and the amount owed to each airline and distributes the payments accordingly. *Id.*

<sup>182</sup> *Id.* To be listed with ARC, each agent must file an application to demonstrate financial stability. *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 896. If the agents deviated from the airlines' "suggested" price, reported weekly to ARC, the agent might be removed from ARC's listing. *Id.*

<sup>186</sup> *Id.* at 902. The reporting system did have the effect of stabilizing prices which could constitute price fixing. *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See *id.* at 900, 902. The reporting system helps the airline industry operate smoothly and increase financial stability. *Id.*

to report sales and remit proceeds from the sales.<sup>189</sup> The reporting agency also ensures that travel agents comply with the airline tariffs.<sup>190</sup> Thus, the reporting agency's role of overseeing compliance of airline tariffs leads to reasonable enforcement of a federal statute which, in turn promotes competition. In short, even though the airlines and reporting agencies agree as to the pricing and terms of airline ticket sales, such an agreement would probably not constitute an unreasonable restraint of trade.

Furthermore, in light of the third element of the rule of reason, it is unlikely that a broker's Section One antitrust claim would withstand judicial scrutiny. The third element of the rule of reason test is that competition must be harmed in the *relevant market* in some fashion, as opposed to individual market participants being harmed.<sup>191</sup> A Section One violation of the Sherman Act requires injury to the market because the antitrust law's purpose is to protect competition.<sup>192</sup> An individual broker's preclusion from the market does not constitute harm. Furthermore, a broker must establish the market from which he is precluded.<sup>193</sup> Since the sale of FFB coupons takes place in a black market, courts would probably refrain from enforcing such antitrust claims on the grounds of public policy.<sup>194</sup>

---

<sup>189</sup> See *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) (clearinghouse established by music producers was essential for market efficiency and competition).

<sup>190</sup> *Trans World Airlines, Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1484 (C.D. Cal. 1988) (describing functions the reporting agency undertakes for the airline ensuring tariff compliance).

<sup>191</sup> See *Car Carriers Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1109 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985). The antitrust laws protect competition, not individual market participants. *Id.*

<sup>192</sup> See *id.* ("[I]t is the function of § 1 to compensate the unfortunate only when their demise is accompanied by a generalized injury to the market." (emphasis added)); see also *supra* text accompanying notes 160-161 for the elements required to establish an antitrust claim under the rule of reason.

<sup>193</sup> *Id.* *Car Carriers, Inc.*, 745 F.2d at 1109.

<sup>194</sup> *Trans World Airlines*, 682 F. Supp. at 1487.

C. *Monopoly Power of the Airlines Regarding FFB Coupons*

FFB coupon brokers could defend their practice of selling the coupons, regulated by airline tariffs, by asserting an antitrust claim of monopolization of the FFB coupon market against the airlines.<sup>195</sup> Section Two of the Sherman Act applies to the unilateral conduct of a corporation or a person who monopolizes or attempts to monopolize a relevant geographic or product market.<sup>196</sup>

The Sherman Act's purpose is to ensure that consumers receive the benefits of price competition by protecting economic freedom among participants in the market.<sup>197</sup> Monopolization consists of monopoly power for the purpose of eliminating competition in the relevant market and a willful acquisition or maintenance of such power, as opposed to attaining power as a consequence of developing a successful business venture or superior product.<sup>198</sup> In order for coupon brokers to prevail on an antitrust claim against the airlines for monopolizing the FFB coupon market, the brokers must establish that the airline has: "1) possession of monopoly power in the relevant market; 2) willful acquisition [or] maintenance of that power; and 3) causal 'antitrust' injury."<sup>199</sup>

---

<sup>195</sup> 15 U.S.C. § 2 (1988). Section two of the Sherman Act states: [e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, . . . in the discretion of the court.

*Id.*

<sup>196</sup> See Beane, *supra* note 94, at 1016.

<sup>197</sup> *Brian Clewer, Inc. v. Pan Am. World Airways*, 674 F. Supp. 782, 786 (C.D. Cal. 1986) (travel agency claimed antitrust violations against airline for predatory pricing of tickets) (citing *Associated Gen. Contractors v. Carpenters*, 459 U.S. 519, 538 (1983)).

<sup>198</sup> Beane, *supra* note 94, at 1016.

<sup>199</sup> *Trans World Airlines Inc. v. American Coupon Exch., Inc.*, 682 F. Supp. 1476, 1487 (C.D. Cal. 1988) (citing *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377, 1382 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983)); see also *Ad-Vantage Tel. Directories Consultants, Inc. v. GTE Directories Corp.*, 849 F.2d 1336, 1341 (11th Cir. 1987) (antitrust suit alleging monopoly and attempt to monopolize on part of publisher for soliciting plaintiff's clients).



Initially the brokers must establish a relevant market in order to measure the monopoly power of the airline in question.<sup>200</sup> The two types of relevant markets are the geographic market, which is the *area* where products of the defendant are sold or serviced, and the product market, which is the *economic* market in which a particular product is sold.<sup>201</sup> The broker should allege a relevant market small enough to establish the monopoly power of an airline. Since FFB coupons are sold both nationally and internationally, the geographic market is probably too expansive to conclude that an individual airline possesses significant monopoly power to lessen competition in the FFB coupon area.<sup>202</sup> Thus, the product market is the most narrowly defined field in which brokers could establish significant monopoly power regarding the market of the FFB flyer coupons.

The difficulty with the monopoly claim is that a legitimate market for the frequent flyer coupons does not exist.<sup>203</sup> The coupon sales, precluded by tariffs set by individual airlines, constitute a black market for the purchase of coupons.<sup>204</sup> Courts are reluctant to enforce antitrust claims against airlines when the relevant product market is, in fact, a black market.<sup>205</sup>

Additionally, the FFB coupons do not constitute a

<sup>200</sup> See Beane, *supra* note 94, at 1016-17.

<sup>201</sup> *Id.* (emphasis added); see also *Ad-Vantage Tel. Directories Consultants, Inc.*, 849 F.2d at 1341. The relevant product market consists of "those commodities reasonably interchangeable by consumers for the same purposes." *Ad-Vantage Tel. Directories Consultants, Inc.*, 849 F.2d at 1341 (citing *United States v. DuPont & Co.*, 351 U.S. 377 (1955)).

<sup>202</sup> See Bliss & Lewis, *Overseeing Competition in the Airline Industry: Will the Transfer to Justice Make a Difference?*, 34 FED. B. NEWS & J. 293, 294 (1987). Even though the top four airlines control approximately 61% of the market and the top nine control approximately 94% of the market, the geographic market in terms of selling tickets (both regular fare and FFB coupon tickets) is too large to determine whether an individual airline is suppressing competition. *Id.* at 293-94.

<sup>203</sup> See *Trans World Airlines*, 682 F. Supp. at 1487.

<sup>204</sup> *Id.* The tariffs, precluding the transfer or sale of the FFB coupons, forced brokers to sell the coupons in a "black market." *Id.*

<sup>205</sup> *Id.* Since the brokers could not establish a legitimate product market, the court did not inquire into the relevance of any geographic market. *Id.*

"product" such as inventory to be monopolized.<sup>206</sup> In the recent case of *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*,<sup>207</sup> a travel agent sued American because American would not allow the agent to sell American airline tickets.<sup>208</sup> American precluded the agent from writing tickets to customers because the agent would not refrain from giving airline discounts in violation of American's tariffs.<sup>209</sup> The district court acknowledged that American's policy was essentially a price restraint but held that the agent did not have standing to sue because of the agent's failure to identify a product.<sup>210</sup> The court stated that the airline gives clearance for the agent to sell tickets; however, the right to sell tickets does not constitute a transfer of inventory.<sup>211</sup> The travel agent "cannot resell air travel," and the right to sell tickets is not a product produced and distributed.<sup>212</sup> By analogy, a broker, because of the lack of a legitimate relevant market and a "product" to sell, would be hard pressed to satisfy the first element of the monopoly claim against the airlines.

Assuming, however, that a broker can establish a product and its relevant market, the next element to establish would be that the airline maintained its monopoly over the FFB coupon market willfully, with specific intent, and caused injury to the competitive market. The airline's maintenance of monopoly power could be evidenced by

---

<sup>206</sup> See *Ad-Vantage Tel. Directories Consultants, Inc.*, 849 F.2d at 1345. The court of appeals ruled that yellow page advertisements were not a product transferred to the advertiser, rather they were "created" by the wholeseller. *Id.*; *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 725 (7th Cir. 1986) (discussing the relationship between travel agents and air carriers).

<sup>207</sup> 806 F.2d 722 (7th cir. 1986).

<sup>208</sup> *Id.* at 724. American's airline tariffs specifically prohibited the 10% discounts given to customers by the travel agent. *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 725. The court concluded that the sale of air fares is not analogous to a physical product, such as the chair a passenger sits in, and does not constitute a product. *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

the tariffs precluding transfer of the coupons<sup>213</sup> and the coercive practice of "revoking" tickets from passengers who purchase the brokered coupons.<sup>214</sup> The tariffs, however, are a valid means for the airlines to regulate the relationship between themselves and passengers but do not apply to brokers.<sup>215</sup> Furthermore, assuming an airline retains monopoly power over a broker, this may be justified if the airline has valid business reasons not to deal with the brokers.<sup>216</sup> Valid reasons for the airlines' refusal to deal with coupon brokers include the tariff's preclusion of such dealings, the encouragement of "brand loyalty" by earning the coupons through the purchase of regular price tickets, and the loss of revenue when a passenger using a brokered ticket takes a seat from a full paying passenger.<sup>217</sup>

The broker could also assert an argument concerning an attempt by an airline to monopolize the market by exercising predatory pricing.<sup>218</sup> Predatory pricing exists when a business prices its product below cost in order to drive out competition.<sup>219</sup> The practice of offering FFB coupons free of charge could be so construed. As a method of foregoing short term profits in order to develop a market position, FFB coupons do not prohibit the airlines from later raising prices and regaining the cost of the coupons.<sup>220</sup> The airlines, however, could counter this

---

<sup>213</sup> See *supra* notes 18 and 28 and accompanying text for a discussion of tariff filing requirements under federal law.

<sup>214</sup> See Allen, *supra* note 1, at 12.

<sup>215</sup> See *supra* notes 33-75 and accompanying text for a discussion of the validity of tariff use to regulate the relationship between the airlines and their customers.

<sup>216</sup> *Trans World Airlines*, 682 F. Supp. at 1488; see also *Bushie v. Stenocord Corp.*, 460 F.2d 116, 119-20 (9th Cir. 1972) (manufacturer may discontinue distribution to distributor if valid business reasons exist).

<sup>217</sup> *Ad-Vantage Tel. Directories Consultants, Inc.*, 849 F.2d at 1348; *Trans World Airlines*, 682 F. Supp. at 1488.

<sup>218</sup> See generally Beane, *supra* note 94, at 1020-21.

<sup>219</sup> *Id.* at 1020.

<sup>220</sup> See *id.* at 1021. But see *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 588-90 (1986) (predatory pricing is inherently speculative in nature and is unlikely to occur when the prospects of attaining monopoly power over the relevant market are slight).

argument by asserting that predatory pricing is an unrealistic claim because FFB coupons are not priced and because control by the airlines of the FFB market is unlikely.

In sum, both the Section one and Section Two antitrust theories encounter inherent difficulties. Brokers will face an arduous task in establishing a relevant market,<sup>221</sup> maintaining such market or establishing intent by the airlines to monopolize,<sup>222</sup> especially in light of court approval of the airlines' valid business reasons for precluding the transfer of FFB coupons.<sup>223</sup>

## VI. CONCLUSION

The airlines' attempts to preclude the brokering of frequent flyer coupons presents a question of first impression for many courts. In the past there was little need to address this issue because the brokering of coupons occurred on a small scale. Due to the increasing magnitude of this business, however, airlines have justifiable economic and policy grounds on which to challenge the brokering of FFB coupons.

The tariffs established by the airlines legally govern the sale or transfer of the coupons. If brokers can establish that the tariff's purpose is only to insulate the airlines from antitrust claims, the tariffs should be invalidated. These tariffs, however, govern the relationship between the airlines and their passengers and do not have the purpose of circumventing antitrust claims. Furthermore, the brokers have the difficult task of establishing a legitimate relevant market and showing harm to that market. These elements are essential in order to have standing for an antitrust claim.

A possible basis for the liability of the brokers is the tort

---

<sup>221</sup> See *supra* notes 200-205 and accompanying text for a discussion of the difficulties encountered when establishing a relevant market.

<sup>222</sup> See *supra* notes 213-217 and accompanying text for a discussion of the purpose of tariffs and the element of specific intent and maintenance of monopoly power.

<sup>223</sup> See *Trans World Airlines*, 682 F. Supp. at 1488.

of interfering in the business relationship between the airlines and their passengers. This claim is a state specific action, and the outcome hinges on the applicable state law where the claim is brought. For instance, California and Illinois tend to guard business agreements more so than New York or Texas. Thus, if an airline brought a claim in California or Illinois they might prevail, while a claim brought in New York or Texas would be more likely to fail. The point at which brokering FFB coupons becomes a tortious interference is not yet clear. The brokers' economic interest, however, and the public gain of obtaining inexpensive air fare certainly mitigates in favor of the broker.

In sum, it appears that airlines have a strong basis to prevent the brokering of FFB coupons due to tariff preclusion of such acts. It is unclear, as of yet, the direction individual states will take regarding the airlines' interference with business relation claims against brokers. The brokers' antitrust claims against the airlines, however, appear to be uphill battles not likely to be won in the courtroom.