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AIRLINES' RESPONSE TO THE DTPA SECTION 1305 PREEMPTION

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I. INTRODUCTION

BEGINNING WITH THE Air Commerce Act of 1926[1] and continuing through the 1984 enactment of Public Law 98-443, commonly known as the CAB Sunset Act,[2] the airline industry has been the subject of pervasive federal regulation.[3] A more "comprehensive scheme of combined regulation, subsidization, and operational participation than that which Congress has provided in the field of aviation" is difficult to visualize.[4] Airplanes "move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls."[5] The federal government has issued Federal Aviation Regulations (FARs),[6] Airworthiness Directives (ADs),[7] and other fed-

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[1] Air Commerce Act of 1926, ch. 344, 55 Stat. 568, *repealed by* Civil Aeronautics Act of 1938, 52 Stat. 973.

[2] Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984).

[3] Hughes Air Corp. v. Public Util. Comm'n, 644 F.2d 1334, 1336 (9th Cir. 1981).

[4] New England Legal Found. v. Massachusetts Port Auth., 883 F.2d 157, 172 (1st Cir. 1989).

[5] *Id.* (quoting Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 303 (1944)).

[6] For the power to issue FARs and related procedures, see 49 U.S.C. app. § 1348(a) (1982); 14 C.F.R. § 11.1 (1990).

eral regulations through Title 14 of the Code of Federal Regulations,[8] all in an attempt to provide consistent regulation of the airline industry.[9]

Congress, however, went one step further in 1978 by enacting 49 U.S.C. app. § 1305, which preempts state laws that regulate the rates, routes, or services of interstate air carriers.[10] Although a simple reading of this statute suggests that any state law, rule, or regulation that relates to the "rates, routes, or services" of a title IV air carrier[11] is preempted, the majority of states have enacted unfair trade practice statutes that may directly affect the air carrier's rates, routes, and particularly, the manner in which they perform their services.[12]

In general, unfair trade practice statutes allow plaintiffs to collect not only their actual damages but also to receive attorney's fees and two or three times the actual damages as a penalty.[13] These unfair trade practice statutes, if not

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[7] For the power to issue AD's and related procedures, see 49 U.S.C. app. §§ 1421, 1423 (1982); 14 C.F.R. § 39.1.

[8] 14 C.F.R. § 1 (1990).

[9] Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended at 49 U.S.C. app. §§ 1301-1552 (1982 & Supp. V 1987)).

[10] 49 U.S.C. app. § 1305(a) (1982 & Supp. V 1987). The text of the statute reads as follows:

> (1) Except as provided in paragraph (2) of this subsection, no 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 to provide interstate air transportation.

Id.

[11] *See* 49 U.S.C. app. § 1371.

[12] As early as 1972, a total of 32 states had adopted consumer protection legislation generally prohibiting deceptive acts or practices. New Topic Service, AM. JUR. *Consumer Protection* § 205 n.39 (1982); Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724 (1972); Sebert, *Enforcement of State Deceptive Trade Practice Statutes*, 42 TENN. L. REV. 689, 691 (1975); Annotation, *Consumer Protection—Forbidden Conduct*, 89 A.L.R.3d 449, 456 (1979).

[13] Connecticut, Georgia, Hawaii, Kentucky, Louisiana, Massachusetts, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, and Texas all have deceptive trade practice acts (DTPAs) that provide for multiple damages. Of the seventeen, Hawaii and North Carolina have the provisions most favorable to the plaintiffs, with mandatory treble damages whenever the plaintiff prevails. D. PRIDGEN, CONSUMER PROTEC-

preempted by section 1305, would subject title IV air carriers to greater liability than previously encountered under general common law theories of liability because such statutes allow the court to award reasonable attorney's fees.[14]

Although section 1305 was enacted over ten years ago, airlines have only recently utilized the provision to avoid application of the unfair trade practice statutes.[15] A Texas district court analyzed the preemption issue when it granted an injunction enjoining the Texas Attorney General[16] from enforcing any unfair trade practice statutes against various airlines for false or deceptive advertising. The injunction was subsequently modified to include thirty-three other state attorneys general.[17] Although section 1305 was not specifically cited, the court discussed preemption of "any state regulation of advertising of the

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TION AND THE LAW § 6.05[3][a] (1988). The DTPAs of California, Connecticut, the District of Columbia, Georgia, Idaho, Kentucky, Missouri, Oregon, and Rhode Island all specifically provide for other punitive damage awards. Furthermore, punitive damages are judicially available in Arizona and Ohio. *Id.* § 6.05[4]. Taking overlap into account, twenty-one states now provide enhanced damages under their DTPAs. This figure does not include states with acts similar to Illinois, which provides for actual damages plus "any other relief which the court deems proper." ILL. ANN. STAT. ch. 121 1/2, para. 270a (Smith-Hurd Supp. 1989). If jurisdictions that provide for discretionary enhanced damages were included, the above figures would certainly increase. P. Foss, The Extraterritorial Application of Deceptive Trade Practices and Consumer Protection Acts (March 1, 1990) (speech presented at *Journal of Air Law and Commerce* Air Law Symposium). Although this article will address only preemption of the Texas DTPA, the same principles would apply by analogy to other states.

[14] In Texas, attorney's fees may be awarded only if provided for by statute. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1986); TEX. BUS. & COMM. CODE ANN. § 17.50(d) (Vernon 1987)[Tex. DTPA]. Section 17.50(d) allows an injured plaintiff to recover attorney's fees for personal injury actions falling under the Texas DTPA.

[15] For a discussion of the cases that recently began to address section 1305, see *infra* notes 94-135 and accompanying text.

[16] Trans World Airlines, Inc. v. Mattox, 712 F. Supp. 99 (W.D. Tex. 1989), *aff'd* 897 F.2d 773 (5th Cir. 1990).

[17] The states added to the injunction were Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 105.

Plaintiffs' rates, routes, and services."[18] The preemption issues that arise under deceptive trade practices acts (DTPAs) are emphasized in the decision. This article will examine the following areas: (1) the legislative history of section 1305;[19] (2) the definition of "rates, routes and services;"[20] (3) controversies and questions that surround section 1305;[21] and (4) causes of action that are available if section 1305 preempts state law actions.[22]

II. LEGISLATIVE HISTORY

The Federal Aviation Act of 1958[23] along with its predecessor, the Civil Aeronautics Act of 1938,[24] set up a comprehensive federal system regulating interstate air transportation. These statutes established the Civil Aeronautics Board (CAB) to carry out this system of federal regulation.[25]

In 1978, Congress enacted the Airline Deregulation Act (ADA).[26] Section 1305 was included in the ADA in virtually the same form as it exists today.[27] This provision preempted state law relating to rates, routes, or services.[28] The basic purpose of the statute was to resolve conflicts arising from jurisdictional disputes.[29]

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[18] *Id.* at 101.

[19] For a discussion of the legislative history, see *infra* notes 23-48 and accompanying text.

[20] For a discussion of the definition of "rates, routes, or services," see *infra* notes 49-64 and accompanying text.

[21] For a discussion of the section 1305 controversies, see *infra* notes 65-156 and accompanying text.

[22] For a discussion of remaining causes of action, see *infra* notes 157-185 and accompanying text.

[23] 49 U.S.C. app. §§ 1301-1552 (1982 & Supp. V 1987).

[24] Pub. L. No. 601, 52 Stat. 973, *repealed by* Federal Aviation Act of 1958, 49 U.S.C. app. §§ 1301-1552 (1982 & Supp. v 1987).

[25] *Hughes Air Corp.*, 644 F.2d at 1336.

[26] Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified as amended at 49 U.S.C. app. §§ 1301-1552 (1982 & Supp. V 1987)).

[27] *Compare* H.R. REP. No. 1211, 95th Cong., 2d Sess. 15-16, 94-95, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 3751-52, 3804-05 [hereinafter H.R. REP. No. 1211] *with* 49 U.S.C. § 1305.

[28] 49 U.S.C. app. § 1305.

[29] H.R. REP. No. 1211, *supra* note 27, at 15-16.

The evolution of section 1305 is interesting in that the House and Senate apparently intended preemption of different areas. Section 1305 as originally proposed by the Senate "prohibit[ed] a State from enacting any law, establishing any standard determining routes, schedules, or rates, . . . or otherwise promulgating *economic* regulations for, any air carrier certified by the Board."[30] Later, the House amendment dropped the "economic" language, and the modified statute stated that "when a carrier operates under authority granted pursuant to Title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services."[31] The House amendment was ultimately adopted.[32] The amendment is significant because it indicates a clear intent on the part of Congress to expand the scope of federal preemption to all areas relating to routes, rates, or services, not merely economic regulation of the airlines. The expansion was was designed to promote the underlying "consistency" purpose of the ADA.[33]

In 1984, Congress adopted the CAB Sunset Act.[34] The fundamental purpose of the Sunset Act was to terminate some CAB functions and to transfer others to the Department of Transportation (DOT).[35] The legislature, how-

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> Existing law contains no specific provision on the jurisdiction of the States and the Federal Government over airlines which provide both intrastate and interstate service. The lack of specific provisions has created uncertainties and conflicts. . . H.R. 12611 (§ 1305) will prevent conflicts and inconsistent regulations by providing that when a carrier operates under authority granted pursuant to Title IV of the Federal Aviation Act, no State may regulate the carrier's routes, rates or services.

Id.

[30] *Id.* at 94 (emphasis added).

[31] *Id.* at 94-95.

[32] *See* 49 U.S.C. § 1305.

[33] Hingson v. Pacific Southwest Airlines, 743 F.2d 1408, 1416 n.11 (9th Cir. 1984).

[34] Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984).

[35] H.R. REP. NO. 793, 98th Cong., 2d Sess. 3-4, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2859-60 [hereinafter H.R. REP. NO. 793]. The ADA provided that the CAB would terminate on January 1, 1985, and certain powers would be transferred to other agencies. Therefore, the CAB Sunset Act was

ever, recognized that the CAB was exercising certain powers that were not specifically addressed by the ADA, including the protection of consumers, the prevention of unfair competitive practices, and the certification of a carrier's fitness for providing air transportation.[36] Because these areas were not specifically addressed in the ADA, a substantial amount of discussion is found in the legislative history about the actual authority for the powers that the CAB was exercising.[37]

A. *Consumer Protection and Unfair Competitive Practices*

Congress recognized that various provisions of the Federal Aviation Act granted authority to the CAB to protect consumers and ensure fair competition.[38] From 1978, the CAB exercised this authority in the form of regulations protecting consumers in the following areas: (1) overbooking and denied boarding compensation; (2) limitations on liability for lost or damaged baggage; (3) smoking policies; (4) discrimination against the handicapped; (5) terms of charter service; (6) notice of contractual terms between the passenger and carrier which airlines must provide to passengers; and (7) computer reservation systems standards.[39] Congress determined that the federal government should continue to have the authority to protect consumers against unfair and deceptive trade practices.[40]

In addition to protecting consumers, the legislature rec-

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adopted to provide some guidelines with respect to the powers that would be transferred to various agencies. *Id.*

[36] *Id.* at 2859.

[37] *See generally id.* at 2859-63.

[38] H.R. REP. No. 793, *supra* note 35, at 4; *see also* Federal Aviation Act, § 404, 49 U.S.C. app. § 1374 (requiring air carriers to provide safe and adequate service, equipment, and facilities); § 411, 49 U.S.C. app. § 1381 (giving the CAB authority to proceed against unfair or deceptive practices or unfair methods of competition); § 204(a), 49 U.S.C. app. § 1324 (empowering the CAB to enact necessary regulations); § 102, 49 U.S.C. app. § 1302 (providing policy guidelines for the CAB exercise of authority).

[39] H.R. REP. No. 793, *supra* note 35, at 4.

[40] *Id.*

ognized that federal regulation provides a uniform system of regulation through preemption of state regulations.[41] Accordingly, Congress transferred to DOT the existing CAB authority to regulate rates, routes, and services, leaving section 1305 in place to preempt state regulation in the same area.[42]

B. *Carrier Fitness*

Under its authority to protect consumers, the CAB also initiated a fitness evaluation[43] that complements the evaluation made by the Federal Aviation Administration (FAA).[44] The CAB evaluation was more general than that of the FAA and covered the "general management capabilities of an applicant's top management, the adequacy of the applicant's financial plan, and the record of the owners and top management of the applicant in complying with state and federal laws and regulations."[45] The CAB plan was designed to ensure that the applicant would operate safely while protecting consumers from dishonest or incompetent operators.[46] Congress found that "consumers should continue to have the safety and economic protections which result from a CAB fitness investigation," and transferred these powers to DOT.[47]

C. *Importance of Legislative History*

Because section 1305 preempts state regulation of rates, routes, and services, the legislative history of the

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[41] *Id.* "If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines." *Id.*

[42] H.R. REP. No. 793, *supra* note 35, at 3-7. *Compare* 49 U.S.C. app. § 1305 (1982) *with* 49 U.S.C. § 1305 (Supp. V 1987).

[43] H.R. REP. No. 793, *supra* note 35, at 6-7.

[44] *See* Federal Aviation Act § 604. "The FAA determines if an applicant has technically qualified operations and maintenance personnel and whether the applicant has developed the necessary operational and maintenance programs." H.R. REP. No. 793, *supra* note 35, at 7.

[45] H.R. REP. No. 793, *supra* note 35, at 7.

[46] *Id.*

[47] *Id.*

CAB Sunset Act provides an important insight into which powers Congress was transferring to DOT.[48] Since Congress transferred these powers as part and parcel of the ADA regulatory function, they arguably provide the starting point for determining the meaning of rates, routes, and services, which in turn forms the basis for the remainder of this article's discussion.

III. WHAT ARE RATES, ROUTES, AND SERVICES?

In order to properly determine whether section 1305 would preempt any available state law claims, a determination of what the phrase "rates, routes, and services" actually means is important.[49] In the 1982 *Diefenthal v. CAB* decision,[50] the Fifth Circuit was faced with interpreting section 1374(a) of the Federal Aviation Act, which requires an air carrier to provide "adequate service."[51] Although the Fifth Circuit was not required to determine the meaning of "services" in section 1305, basic rules of statutory construction dictate that a term should have a consistent meaning throughout a statute unless a clear intent is demonstrated otherwise.[52] Therefore, the meaning assigned to "services" under section 1374(a) is instructive in assigning a definition to section 1305 "services."

In *Diefenthal*, the argument was made that Congress did not authorize the CAB to "regulate the kind or quality of service which a carrier provides."[53] The Fifth Circuit re-

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[48] *See generally id.* at 3-7 (discussing the powers transferred).

[49] 49 U.S.C. app. § 1305(a)(1).

[50] 681 F.2d 1039 (5th Cir. 1982), *cert. denied*, 459 U.S. 1107 (1983).

[51] *Id.* at 1043.

[52] In the legislative history of the CAB Sunset Act, Congress specifically stated that the "Board's basic authority to protect consumers and ensure fair competition comes from a number of provisions in the Federal Aviation Act, including Section 404 of the Act . . . ," which was ultimately codified as section 1374. H.R. REP. No. 793, *supra* note 35, at 4. Since section 1374 of the Federal Aviation Act provided the CAB with some of its regulatory powers, the word "service" should be interpreted consistently throughout the Act. *See* Barnson v. United States, 816 F.2d 549, 554 (10th Cir.), *cert. denied*, 484 U.S. 896 (1987); Firestone v. Howerton, 671 F.2d 317, 320 (9th Cir. 1982); United States v. Nunez, 573 F.2d 769, 771 (2d Cir.), *cert. denied*, 436 U.S. 929 (1978).

[53] *Diefenthal*, 681 F.2d at 1043.

jected this argument and held that the term "adequate service" represents the type, kind, and quality of services provided by a carrier, not merely the number of flights.[54] Based upon this decision, the term "services" apparently has a very broad application.[55]

To date, section 1305 has not been utilized to preempt state law claims against an airline in a personal injury context.[56] Section 1305 has been used, however, to preempt the following state law claims: (1) wrongful exclusion from an airplane flight;[57] (2) failure to allow a blind person to sit by an emergency exit;[58] (3) avoidance of state law mandatory drug testing;[59] (4) refusal to allow advertising and sale of airline tickets to the general public at a discount;[60] (5) improperly calculating the amount charged for cancellation of an air travel ticket;[61] and (6) deceptive advertising.[62] Conversely, section 1305 has been interpreted as excluding services that do not specifically relate to the rates, routes, or services of a title IV carrier, such as violation of deceptive advertising statutes[63] and challenging an airline's use of its telephone equipment to record

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[54] *Id.* at 1044-48.

[55] No other cases dealing with the general meaning of rates, routes, or services were found. For examples of cases addressing specific factual patterns, see *infra* notes 56-64 and accompanying text.

[56] The defendant in *In re* Air Crash Disaster at Stapleton Int'l Airport, Denver, Colorado, on November 15, 1987, 721 F. Supp. 1185 (D. Colo. 1988) may have asserted a section 1305 preemption argument, but it was not mentioned in the court's opinion. *See infra* notes 88-91 and accompanying text. For a discussion of the preemption of DTPA personal injury claims, see *infra* notes 178-185 and accompanying text.

[57] O'Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir.), *cert. denied*, 109 S. Ct. 3158 (1989); Kohl v. Air New Orleans, Inc., No. 87-4638 (E.D. La. Aug. 17, 1989) (LEXIS 10153, Genfed Library, Dist file).

[58] Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984); Anderson v. USAir, Inc., 619 F. Supp. 1191 (D.D.C. 1985), *aff'd*, 818 F.2d 49 (D.C. Cir. 1987).

[59] French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989).

[60] Illinois Corporate Travel v. American Airlines, Inc., 682 F. Supp. 378 (N.D. Ill. 1988), *aff'd*, 889 F.2d 751 (7th Cir. 1989).

[61] Stone v. American Airlines, Inc., No. 86-C-5783 (N.D. Ill. Feb. 19, 1987) (LEXIS 1183, Genfed library, Dist File).

[62] Trans World Airlines, Inc. v. Mattox, 712 F. Supp. 99 (W.D. Tex. 1989), *aff'd*, 897 F.2d 773 (5th Cir. 1990).

[63] *See* Abrams v. Trans World Airlines, Inc., 728 F. Supp. 162 (S.D.N.Y. 1989)

conversations without notification.[64] Given the myriad of decisions, the suggested conclusion is that state law claims are preempted if they relate directly to an airline's rates, routes, or services.

IV. CONTROVERSIES AND QUESTIONS SURROUNDING SECTION 1305

Section 1506,[65] commonly known as a "savings clause"[66] statute, explictly states that the remedies of the Federal Aviation Act are not exclusive.[67] Unlike the adoption of section 1305, none of the legislative history of the 1958 congressional session relates to this provision. Case law, however, has provided an interpretation of the scope of section 1506.[68] In general, courts have acknowledged

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(holding that section 1305 does not expressly preempt New York's deceptive advertising laws).

[64] Air Transp. Ass'n of Am. v. Public Util. Comm'n, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988) (holding that certain telephone operations were not peculiar to airlines).

[65] 49 U.S.C. app. § 1506 (1982 & Supp. V 1987).

[66] Savings clauses generally refer to provisions within federal statutes that "preserve" state laws or other state remedies. Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739-40 (1985) (discussing ERISA savings clause); Taylor v. General Motors Corp., 875 F.2d 816, 824 (11th Cir. 1989), *cert. denied*, 110 S. Ct. 1781 (1990) (discussing automobile manufacturer's tort liability under savings clause).

[67] 49 U.S.C. app. § 1506. "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.*

[68] *See, e.g.*, Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 298 (1976) (common law tort action based on alleged fraudulent misrepresentation by air carrier subject to regulation by the CAB did not have to be stayed pending determination by the CAB whether such actions were "deceptive"); Bieneman v. City of Chicago, 864 F.2d 463, 471 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 2100 (1989) (savings clause preserves common law remedies even when federal law exclusively determines the content of substantive rules); *In re* Air Crash Disaster at John F. Kennedy Int'l Airport on June 14, 1975, 635 F.2d 67, 74 (2d Cir. 1980) (holding that a provision of New York's General Business Law prohibiting operation of an aircraft in a careless or reckless manner was not preempted by federal statute); Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338, 1345-46 (W.D. Pa. 1982) (claims under both state common law and unfair trade practices act for discontinuing service were not preempted by federal regulation of air travel); Rosdail v. Western Aviation, Inc., 297 F. Supp. 681, 687 (D. Colo. 1969) (Congress did not intend to replace the legal relationships created by state common law or statute with respect to tort liability); Elsworth v. Beech Aircraft Corp., 37 Cal. 3d 540, 691 P.2d 630, 208 Cal. Rptr. 874 (1984), *cert. denied*, 471 U.S. 1110 (1985) (holding

that section 1506 preserves state law remedies. Some courts, however, have made no attempt to reconcile sections 1305 and 1506.

A. *Does Section 1305 Conflict With Section 1506?*

Because section 1305 specifically preempts any state law relating to rates, routes, and services and section 1506 indicates that the federal remedies are not exclusive, an inherent conflict appears to exist between these provisions. Courts have had some difficulty in resolving this conflict. Cases in which courts have confronted the potential conflict between sections 1305 and 1506 fall into the following categories: (1) decisions before the 1978 effective date of section 1305;[69] (2) decisions after 1978 that do not mention section 1305;[70] and (3) decisions after 1978 that attempt to reconcile the sections.[71]

1. *Pre-1978 Decisions*

Obviously, the conflict issue did not arise in decisions rendered before the 1978 enactment of section 1305. The discussions in some of those decisions, however, foreshadow the enacted version of section 1305.

One of the cases most often cited by advocates who claim that section 1305 does not totally preempt state law claims is *Nader v. Allegheny Airlines, Inc.*[72] *Nader* involved a common law tort action based upon alleged fraudulent misrepresentation for "bumping" a passenger.[73]

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that no question exists as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes).

[69] For a discussion of the pre-1978 cases, see *infra* notes 72-77 and accompanying text.

[70] For a discussion of the post-1978 cases that ignore the conflict issue, see *infra* notes 68-91 and accompanying text.

[71] For a discussion of post-1978 cases addressing the conflict issue, see *infra* notes 92-135 and accompanying text.

[72] *Nader*, 426 U.S. at 298. For additional discussion, *see supra* note 68 and accompanying text.

[73] "Bumping" results when an airline overbooks a certain flight and then is forced to "bump" passengers in accordance with a specified policy in order to

Although the Supreme Court determined that section 1506 "saved" the state law claims, Justice White's concurring opinion seemed to predict the future: "It may be that under its rulemaking authority the Board would have power to order airline overbooking and to pre-empt recoveries under state law for undisclosed overbooking or for overselling. But it has not done so, at least as yet."[74]

In *Rogers v. Ray Gardner Flying Service, Inc.*,[75] the Fifth Circuit also recognized the power of Congress to preempt state law. In dicta, the court stated that Congress' commerce clause powers allowed preemption of state laws regarding liability for injuries resulting from air crashes. The court, however, was not convinced that Congress indicated any such intent to supersede state laws related to the operation of aircraft.[76] Although both *Nader* and *Rogers* were decided before the enactment of section 1305, they are significant in that the Supreme Court and the Fifth Circuit recognized the inherent power of Congress to preempt state laws with respect to aviation.[77]

2. *Decisions Ignoring Section 1305*

Since Congress enacted section 1305 in 1978, courts have decided several cases that concern the preservation of state law claims pursuant to section 1506. The decisions discussed below, however, do not mention section 1305, and the courts conveniently avoided resolution of any potential conflict between sections 1305 and 1506.

Although *In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975*[78] was decided by the Second Circuit after the addition of section 1305, the opinion

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accommodate all passengers. *See* 14 C.F.R. § 250.1-250.11 (bumping regulations); *see also* Roman v. Delta Air Lines, Inc., 441 F. Supp. 1160, 1163-64 (E.D. Ill. 1977)(holding that overbooking alone does not give rise to an action for violating the FAA regulations).

[74] *Nader*, 426 U.S. at 308 (White, J., concurring).

[75] 435 F.2d 1389, 1393 (5th Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971).

[76] *Id.*

[77] *Nader*, 426 U.S. at 298; *Rogers*, 435 F.2d at 1393.

[78] 635 F.2d 67 (2d Cir. 1980) [hereinafter *JFK Air Crash*].

does not address this statute.[79] The only mention of section 1506 in the decision is a very cursory statement that "the federal statute does not preclude common law remedies."[80] The court appeared to state in dicta that the submission of state law standards to the jury was harmless error.[81] Federal preemption under section 1305 and its impact on section 1506 was not discussed.[82]

In *Brunwasser v. Trans World Airlines, Inc.*,[83] the court determined that a Pennsylvania deceptive trade practices statute was not preempted.[84] The court discussed various air travel regulations but decided that section 1506 specifically preserves the legal remedies of air travelers beyond those set forth in the Federal Aviation Act.[85] This discussion appears to focus upon the defendant's argument that the FAA intended to preempt state regulation through the extensive regulatory scheme.[86] Again, section 1305 was not mentioned.[87]

Similarly, in *In re Air Crash Disaster at Stapleton Interna-*

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[79] *Id.* at 74.

[80] *Id.*

[81] *See id.* at 74-75. Although the court did not specifically indicate that the submission of the New York business statute was harmless error, the court apparently reached that conclusion. The statute at issue simply provided that operation of an aircraft in a careless manner that endangered the life or property of others was prohibited. *Id.* at 74 n.4. The court further stated that the lower court only instructed the jury to determine if the law had any application to the facts and that the question of whether the pilot was reckless was a fact question for the jury. *Id.* at 74-75.

[82] *See id.* at 67.

[83] 541 F. Supp. 1338 (W.D. Pa. 1982).

[84] *Id.*

[85] *Id.* at 1345.

[86] *Id.* Although the defendant's pleadings were not reviewed, the court in dicta noted the extensive federal regulation in the field of aviation. Specifically, the court stated that "while federal regulation of air travel is extensive; it is not exclusive." *Id.* Further, the court found that the "plaintiffs' claims under both the common law of Pennsylvania and the Pennsylvania Unfair Trade Practices and Consumer Protection Law would remain unaffected by this federal regulation of air travel." *Id.* at 1346. Based upon the court's discussions, it appears that the defendant did not argue for section 1305 preemption but rather contended that the federal government impliedly preempted the field of aviation through extensive regulation.

[87] *See id.* at 1338.

tional Airport, Denver, Colorado, on November 15, 1987,[88] the court concluded that "[r]egulation of the conduct of commercial air carriers through the Federal Aviation Act and regulations promulgated thereunder does not preempt traditional tort remedies which have the effect of regulating that same conduct."[89] In support of this holding, the court cited a number of decisions.[90] Each of these cases discuss section 1506, but they do not provide an explanation for the conflict between sections 1305 and 1506. Although the statute had been in effect for almost ten years, each court failed to mention section 1305.[91]

3. *Cases Attempting to Reconcile Sections 1305 and 1506*

Many courts have "taken the bull by the horns" and attempted to reconcile the apparent conflict between sections 1305 and 1506. The courts that have undertaken this analysis are divisible into two categories: (1) those deciding that section 1305 totally preempts state law claims;[92] and (2) those deciding that section 1305 preempts only state law claims that conflict with the federal regulations.[93]

a. *Section 1305 Preempts State Law Claims*

The first category includes cases holding that section 1305 totally preempts all state law claims. In *O'Carroll v. American Airlines, Inc.*,[94] the Fifth Circuit specifically addressed the conflict between sections 1305 and 1506 in an action for wrongful removal of the plaintiff from an air-

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[88] 721 F. Supp. 1185 (D. Colo. 1988) [hereinafter *Stapleton Air Crash*].

[89] *Id.* at 1187.

[90] *Nader*, 426 U.S. at 298-300; *JFK Air Crash*, 635 F.2d at 74; *Rosdail*, 297 F. Supp. at 684-85; *Elsworth*, 37 Cal. 3d at 540, 691 P.2d at 630; 208 Cal. Rptr. at 879; People v. Valentino, 153 Cal. App. 3d Supp. 35, 200 Cal. Rptr. 862, 865 (Cal. App. Dep't Super. Ct. 1984); Ward v. State, 374 A.2d 1118, 1122 (Me. 1977).

[91] *See Stapleton Air Crash*, 721 F. Supp. at 1185.

[92] For a discussion of total preemption cases, see *infra* notes 94-117 and accompanying text.

[93] For a discussion of partial preemption cases, see *infra* notes 124-135 and accompanying text.

[94] 863 F.2d 11 (5th Cir.), *cert. denied*, 109 S. Ct. 3158 (1989).

plane.[95] The court reasoned that Congress clearly intended to preempt state law because section 1305 was enacted well after section 1506.[96] The court further held that section 1305 expressly preempted state law claims.[97] In a factually similar case, *Kohl v. Air New Orleans, Inc.*,[98] a district court in Louisiana followed *O'Carroll* in holding that all state law claims arising from the alleged wrongful removal of the plaintiff from the airplane were preempted by the Federal Aviation Act and should be dismissed.[99]

In *Hingson v. Pacific Southwest Airlines*,[100] the Ninth Circuit also analyzed the conflict between sections 1305 and 1506 and found that the state law claims were preempted. The plaintiff contended that certain common law remedies were available and that the airline had violated a California statute relating to equal access for the blind.[101] The plaintiff further argued that California laws were not in conflict with the federal law and should survive under section 1506.[102] The Ninth Circuit stated that this argument missed the point because section 1305 "is not limited to those state laws that *conflict* with federal law. It preempts state laws and regulations *'relating* to rates, routes, or services.' "[103] The court determined that since the California statute would regulate the services of an air carrier, it would be preempted, notwithstanding the savings clause in section 1506.[104]

French v. Pan Am Express, Inc.[105] addressed the issue of whether section 1305 preempted a Rhode Island statute that required drug testing of pilots. In an unequivocal de-

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[95] *Id.* at 12.
[96] *Id.* at 13.
[97] *Id.*
[98] No. 87-4638 (E.D. La. Aug. 17, 1989) (LEXIS 10153, Genfed library, Dist file).
[99] *Id.* at LEXIS 10153 p.1. *But see* Salley v. Trans World Airlines, Inc., 723 F. Supp. 1164 (E.D. La. 1989) (distinguishing *O'Carroll*).
[100] 743 F.2d 1408 (9th Cir. 1984).
[101] *Id.* at 1415.
[102] *Id.* at 1415-16.
[103] *Id.* at 1415.
[104] *Hingson*, 743 F.2d at 1416 n.11.
[105] 869 F.2d 1 (1st Cir. 1989).

cision that the statute was preempted, the First Circuit stated:

> We infer from the Federal Aviation Act an unmistakably clear intent to occupy the field of pilot regulation related to air safety, to the exclusion of state law. In our judgment, such an intent is implicit in the pervasiveness of relevant federal regulation, the dominance of the federal interest, and the legislative goal of establishing a single, uniform system of control over air safety.[106]

Once again, the argument was made that the Rhode Island statute did not conflict with federal goals.[107] The court, however, held that as long as Congress intended to occupy an envisioned field, any state law falling within that field is preempted.[108] In other words, once Congress has appropriately legislated in a field, any state's attempt to regulate within that field is invalidated despite the level of compatibility with federal policies. Federal interests are necessarily predominant, and states are powerless to regulate in those preempted areas.[109]

Likewise, *Illinois Corporate Travel v. American Airlines*,[110] held that a state law claim seeking to impose liability on an airline for differences in ticket prices was preempted by section 1305. The court also recognized the following: (1) preemption is not limited to state laws or regulations that conflict with federal law; and (2) any state law that could cause rates for airline tickets in one state to differ from those in other states is preempted.[111] The Seventh Circuit affirmed the decision[112] and held that "[a]lthough [section 1506] preserves state common law from implicit preemption, the preemption here [section 1305] is express rather than implied. If the state law relates to 'rates,

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[106] *Id.* at 6-7.

[107] *Id.* at 6.

[108] *Id.* at 6-7.

[109] *Id.* at 6.

[110] 682 F. Supp. 378 (N.D. Ill. 1988), *aff'd*, 889 F.2d 751 (7th Cir. 1989).

[111] *Id.* at 379.

[112] Illinois Corporate Travel v. American Airlines, Inc., 889 F.2d 751 (7th Cir. 1989).

routes, or services,' the absence of contrary federal law is irrelevant."[113]

Perhaps the most far reaching opinion to date was delivered in *Trans World Airlines, Inc. v. Mattox*,[114] in which the court granted an injunction against the Texas Attorney General. The court enjoined the attorney general from bringing an enforcement action under the Texas DTPA for alleged false advertising practices.[115] Although the court did not specifically mention section 1305, it held that "it is probable that Plaintiffs will prevail in establishing their claims that any state regulation of advertising of the Plaintiffs' *rates, routes, and services* has been preempted by the Federal Government . . . ."[116] Given the fact that this language tracks section 1305 word for word, the court apparently considered the preemption statute in granting the injunction.[117] Thirty-three addtional states were later added to the injunction.[118]

The Fifth Circuit affirmed the issuance of the injunc-

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[113] *Id.* at 754. Preemption may be express or implied. *See* Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983); Palmer v. Liggett Group, Inc., 825 F.2d 620, 625 (1st Cir. 1987). Whether preemption is express or implied, the question whether federal law preempts a state statute is one of congressional intent. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 280, (1987); Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 6 (1986); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 365, 369 (1986). Express preemption exists when state laws are blunted by explicit direction of Congress. Implied preemption is a more subtle creature. *French*, 869 F.2d at 2. The Supreme Court has described the difference as follows: Congress implicitly may indicate an intent to occupy a given field to the exclusion of state law. Such a purpose properly may be inferred where the pervasiveness of the federal regulation precludes supplementation by the State, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal the same purpose." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (citations omitted). Finally, even when Congress has not entirely displaced state regulation in a particular field, state law is preempted if it actually conflicts with federal law. Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988).

[114] 712 F. Supp. 99 (W.D. Tex. 1989), *aff'd*, 897 F.2d 773 (5th Cir. 1990).

[115] *Id.* at 101.

[116] *Id.* (emphasis added).

[117] *Compare* 49 U.S.C. app. § 1305 *with* the court's holding quoted in the text.

[118] *Mattox*, 712 F. Supp. at 105; *see also supra* note 17 for a list of the thirty-three states.

tion.[119] The court held in its affirmation that state laws prohibiting deception in advertisements of airline rates are preempted by federal law.[120] That is, section 1305 was held to expressly preempt DTPAs because such acts "relate to" airline rates and section 1506 cannot save remedies expressly preempted.[121]

In addition to the cases discussed above, other cases have also held that section 1305 preempts state law claims.[122] These cases, however, did not focus upon implied preemption. Instead, section 1305 was viewed as an express intention to preempt state law in the area of rates, routes, and services.[123] Other courts, as discussed below, have focused upon implied preemption and evaluated the degree of conflict between the federal and state laws to determine if preemption occurred.

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[119] Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990). Given that the Fifth Circuit in *O'Carroll* explicitly decided that section 1305 provides a "[c]lear indication of Congressional intent to preempt and is controlling," the afffirmation of the injunction on appeal was expected. *See O'Carroll*, 863 F.2d at 13. For further discussion of DTPA preemption, see *infra* notes 168-185 and accompanying text.

[120] *Mattox*, 897 F.2d at 780-83.

[121] *Id.*

[122] *See, e.g.*, Montauk-Caribbean Airways, Inc. v. Hope, 784 F.2d 91 (2d Cir.), *cert. denied*, 479 U.S. 872 (1986) (section 1305 is a preemption statute that establishes the federal government's sphere of power over the states in areas of interstate air transportation); Wolens v. American Airlines, Inc., No. 88-C-8158. (N.D. Ill. Oct. 24, 1988) (LEXIS 12026, Genfed library, Dist file) (while it is not wholly inconceivable that a preemption defense may be made to plaintiff's state law claims in state court, defendant appears to be facing an uphill battle); Stone v. American Airlines, No. 86-C-5783 (N.D. Ill. Feb. 19, 1987)(LEXIS 1183, Genfed library, Dist file) (resolution of state law claims would necessarily relate to rates charged by airline for cancellation of airline tickets and are therefore preempted under section 1305); Anderson v. USAir, Inc., 619 F. Supp. 1191 (D.D.C. 1985) (the legislative history is clear that this Act and regulations issued thereunder preempted any state laws relating to air carrier service), *aff'd*, 818 F.2d 49 (D.C. Cir. 1987) (a state law obligation to give courteous service is expressly preempted by section 1305); New York Airlines, Inc. v. Dukes County, 623 F. Supp. 1435 (D. Mass. 1985) (air carrier's complaint states a cause of action under the supremacy clause to the extent a commission's action is alleged to constitute a law, rule, regulation, standard, or other provision affecting its rates, routes, or services).

[123] *See supra* note 113 and accompanying text regarding implied and express preemption.

b. *If State Law Conflicts with Federal Law Section 1305 Preempts*

The second category of cases interpreting the conflict of sections 1305 and 1506 includes those decisions holding that section 1305 applies only if the state law is incompatible with the federal law. In *People v. Western Airlines, Inc.*,[124] a California court conducted an analysis of sections 1305 and 1506. Relying upon *Nader*, the court found that state regulation of interstate air carriers is preempted only where the federal and state regulatory schemes are irreconcilable.[125] This matter involved an appeal of the lower court's determination that the claims were preempted as a matter of law.[126] On appeal, the state argued that "the People do not challenge Western's rates, routes or services. The People's complaint involves the [distinct] issue of the manner [in which] Western advertised its rates and services. 49 United States Code section 1305(a) does not insulate Western from liability for violating California statutes prohibiting false advertising."[127]

Interestingly, the court suggested that the result might have been different if evidence of inconsistencies between California and federal law had been introduced. Since the record did not reflect any inconsistencies between the state advertising statutes and section 1305, assertion of only incidental effects arising from liability under the state law was insufficient to establish preemption.[128] Accord-

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[124] 155 Cal. App. 3d 597, 202 Cal. Rptr. 237, 238 (1984), *cert. denied*, 469 U.S. 1132 (1985).

[125] *Id.* at 597, 202 Cal. Rptr. at 238. For a discussion of *Nader*, see *supra* notes 72-77 and accompanying text.

[126] *Western Airlines*, 155 Cal. App. 3d at 597, 202 Cal. Rptr. at 238.

[127] *Id.* (citation omitted).

[128] *Id.* at 597, 202 Cal. Rptr. at 239.

> Nothing in this record suggests any inconsistency between California's false advertising statutes and the Federal Aviation Program precluding as a matter of law their coexistence here; any assertion of more than incidental impact on rates resulting from California imposing liability on Western for false advertising or from Western adopting practices to avoid such liability involves factual issues beyond the scope of demurrer. *On this record* the People's complaint is not preempted by federal law.

ingly, the case was reversed.[129]

In *Salley v. Trans World Airlines, Inc.*,[130] the court also determined that section 1305 preempts only those state law claims that conflict with federal laws. Specifically, the court found that the state law claims were not in conflict with any Federal Aviation Act provisions and, therefore, no preemption resulted.[131] Apparently ignoring the requisites of express preemption, the court found that section 1305 was "not preemption based on pervasive federal regulation, but preemption due to interference or conflict with federal law."[132]

Given the fact that section 1305 constitutes an express preemption of any law, rule, or regulation that relates to rates, routes, or services,[133] an analysis of the inconsistencies between state and federal rules is unnecessary.[134] Thus, if any state law, rule, or regulation relates to rates, routes, or services, section 1305 should preempt it whether or not it is consistent with any similar federal laws.[135]

B. *Is Section 1305 a Federal Question Statute?*

Along with the discussion of preemption, an analysis of the issue of whether section 1305 constitutes a federal question for removal purposes is essential.[136] Normally, a

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Id. (emphasis added).

[129] *Id.*

[130] 723 F. Supp. 1164 (E.D. La. 1989); for additional discussion of *Salley*, see *infra* note 157.

[131] *Id.* at 1166.

[132] *Id.* Since inconsistencies between state and federal regulations are examined only if implied preemption exists, the court must have determined that express preemption did not exist. *See also* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208-09 (1985) (holding that without express preemption a state statute will be upheld if it does not conflict with federal law); Paige v. Henry J. Kaiser Co., 826 F.2d 857, 861 (9th Cir. 1987) (holding that without express preemption state law is only displaced when it conflicts with or frustrates the federal scheme); *supra* notes 105-109 and accompanying text.

[133] 49 U.S.C. app. § 1305.

[134] *See Hingson*, 743 F.2d at 1415; *Mattox*, 897 F.2d at 779.

[135] *Hingson*, at 1415-16; *French*, 869 F.2d at 6.

[136] If Congress has demonstrated an intent to totally preempt an area of law, such as in ERISA and section 301 of the Labor Management Relations Act, then

defendant is faced with the "well-pleaded complaint" rule[137] because the plaintiff is asserting state law claims and not federal claims. However, when Congress has indicated an intent to preempt an area of law, courts have held that the well-pleaded complaint rule will not prevent removal of the matter to federal court.[138] Arguably, section 1305 represents an explicit congressional intent to preempt state law completely with respect to the regulation of rates, routes, and services of a title IV carrier.[139] The courts, however, have not yet reached a consistent conclusion.

1. *Section 1305 Constitutes a Federal Question*

Those courts which have concluded that section 1305 constitutes a federal question for removal purposes find that Congress statutorily indicated an intent to totally preempt the field of law relating to the rates, routes, and services of a title IV carrier.[140] In *Stone v. American Airlines,*

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any claim relating to that particular field would constitute a federal question for removal purposes. Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987). Thus, if section 1305 is a statute similar to ERISA, a defendant may be able to remove a state court proceeding to federal court based on federal question jurisdiction if the state law claim relates to the rates, routes, or services of a title IV carrier.

[137] The well-pleaded complaint rule provides that if the plaintiff's pleading on its face does not state a federal question, then any federal preemption argument would be defensive in nature and would not provide grounds for removal. *Metropolitan Life*, 481 U.S. at 63; Aaron v. National Union Fire Ins. Co. of Pittsburgh, 876 F.2d 1160 (5th Cir. 1989).

[138] *Aaron*, 876 F.2d at 1161; *see* Federated Dep't Stores, Inc. v. Moitte, 452 U.S. 394, 396 (1981); Oliva v. Wine, Liquor & Distillery Workers Union, 651 F. Supp. 369, 371 (S.D.N.Y. 1987) (holding that if the real nature of a complaint is federal, removal jurisdiction is proper regardless of whether a plaintiff pleads his claims in state law); Bowlus v. Alexander & Alexander Services, Inc., 659 F. Supp. 914, 918 (S.D.N.Y. 1987); Triple A Maintenance Corp. v. Bevona, 657 F. Supp. 1171, 1172-73 (S.D.N.Y. 1987).

[139] For a discussion of congressional intent, see *supra* notes 105-109 and accompanying text.

[140] State v. Pan American World Airways, Inc., No. 3-89-0713-H (N.D. Tex. Apr. 19, 1989); *Stone*, No. 86-C-5783 (LEXIS 1183, Genfed Library, Dist file); see also *Mattox*, 897 F.2d at 787 (holding that the legislative history of section 1305 exhibits a congressional intent to treat a complaint raising this select group of claims as necessarily federal in character).

Inc.,[141] the court specifically stated that "the effect of Section 1305(a)(1) . . . is to preempt state court jurisdiction over the instant suit since resolution of the claims therein would necessarily relate to rates charged by [the] defendant for cancellation of airline tickets. Jurisdiction over the dispute is thus exclusively federal."[142] Additionally, in declining to remand a section 1305 matter, a federal district court in Texas held that the case arose under federal law, which is indicative of the federal government's pervasive regulation of the airline industry.[143]

2. *Section 1305 Does Not Provide a Basis for Removal*

A number of cases, however, have determined that section 1305 does not constitute a federal question for removal purposes.[144] The fundamental arguments asserted by these courts generally involve two theories. That is, courts hold either that the well-pleaded complaint rule precludes removal[145] or that state laws were not totally preempted by Congress.[146]

a. *The Well-Pleaded Complaint Rule*

Courts that rely upon the well-pleaded complaint rule to deny removal base that decision upon the fact that section 1305 preemption constitutes a defense to any state law claim that is not subject to removal.[147] Implicit in this

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[141] No. 86-C-5783 (N.D. Ill. Feb. 19, 1987) (1987 LEXIS 1183).

[142] *Id.* at LEXIS 1183 p.5.

[143] *Texas v. Pan American*, No. 3-89-0713-H.

[144] People v. Trans World Airlines, 728 F. Supp. 162 (S.D.N.Y. 1989); People v. Trans World Airlines, 720 F. Supp. 826 (S.D. Cal. 1989); *Wolens*, No. 88-C-8158 (LEXIS 12026, Genfed library, Dist file); Wolst v. American Airlines, Inc., 668 F. Supp. 1117 (N.D. Ill. 1987).

[145] *See infra* notes 147-149 and accompanying text.

[146] *See infra* notes 150-155 and accompanying text.

[147] People v. Trans World, 728 F. Supp. at 184 (although federal preemption is usually a federal defense, if it does not appear on the face of a well-pleaded complaint, then removal to federal court is not authorized); People v. Trans World, 720 F. Supp. at 828 (a defendant cannot establish removal jurisdiction because of section 1305 defenses); *Wolens*, at LEXIS 12026 p.2 (section 1305 and its legislative history provide no indication of congressional intent to convert state claims into federal actions and defendant cannot plead preemption to remove to federal

decision is the determination that section 1305 does not completely preempt the area of rates, routes, or services of a title IV carrier.[148] This logic, however, is contrary to the express language of section 1305, which Congress labeled as a "preemption" statute.[149] Accordingly, to comply with congressional intent, section 1305 should allow for removal of the matter to federal court if the state law claim relates to rates, routes, or services of a title IV carrier.

b. *Assertions of Partial Congressional Preemption*

As an alternative to relying solely upon the well-pleaded complaint rule,[150] some courts have also found that the state law claim did not relate to the rates, routes, or services of a title IV carrier.[151] In *People v. Trans World Airlines, Inc.*,[152] the court discussed whether New York's regulation of deceptive advertising related to the airline's rates, routes, or services. Interestingly, the court held that the relationship was too remote, and the implied conclusion is that section 1305 has no application in this instance.[153] The court later recognized the exception to the

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court); *Wolst*, 668 F. Supp. at 1119-20 (section 1305 cannot be fairly read as barring state courts from entertaining lawsuits against air carriers, and it is well settled that such a defense does not provide a predicate for removal).

[148] If such a determination had been made, the cases would have been properly removed. *See, e.g., People v. Trans World*, 720 F. Supp. at 829.

[149] 49 U.S.C. app. § 1305. The legislative history provides an indication that Congress intended to totally preempt state regulation of only the rates, routes, and services of title IV carriers. Congress did not intend to preempt state regulation of the entire field of aviation. Therefore, if a state law, rule, or regulation relates to rates, routes, or services of a title IV carrier, then any claim based on a violation of such state law, rule, or regulation should be removable. *See supra* notes 23-48 and accompanying text.

[150] For a discussion of the well-pleaded complaint rule, see *supra* notes 137, 147-149 and accompanying text.

[151] *People v. Trans World*, 728 F. Supp. at 162 (holding that any relationship between New York's enforcement of its laws against deceptive advertising and the airline's rates, routes, or services is remote and indirect); Air Transp. Assoc. of Am. v. Public Util. Comm'n, 833 F.2d 200, 207 (9th Cir. 1987), *cert. denied*, 487 U.S. 1236 (1988) (holding that regulation of telephone operations is not related to rates, routes, or services).

[152] 728 F. Supp. 162 (S.D.N.Y. 1989).

[153] *Id.*

well-pleaded complaint rule but determined that the Federal Aviation Act had "not completely preempted state regulation of airline advertising," apparently because the New York regulation did not relate to rates, routes, or services.[154]

In contrast to the decisions based upon the well-pleaded complaint rule, the decisions holding that the state law claims do not relate to rates, routes, or services are consistent with the express wording of section 1305.[155] At this time, however, the issue of whether a state or federal court should make the determination that a particular claim relates to rates, routes, or services is undecided.[156]

V. WHAT CAUSES OF ACTION ARE AVAILABLE?

If a plaintiff's state law claims are preempted by section 1305, a situation may arise where the plaintiff has no cause of action.[157] Prior to 1975, *Gabel v. Hughes Air Corp.*[158] and *In re Paris Air Crash of March 3, 1974*[159] held that there was a private cause of action to enforce violations of federal standards. In August 1975, however, the

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[154] *Id.* at 184. The district court's analysis raises an interesting question about section 1305. For instance, if the court had determined that the plaintiff's allegations related to the rates, routes, or services of a title IV carrier, its conclusion about removal might have been different. Logically, since the interpretation of a federal statute is involved in the determination of the meaning of the phrase "relates to rates, routes, or services," removal may be appropriate to allow a federal court to make this determination. This issue, however, remains unanswered.

[155] Since section 1305 expressly preempts certain state law regulations, any decision finding that this statute merely constitutes a defense and not a federal question would be inconsistent with the statute's "preemption" title.

[156] *See supra* note 154.

[157] In *Salley v. Trans World Airlines, Inc.*, 723 F. Supp. 1164 (E.D. La. 1989), the court recognized that the plaintiff did not have a claim and attempted to remedy the situation by concluding that 49 U.S.C. § 1374 was repealed January 1, 1985. *Id.* at 1166. Section 1374, however, was amended by Congress in 1986 and 1987. Pub. L. No. 99-435, 100 Stat. 1080 (1986); Pub. L. No. 100-202, 1329 (1988). Thus, section 1374 remains an enforceable statute despite the court's conclusion to the contrary.

[158] 350 F. Supp. 612 (C.D. Cal. 1972).

[159] 399 F. Supp. 732 (C.D. Cal. 1975).

Supreme Court decided *Cort v. Ash*[160] and listed four factors to evaluate in deciding whether Congress intended to create a private cause of action.[161] Since *Cort*, federal courts that have addressed the question whether a private right of action for violations of the Federal Aviation Act exists have unequivocally determined that no private right of action is available.[162]

When federal law totally preempts state law claims relating to a title IV carrier's rates, routes, or services, the plaintiff is then left with only federal common law or federal statutory claims.[163] This scenario, however, should result in the application of state common law remedies because federal courts look to state law if federal common law fails to address the allegations.[164] But, federal courts do not look to consumer protection statutes, such as the Texas DTPA, because these statutes are legislative, not

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[160] 422 U.S. 66, 78 (1975).

[161] *Id.* The Supreme Court utilized the following four part test in *Cort* to determine if Congress intended to create a private cause of action:

> First, is the plaintiff one of the class for whose *especial* benefit the statute was enacted . . . . Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action solely on federal law?

Id. at 78 (emphasis in original).

[162] *See Gabel*, 350 F. Supp. at 612 (holding a private cause of action exists); *Paris Air Crash*, 399 F. Supp. at 732 (holding a private cause of action exists). Cases that have held otherwise include: Anderson v. USAir, Inc., 818 F.2d 49, 55 (D.C. Cir. 1987); *In re* Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 408 (9th Cir. 1983); Obenshain v. Halliday, 504 F. Supp. 946, 951 (E.D. Va. 1980); Heckel v. Beech Aircraft Corp., 467 F. Supp. 278, 281 (W.D. Pa. 1979); Yelinek v. Worley, 284 F. Supp. 679, 681 (E.D. Va. 1968); Moungey v. Brandt, 250 F. Supp. 445, 450-51 (W.D. Wis. 1966).

[163] This article does not address the dilemma plaintiffs may encounter if federal common law and federal statutory claims are asserted after expiration of the statute of limitations, while all state law claims asserted within the limitations period may be preempted.

[164] 19 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514 (1982). In many cases, relevant factors may indicate that the federal courts should follow or "adopt" state law as the rule of decision, although it will be doing so as a matter of federal law. *Id.*

common law, creations.[165] Total preemption of the DTPA for title IV carriers is appropriate for the following reasons: (1) the federal government clearly intended to provide consumer protection for airline customers;[166] and (2) the application of federal rules would provide consistent criteria for the individual airlines to follow.[167]

A. *Preemption of the Texas DTPA*

The fundamental purpose of the Texas DTPA is to protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty.[168] One of the fundamental elements of a DTPA action is that it can be brought only by a consumer.[169] A consumer is defined as an individual, a partnership or corporation, or a state or one of its subdivisions or agencies who seeks or acquires goods or services by purchase or lease.[170] Similar "consumer protection statutes" have been enacted in most of the states and provide a myriad of different standards of conduct for an airline to follow depending upon the applicable state statute.[171] In order to provide a consistent framework within which title IV carriers could operate, Congress, through section 1305, attempted to preclude application of these consumer statutes whenever rates, routes, or services were involved.[172]

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[165] Smith v. Baldwin, 611 S.W.2d 611, 616 (Tex. 1980) (holding that the DTPA does not represent a codification of the common law); *see generally* Joseph v. PPG Indus., Inc., 674 S.W.2d 862, 865 (Tex. App.—Austin 1984, writ ref'd n.r.e.). This article specifically addresses the preemption of only the Texas Deceptive Trade Practices Act.

[166] For a discussion of the legislative history of the CAB and CAB Sunset Acts, see *supra* notes 24-25, 34-42 and accompanying text.

[167] For a discussion of consistency in airline industry regulation, see *supra* note 29 and accompanying text.

[168] TEX. BUS. & COMM. CODE ANN. § 17.44 (Vernon 1987).

[169] *Id.* § 17.50(a).

[170] *Id.* § 17.45(4).

[171] For a general discussion of state consumer protection statutes, see *supra* notes 12-13.

[172] For a discussion of uniformity in regulation, see *supra* note 29 and accompanying text.

A review of the basic goals of the ADA reveals the same fundamental purposes as the DTPA.[173] The legislative history suggests that Congress intended for the federal government to protect consumers from unfair and deceptive practices in order to promote consistency in the regulation of title IV carriers.[174] In order to achieve this consistency, Congress specifically adopted section 1305 to preempt any state rules, regulations, or other provisions that relate in any manner to title IV carriers' rates, routes, or services.[175]

The language of section 1305 is very clear. The statute does not purport to preempt all state aviation rules and regulations. It merely restricts any regulation of title IV carriers in the areas of rates, routes, and services.[176] Given the history of the ADA indicating a congressional intent to protect consumers from unfair and deceptive practices, and the subsequent adoption of section 1305, application of the DTPA to any area of an airline's rates, routes, or services is preempted.[177]

Although the courts have disagreed as to whether various nonpersonal injury claims relate to rates, routes, or services,[178] no doubt exists that a DTPA personal injury claim is preempted by section 1305. Since only consumers can bring a DTPA action,[179] and a consumer is defined as one who seeks or acquires goods or services,[180] title IV

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[173] Section 411 of the Federal Aviation Act gives the CAB authority to proceed against unfair or deceptive practices. 49 U.S.C. app. § 1381. *See supra* note 38 and accompanying text. The legislative history of unfair and deceptive practices indicates that Congress intended to protect consumers. *See supra* notes 35-42 and accompanying text. Regulation, however, is necessary not only to protect consumers but also to promote consistency in the regulation of title IV common carriers. *See supra* note 41.

[174] For a discussion of the legislative history, see *supra* notes 27-42 and accompanying text.

[175] 49 U.S.C. app. § 1305.

[176] *Id.*

[177] Although there appear to be inconsistencies among the cases addressing DTPA preemption, the fundamental concept remains that if the state law claim relates to rates, routes, or services, it is preempted. *See supra* notes 94-135.

[178] For a discussion of such decisions, see *supra* notes 57-64.

[179] TEX. BUS. & COMM. CODE ANN. § 17.50(a).

[180] *Id.* § 17.45(4).

carriers would be subject to liability because they provide services to their ticket holders.[181] Section 1305, however, preempts state law claims relating to rates, routes, or services,[182] and since consumer DTPA claims must necessarily relate to a carrier's services, the personal injury cause of action is preempted by section 1305. In *Trans World Airlines, Inc. v. Mattox*,[183] the Fifth Circuit also held that section 1305 expressly preempted state deceptive advertising laws, such as DTPAs, as they relate to airline fare advertising.[184] Therefore, in the future, courts may expand this line of reasoning in Texas to hold that DTPA actions against title IV carriers by consumers of services must, by definition, relate to a carrier's services and would be preempted by section 1305.[185]

B. *Application of Federal Law*

The federal government has undeniably attempted to regulate the aviation industry consistently and to create uniform standards for consumer services.[186] By applying federal common law and the related federal rules to title IV carriers, consistent standards of conduct, services, and operations in interstate travel are attained without prejudice to consumer rights. Through the enactment of section 1305, Congress intended to preempt consumer protection statutes, such as DTPAs, to provide a consistent regulatory base within which a title IV carrier could operate.

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[181] Although an air carrier does provide some meals and possibly other goods during flight, the fundamental purpose of an air carrier is to provide the service of flying a passenger from point A to point B.

[182] 49 U.S.C. app. § 1305.

[183] 897 F.2d 773 (5th Cir. 1990).

[184] *Id.*

[185] For the same reasoning found in personal injury actions, any DTPA action against a title IV carrier would be preempted because by definition a consumer would have to seek services from a carrier. *See supra* notes 179-182 and accompanying text. The only exception may be if goods were involved in the transaction since section 1305 does not purport to preempt any state regulation of goods. 49 U.S.C. app. § 1305. This is not to say that all common law causes of action would also be preempted by section 1305. *See supra* note 164 and accompanying text.

[186] *See supra* notes 3-9 and accompanying text.

VI. CONCLUSION

Although section 1305 has been on the books for over a decade,[187] its application in litigation is relatively new.[188] Many questions as to the scope and effects of section 1305 remain unanswered. This article, however, emphasizes the benefits of concluding that section 1305 preempts state laws governing the rates, routes, and services of interstate air carriers. For example, national consistency is promoted when rates, routes, and services are directly regulated only by the federal government. Additionally, common law theories, such as negligence, remain viable claims through the application of federal common law. Title IV airlines can also evaluate their rates, routes, and services against uniform standards provided by the federal regulations. State-by-state modifications of rates, routes, and services will no longer be required because individual business practice statutes do not apply. Finally, consumers will no longer have the liberal protection of the state business practice laws, but they will still receive federal protection. In summary, although many questions about section 1305 remain unanswered, the benefits of uniformity delineated above strongly support the conclusion that any state laws which relate in any manner to a title IV air carrier's rates, routes, or services are preempted generally by the federal regulatory scheme and spcifically by section 1305.

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[187] 49 U.S.C. app. § 1305 was first enacted in 1978.

[188] For a discussion of cases applying section 1305, see *supra* notes 56-64 and accompanying text.

Comments