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## AIR AMBULANCES AND STATE CONTRACT CLAIMS: THE OPENING TO AVOID ADA PREEMPTION

JOHN DAVID JANICEK\*

### I. THE INDIVIDUAL DILEMMA

**L**IFE FLIGHTS BY AIR AMBULANCES produce positive medical outcomes for hundreds of thousands of injured and sick people every year.<sup>1</sup> Though they provide a net positive to society, patients transported in these air ambulances often find themselves with an enormous issue other than their health—crippling debt.<sup>2</sup> In *Scarlett v. Air Methods Corp.*, two classes of plaintiffs brought action in federal court making a series of claims to avoid having to pay the remaining balance of their air ambulance bills.<sup>3</sup> Although the Tenth Circuit ultimately dismissed the complaints after finding the claims were preempted by the Airline Deregulation Act (ADA), the court opened the door for a future plaintiff with the proper facts and pleadings to finally crack through the preemption stronghold of the ADA.<sup>4</sup> This has the potential to upend the legal status quo that currently favors air ambulance companies. If the relevant parties become frustrated with cases having widely different outcomes as a result of seemingly minor differences between cases, they could effectuate change to a more equitable system.

Air ambulances serve two primary roles in medical transportation. They can travel quickly through the air, unencumbered by issues like traffic or natural obstructions, and they have the necessary medical equipment on board, so they are frequently

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<sup>1</sup> See generally Akkie N. Ringburg et al., *Lives Saved by Helicopter Emergency Medical Services: An Overview of Literature*, 28 AIR MED. J. 298 (2009).

<sup>2</sup> See Rachel Bluth, *Why Air Ambulance Bills Are Still Sky-High*, NPR (June 14, 2019), <https://www.npr.org/sections/health-shots/2019/06/14/732174170/why-air-ambulance-bills-are-still-sky-high> [<https://perma.cc/UV2T-6WEQ>].

<sup>3</sup> *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1057 (10th Cir. 2019).

<sup>4</sup> See *id.* at 1063–66.

called to the scene of traumatic injuries when a patient needs to be taken to a trauma center as quickly as possible.<sup>5</sup> Additionally, for those same reasons, they are also often used to transport patients between medical facilities when proper.<sup>6</sup> These services may be provided by a helicopter or airplane.<sup>7</sup> Their services are of great benefit to patient health, but the activity is expensive to operate for companies.<sup>8</sup> As a result, it is well established that air ambulance companies charge “exorbitant” rates for their services.<sup>9</sup> Fees are often as high as \$40,000,<sup>10</sup> and they are up 300% since 2006 in some areas.<sup>11</sup> To compound the problem, insurance companies usually cover only a fraction of the bill, leaving the patients to pay tens of thousands of dollars on average.<sup>12</sup> Many of these patients are either severely injured, dying, or dead, and their families cannot afford to pay bills of this size in addition to all the other bills the infirmity will have created.

In *Scarlett*, the defendants were two companies that provide air ambulance services, Air Methods Corporation and Rocky Mountain Holdings, LLC.<sup>13</sup> The plaintiffs were two separate classes of individuals (some representing their minor children) who were provided air ambulance services by one of the two defendants.<sup>14</sup> The court referred to the members of the first class as the “Scarlett Plaintiffs,” who had an average initial bill of \$47,000, of which their insurance on average covered \$12,000.<sup>15</sup> The court called the other class members the “Cowen Plaintiffs”; similarly, they had an average bill of \$48,500, and their insur-

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<sup>5</sup> See Henry H. Perritt, Jr., *An Arm and a Leg: Paying for Helicopter Air Ambulances*, 2016 U. ILL. J.L. TECH. & POL’Y 317, 326–29 (2016).

<sup>6</sup> See *id.* at 330–31.

<sup>7</sup> See Karen Beasley Grabenstein, *Air-Medical Services: Then and Now*, EMS WORLD (Aug. 2019), <https://www.emsworld.com/article/1223054/air-medical-services-then-and-now> [<https://perma.cc/DTR2-VBAC>].

<sup>8</sup> Though this operation is expensive, it could be operated at a lower cost. The huge spike in cost has been attributed to “[a] 434% increase in Medicare reimbursement rates in 2002 [that] caused new providers to enter the market.” Perritt, *An Arm and a Leg*, *supra* note 5, at 324; see also Henry H. Perritt, Jr., *No Way to Run an “Airline”: Surviving an Air Ambulance Ride*, 82 J. AIR L. & COM. 83, 98 (2017).

<sup>9</sup> See, e.g., Tanner Holton, Note, *Air Ambulance Service Providers: A Lifesaving Industry and a Financial Catastrophe*, 92 N.D. L. REV. 473, 477 (2017).

<sup>10</sup> Perritt, *An Arm and a Leg*, *supra* note 5, at 324.

<sup>11</sup> See Bluth, *supra* note 2.

<sup>12</sup> See Holton, *supra* note 9, at 474–75.

<sup>13</sup> *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1057 (10th Cir. 2019).

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

<sup>15</sup> *Id.* at 1057–58.

ance companies on average only paid \$7,400 of that total.<sup>16</sup> Both classes disputed their obligations to pay the defendants the entire amount of the bill they incurred.<sup>17</sup>

Although the groups of plaintiffs presented numerous claims,<sup>18</sup> this Casenote focuses on the two that have the greatest potential legal implications. First, the plaintiffs argued they had implied contracts with the defendants, which the defendants breached by charging prices in excess of fair market value for their services.<sup>19</sup> The Scarlett Plaintiffs made their contract claim based on state law,<sup>20</sup> while the Cowen Plaintiffs based theirs in federal common law.<sup>21</sup> Both groups of plaintiffs asserted that their claims were not preempted by the ADA.<sup>22</sup> Alternatively, it was argued that, if the plaintiffs could not bring an implied-in-law contract claim in state court to resolve this dispute because of ADA preemption, under the precedent of *Dan's City*,<sup>23</sup> the defendants should not be able to bring debt collection actions in state courts based on equitable principles.<sup>24</sup> Both cases were dismissed by district courts through defendants' 12(b)(6) motion to dismiss.<sup>25</sup> The lower court ruled that the Scarlett Plaintiffs' contract claim was preempted by the ADA,<sup>26</sup> and the Cowen Plaintiffs' contract claim was invalid because there is no federal common law in this area.<sup>27</sup> The argument under *Dan's City* was not before the district courts—it was raised by the U.S. government on appeal.<sup>28</sup>

## II. THE LEGAL DILEMMA

Although the regulation of the service rate for air ambulance companies seems like an issue that would be relatively easy for state legislatures to create a palatable solution, they are prevented from doing so. The ADA was enacted to “encourage, develop, and attain an air transportation system that relied on

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<sup>16</sup> *Id.* at 1059.

<sup>17</sup> *Id.* at 1057.

<sup>18</sup> *See id.* at 1058–59.

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

<sup>20</sup> *Id.* at 1058.

<sup>21</sup> *Id.* at 1059.

<sup>22</sup> *Id.* at 1058, 1067.

<sup>23</sup> *See generally* *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. 251 (2013).

<sup>24</sup> *Scarlett*, 922 F.3d at 1062–63.

<sup>25</sup> *Id.* at 1058–59.

<sup>26</sup> *Id.* at 1058.

<sup>27</sup> *Id.* at 1059.

<sup>28</sup> *Id.* at 1063–64.

competitive market forces to determine the quality, variety, and price of air services.”<sup>29</sup> To accomplish this end, Congress included an explicit preemption clause that says, “[s]tates may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation.”<sup>30</sup> This language has been applied to a wide reaching amount of activity.<sup>31</sup>

By the ADA’s text alone, it was not clear if air ambulance service fell within its reach. The ADA applies to “air carriers,” but it does not define them. Elsewhere in the transportation title of the U.S. Code (Title 49), an air carrier is defined as “a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.”<sup>32</sup> This has been consistently held to apply to air ambulances.<sup>33</sup>

In a series of cases, the Supreme Court has clarified the wide reach of the ADA, curbing existing and possible state legislation on the subject.<sup>34</sup> The first time the Court considered the ADA’s reach was *Morales*, in which the Court held the plain meaning of the ADA’s words meant there was much more that was preempted than just state laws that directly regulate price, route, or service.<sup>35</sup> Specifically, the Court said anything “relating to” an airline rate is preempted,<sup>36</sup> which is a vast amount of activity. Next, in *Wolens*, the Court identified an exception to ADA preemption.<sup>37</sup> The Court said the ADA would not shield airlines from breach-of-contract claims because they are “privately or-

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<sup>29</sup> Ann K. Wooster, Annotation, *Construction and Application of § 105 Airline Deregulation Act (49 U.S.C.A. § 41713), Pertaining to Preemption of Authority over Prices, Routes, and Services*, 149 A.L.R. FED. 299 (1998).

<sup>30</sup> 49 U.S.C. § 41713(b)(1) (2018).

<sup>31</sup> See, e.g., *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 97–98 (1st Cir. 2013) (holding that the ADA preempts claims for tortious interference with custodial relations based on ticketing procedure); *Air Transp. Ass’n of Am. v. Cuomo*, 520 F.3d 218, 220–23 (2d Cir. 2008) (per curiam) (holding that the ADA preempts state laws requiring airlines provide passengers with food and water during lengthy delays); *N. Cypress Med. Ctr. Operating Co. v. FedEx Corp.*, 892 F. Supp. 2d 861, 863, 867–69 (S.D. Tex. 2012) (holding that the ADA preempts claim for negligence loss of medical documents by an air carrier).

<sup>32</sup> 49 U.S.C. § 40102(a)(2) (2018).

<sup>33</sup> See, e.g., *Valley Med Flight, Inc. v. Dwelle*, 171 F. Supp. 3d 930, 934, 938–40 (D.N.D. 2016).

<sup>34</sup> See Andrew J. Upton, Comment, *Air Ambulance Reform – Why Congress Should Exempt Air Ambulances From “Carrier” Classification and Preemption Under the Airline Deregulation Act*, 82 J. AIR L. & COM. 431, 440–42 (2017).

<sup>35</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385–88, 385 n.2 (1992).

<sup>36</sup> *Id.* at 383–86.

<sup>37</sup> *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228–29 (1995).

dered obligations” and thus do not enforce a state regulation.<sup>38</sup> In the last relevant case on ADA preemption, the Court revisited this contract exception in *Ginsberg*.<sup>39</sup> There, the plaintiff filed a claim against an airline for breach of the covenant of good faith and fair dealing after the company removed his frequent flyers status.<sup>40</sup> Narrowing the *Wolens* decision, the Court held that common law claims could still be preempted if they had the “force and effect of [state] law.”<sup>41</sup> So if the action tries to enforce a state-imposed obligation, it is preempted. On the other hand, if the parties voluntarily undertook the relevant aspect of the contract (e.g., price), it would be a private obligation free from preemption.<sup>42</sup>

In *Scarlett*, the court gave little consideration to the multiple claims argued by the plaintiffs because they had no potential given the existing precedent. Instead, the court gave attention to an issue of first impression for the Tenth Circuit. Both classes of plaintiffs made breach-of-implied-contract claims, stating that the defendants charged them more than the reasonable value of the service provided.<sup>43</sup> The court held that the plaintiffs’ argument for an implied-in-law contract was factually insufficient based on their own pleadings and claims, thus the claims were preempted by the ADA.<sup>44</sup> The more important aspect of the holding for future cases was the court’s acknowledgment that an implied-in-fact contract would survive ADA preemption.<sup>45</sup> Additionally, based on *Dan’s City* and *Ginsberg*, the court accepted that the defendants may not attempt to use equitable principles in their recovery efforts against plaintiffs at state court.<sup>46</sup> This was not dispositive of any issue in the case because the defendants’ state court claims were not before the court at that time.<sup>47</sup>

The two classes of plaintiffs alleged breach-of-contract claims under different sources of law. The Cowen Plaintiffs based their breach claim on federal common law, but because *Wolens* already made clear that such a claim does not exist under federal law, the rest of the court’s analysis concentrated on the *Scarlett*

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<sup>38</sup> *Id.*

<sup>39</sup> *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 276 (2014).

<sup>40</sup> *Id.* at 278–79.

<sup>41</sup> *Id.* at 281–82.

<sup>42</sup> *Id.* at 276, 281.

<sup>43</sup> *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1064 (10th Cir. 2019).

<sup>44</sup> *Id.* at 1065–67.

<sup>45</sup> *Id.* at 1065–66.

<sup>46</sup> *See id.* at 1063.

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

Plaintiffs' state contract law claims.<sup>48</sup> Neither party disputed that the claims asserted related to the price of the defendants' air ambulance service.<sup>49</sup> In order to get past the ADA's preemption clause, the Scarlett Plaintiffs' claims had to "satisfy" the exception from *Wolens* and *Ginsberg*.<sup>50</sup> The court described the *Ginsberg*–*Wolens* test as such:

First, '[w]hen the law of a State does not authorize parties to free themselves from [a] covenant, a breach of covenant claim is preempted under the reasoning of *Wolens*.' Second, '[w]hen the application of [an] implied covenant depends on state policy, a breach of implied covenant claim cannot be viewed as simply an attempt to vindicate the parties' implicit understanding of the contract.'<sup>51</sup>

Thus, determining the nature of the contract would be dispositive for preemption issues because, if it was a contract that enforced a private agreement and not state policy, the test would be satisfied.

The court began with a rudimentary contract law analysis, differentiating the three types of contracts: express, implied-in-fact, and implied-in-law (quasi-contract).<sup>52</sup> The plaintiffs did not contend that the parties had an express contract, so the court did not elaborate on it.<sup>53</sup> Instead, the court contrasted the two remaining types of contracts. It said an implied-in-fact agreement is one "inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."<sup>54</sup> On the other hand, "an agreement implied in law is a 'fiction of law' where 'a promise is imputed to perform a legal duty . . . .'"<sup>55</sup>

The plaintiffs failed to distinguish which of these implied contracts they claimed to have formed, which is crucial for determining preemption.<sup>56</sup> An implied-in-law contract is unavoidably an application of state law because it is a legal fiction created by

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<sup>48</sup> *Id.* at 1064.

<sup>49</sup> *Id.* at 1062.

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

<sup>51</sup> *Id.* at 1061–62 (citations omitted) (quoting *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 287–88 (2014)).

<sup>52</sup> *Id.* at 1064.

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* (quoting *Hercules, Inc. v. United States*, 516 U.S. 417, 424 (1996)). But the defendants did claim an express contract existed, and as will be discussed *infra*, this was the reason the *Dan's City* argument failed. *See id.* at 1063–64.

<sup>55</sup> *Id.* at 1064 (quoting *Hercules*, 516 U.S. at 424).

<sup>56</sup> *Id.* at 1065.

the state, and the claim is thus preempted by the ADA.<sup>57</sup> Unfortunately, the Scarlett Plaintiffs had almost entirely argued, to the district court and on appeal, facts that directly contradicted the requirements for an implied-in-fact contract.<sup>58</sup> Specifically, they had claimed there was no meeting of the minds or agreement to any terms, both requirements for implied-in-fact contracts.<sup>59</sup> So, the court found that the plaintiffs made out a breach claim for an implied-in-law contract, which cannot be an attempt to vindicate the understanding of the parties under the contract because, without mutual assent, there was no initial understanding of the terms.<sup>60</sup> Still, the court laid out a potential argument for an implied-in-fact contract breach claim to survive preemption based on the two-part test.<sup>61</sup> It said a breach of implied-in-fact contract claim could succeed “[i]f the parties can contract around the implied price term and the implied price term ‘effectuate[s] the intentions of [the] parties . . . .’”<sup>62</sup>

A second point of contention merits attention. The United States government injected a *Dan’s City* argument into the dispute.<sup>63</sup> The rule established in *Dan’s City* is that a party may not rely on federal preemption to block state law claims by a plaintiff and then take advantage of state law against the same plaintiff in a separate action on the same facts.<sup>64</sup> Applied here, the government argued that the defendants could not claim the plaintiffs’ implied contract claims were preempted by the ADA and then use those same equitable contract principles in state court to recover money from the plaintiff.<sup>65</sup> The court did not reject the logic of this argument, but nonetheless, it did not find in favor of the plaintiffs. The court stated that, throughout the present lawsuit, the defendants maintained that they had express contracts with the plaintiffs (save for briefly at oral argument), so the court would rely on their representations and not assume the defendants were trying to have it both ways.<sup>66</sup> Significantly, the court said that if, in fact, the defendants did claim in

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<sup>57</sup> *Id.* at 1065–66.

<sup>58</sup> *Id.* at 1066–67.

<sup>59</sup> *Id.* at 1065–66.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1065.

<sup>62</sup> *Id.* (quoting *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 286–88 (2014)). This is a succinct restatement of the *Ginsberg–Wolens* test. See *Ginsberg*, 572 U.S. at 286.

<sup>63</sup> *Scarlett*, 922 F.3d at 1062.

<sup>64</sup> *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 265 (2013).

<sup>65</sup> See *Scarlett*, 922 F.3d at 1063.

<sup>66</sup> *Id.* at 1063–64.



their state court breach actions that they formed implied contracts with the plaintiffs, the plaintiffs would be free to raise a *Dan's City* argument at that time.<sup>67</sup>

### III. ANALYSIS AND IMPLICATION

The court's ruling is in line with Supreme Court precedent and tenets of contract law. The result is the same air-ambulance-company-friendly ruling as all the cases that have come before. The real value of this precedent is the different avenues the court explicitly created for future plaintiffs to avoid preemption (or otherwise enforce preemption equally on the air ambulance companies) under the correct, narrow set of facts.

The first path is to argue around preemption, through the *Ginsberg-Wolens* exception to the ADA. To do this, future plaintiffs must have a fact pattern that makes an argument for the formation of an implied-in-fact contract. Offer, acceptance, mutual assent, and consideration are still required elements for implied-in-fact contracts,<sup>68</sup> but they can be established through conduct instead of in writing.<sup>69</sup> Plaintiffs must argue that their conduct, in effect, shows acceptance of an offer to be transported in an air ambulance and pay for the service later. The conduct must also show mutual assent, as this is an essential distinction from a quasi-contract.<sup>70</sup> But plaintiffs cannot in any way—in writing, orally, or by conduct—have accepted a specific fee rate; otherwise, they likely formed an express contract.<sup>71</sup> These requirements are possible for some plaintiffs to meet and impossible for others. Many patients are incapacitated at the time of injury without a legal guardian there to bind them and thus will have a hard time showing mutual assent. If these requirements are met, then the plaintiff has met the threshold (but most challenging) aspect of the exception for implied-in-fact contracts. This leaves at issue the implied term of price.<sup>72</sup> To pass the *Ginsberg-Wolens* test, the plaintiff must show that

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<sup>67</sup> *Id.* at 1063 & n.3.

<sup>68</sup> 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:5 (4th ed. 2003 & Supp. July 2019).

<sup>69</sup> 1–2 JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 38 (5th ed. 2011).

<sup>70</sup> *See Scarlett*, 922 F.3d at 1064 n.5.

<sup>71</sup> LORD, *supra* note 68, § 1:5.

<sup>72</sup> Lack of an agreement to a price term does not mean that the parties did not form an implied-in-fact contract. *See* 1 PHILIP L. BRUNER & PATRICK J. O'CONNOR, JR., BRUNER & O'CONNOR CONSTRUCTION LAW § 2:10 n.3 (2002 & Supp. Jan. 2020) (citing *Fox v. Mountain W. Elec., Inc.*, 52 P.3d 848 (Idaho 2002)).

state law allows for parties to contract around the implied term.<sup>73</sup> This is simple when price is the implied term, since the price of air ambulance service is never a “state-imposed obligation,” and as a result, it would not be preempted.<sup>74</sup>

The second requirement in this scenario presents a slightly larger challenge. The plaintiff must prove that the implied price term will be used “to effectuate the intentions of parties or to protect their reasonable expectations.”<sup>75</sup> One would believe air ambulance patients would have better luck with the second clause, as they probably do not intend a specific price in contracting for life flights. On the other hand, they very well may have reasonable expectations of the cost and could make such an argument easily.<sup>76</sup> Although not all air ambulance patients will have the necessary facts, if patients can convince a court that they formed implied-in-fact contracts, they will have a relatively simple time avoiding preemption. Though this Casenote is focused on paths to avoid preemption, this does not mean the patients have then dodged their responsibility to pay their bills altogether. Rather, it means the patients get their day in state court and can rely on other state law- and common law-based equitable principles like declaratory judgments or unjust enrichment.<sup>77</sup>

The second avenue discussed is based on the precedent of the Supreme Court’s decision in *Dan’s City*.<sup>78</sup> This is a strategy that would commonly benefit those air ambulance patients that do not have facts that support an implied-in-fact contract, specifically those incapacitated at the time of the life flight. Patients that are fully incapacitated have no ability to form an express contract because they could not have mutually assented.<sup>79</sup> But the equitable principle of unjust enrichment provides a remedy

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<sup>73</sup> *Scarlett*, 922 F.3d at 1065 & n.7.

<sup>74</sup> *See* *Northwest, Inc. v. Ginsberg*, 572 U.S. 273, 286 (2014).

<sup>75</sup> *See id.*

<sup>76</sup> While the Tenth Circuit has already shown hostility to this idea, none is present in the *Scarlett* decision. *See* *Schneberger v. Air Evac EMS, Inc.*, 749 F. App’x 670, 678–80, 678 n.9 (10th Cir. 2018).

<sup>77</sup> *See* *Scarlett*, 922 F.3d at 1069. *But see* *Stout v. Med-Trans Corp.*, 313 F. Supp. 3d 1289, 1296–97 (N.D. Fla. 2018) (holding that the ADA preempts unjust enrichment claims based on allegations that the air ambulance company’s cost of service was in excess of the reasonable and customary rate).

<sup>78</sup> In *Schneberger*, the plaintiffs made a similar claim for judicial estoppel, but the court rejected it for the same reasons set forth by the *Scarlett* court—lack of proof that the companies were making contradictory claims in state court. *Schneberger*, 749 F. App’x at 680–81.

<sup>79</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. c (AM. LAW INST. 1981).

for a party that confers a benefit on another by creating the legal fiction of a quasi-contract (an implied-in-law contract).<sup>80</sup> When a patient refuses payment to the air ambulance company for the bill, the company usually brings a state claim for recovery under a breach of implied-in-law contract or some other similar equitable theory of unjust enrichment.<sup>81</sup> This is because, as just stated, the company will not be able to prove that an incapacitated patient formed an express contract with it, leaving only implied contracts (and other equitable theories). The result of arguing for an implied-in-fact contract has been outlined.<sup>82</sup> So, this leaves only the implied-in-law contract on which to base the company's recovery claim. Notwithstanding the fact that the claim should be preempted under the *Ginsberg–Wolens* test, the air ambulance company would be protecting itself from the patient's equitable claims through ADA preemption, while making similar claims in state court based on the law it argued is preempted.<sup>83</sup> Under *Dan's City*, the air ambulance company should not be permitted to have it both ways. If patients were to bring this argument to the state court's attention, they could have the claim preempted or at least be allowed to counter with their own state claims. Again, this is all under the presumption that the patients did not form express contracts, as those claims are not preempted by the ADA.<sup>84</sup>

This author does not contend that the preemption clause should not apply to air ambulances as argued in other scholarship.<sup>85</sup> There are all kinds of nightmare scenarios resulting from varying state laws that could prevent air ambulances from providing service across states at times when it is the most essential—something nobody wants.

This was a case of first impression for the Tenth Circuit.<sup>86</sup> There is no doubt that the court opened the door for future

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<sup>80</sup> See Juli Loden, Comment, *The Earth Is Not Flat, and "A Quasi Contract Is Not a Contract, at All"—Tennessee Restitution and Unjust Enrichment at Law*, 11 TRANSACTIONS 167, 169–72 (2010).

<sup>81</sup> Cf. *Scarlett*, 922 F.3d at 1063–64.

<sup>82</sup> See *supra* notes 66–73 and accompanying text for discussion of implied-in-fact contracts.

<sup>83</sup> See *Scarlett*, 922 F.3d at 1062–63.

<sup>84</sup> See *id.* at 1064.

<sup>85</sup> See Upton, *supra* note 34, at 434; cf. Perritt, *An Arm and a Leg*, *supra* note 5, at 397–401 (arguing that the fees can be brought down by natural market forces if the ADA is not applied to air ambulances).

<sup>86</sup> *Scarlett*, 922 F.3d at 1060. The court made the assertion it has never directly settled the question of whether the ADA applies to air ambulances after citing

plaintiffs to avoid preemption under these paths, but they would not be the first to try these arguments. Plaintiffs in other courts have made these exact arguments and failed, like the plaintiffs in *Stout*.<sup>87</sup> There, the court decided that “forcing [the company] to accept a lower rate results in the imposition of a state policy-based standard,”<sup>88</sup> and thus implied-in-fact contracts fail the *Ginsberg–Wolens* test to avoid preemption.<sup>89</sup> It is possible that upon actually being faced with an implied-in-fact contract, the court may see the case in a different light, as it did in the *Schneberger* case. There, only a year before, the Tenth Circuit showed hostility to the ideas it seemed to embrace in *Scarlett*.<sup>90</sup> On the other hand, plaintiffs have had success in other courts making these same arguments.<sup>91</sup> The point being, this is not a novel idea or guaranteed path to success, but given how strongly the court suggested that an implied-in-fact contract claim could be viable in the future, it is fair to say that it may be receptive to the idea. Additionally, there is no telling how a state court may rule on the plaintiffs’ equitable claims if faced with them. The avoidance of preemption may not result in the desired outcome, but a chance for plaintiffs to make their arguments in court would be a positive step in this field. Further, the frustration with air ambulance cases being treated differently may force reform.

#### IV. CONCLUSION

Air ambulance fees are a pressing issue for states in the Tenth Circuit because the region is mountainous and rural, making the service very important. As *Scarlett* was the first time the court had considered ADA preemption as it applies to these services, the case had potential for significant implications. It delivered on this potential by showing future plaintiffs the path—and the court’s willingness—to avoid preemption of state contract claims. It did so by appropriately reading the *Ginsberg–Wolens*

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cases that seem to do just that. *See, e.g.*, *Schneberger v. Air Evac EMS, Inc.*, 749 F. App’x 670, 673 n.4 (10th Cir. 2018).

<sup>87</sup> *See Stout v. Med-Trans Corp.*, 313 F. Supp. 3d 1289, 1295–98 (N.D. Fla. 2018).

<sup>88</sup> *Id.* at 1297.

<sup>89</sup> *See id.* at 1298.

<sup>90</sup> *See Schneberger*, 749 F. App’x at 679 n.11.

<sup>91</sup> *See, e.g.*, *Wagner v. Summit Air Ambulance, LLC*, No. CR-17-57-BU-BMM, 2017 U.S. Dist. LEXIS 177709, at \*13–15 (D. Mont. Oct. 26, 2017); *Adams v. Air Methods Corp.*, No. 3:15-cv-1683-TLW, 2016 U.S. Dist. LEXIS 174584, at \*7–9 (D.S.C. Aug. 12, 2016).

test as creating an ADA preemption exception for an implied-in-fact contract. Though the facts required for an implied-in-fact contract will not exist for every air ambulance patient, the right plaintiffs have a shot at beating preemption and taking their claims to state court. Additionally, the court relied on a relatively new precedent set under *Dan's City* that could help resolve an unevenness in the litigating power between the air ambulance companies and their patients. The court said that, based on *Dan's City*, the companies should not make their own claims in state court based on equitable principles and then use ADA preemption as a shield from patients' claims under similar equitable principles. This could be of considerable benefit to patients who are incapacitated during life flights, as they probably do not have an express contract. Though the result of the *Scarlett* case was more of the same for air ambulance patients, it created a ray of hope for future patients in the Tenth Circuit and thus the potential for reform.