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“No Waif in the Wilderness”: Contractual Doctrine and the “Self” Versus “State” Imposed Obligation

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**“NO WAIF IN THE WILDERNESS”: CONTRACTUAL
DOCTRINE AND THE “SELF” VERSUS “STATE”
IMPOSED OBLIGATION**

TORY A. WEIGAND*

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INTRODUCTION

A CONTRACT IS “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”¹ Contracts are present in all services and professions, and the contractual relation between passengers and airlines has a long-standing vintage.² Indeed, the relation between passenger and airline derives from common carrier jurisprudence and the fundamental agreement: carriage by air.³

Given the breadth of federal preemption, the pace and role of technology, the broadening range of services from commercial airlines, and the scope of common law contract principles, the contractual obligations and defenses in the modern commercial airline setting have become increasingly complex and a source of recurring dispute. Tension exists between state common law contractual rights and remedies, including contractual-related theories of recourse and impermissible encroachment into the federally-demanded preemptive sphere as to matters “relating to

¹ RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981).

² For two early reported cases addressing passenger breach of contract claims against a commercial airline, see *Jones v. Nw. Airlines*, 157 P.2d 728, 729 (Wash. 1945) and *Warshak v. E. Air Lines, Inc.*, 191 Misc. 503, 504 (N.Y. City Ct. 1948). *But see Mack v. E. Air Lines, Inc.*, 87 F. Supp. 113, 114 (D. Mass. 1949) (explaining that contractual arrangements and obligations of air carriers are governed by the Civil Aeronautics Act, not by common law).

³ *Farag v. Sw. Airlines, Inc.*, 2018 IL App (2d) 180113-U, ¶ 12 (citing *Howard v. Chi. Transit Auth.*, 402 Ill. App. 3d 455, 458 (2010)) (“It is well established that a passenger enters a contract for carriage with a carrier when the passenger offers himself to ride on the carrier’s transportation and the carrier expressly or impliedly accepts by carrying the passenger to the agreed-upon destination for a designated fare.”).

prices, routes or services.”⁴ Both the application of state contract law to the modern commercial airline–passenger relation and the distinction between self- and state-imposed obligations continue to be sources of uncertainty. This article surveys recent decisions concerning the contractual exception to preemption and the application of common law contract principles to the airline–passenger relation.

I. THE CONTRACTUAL RELATION AND PRINCIPLES

The primary contract between an airline and a customer is the customer’s ticket or airway bill, any applicable tariffs,⁵ and the airline’s Contracts (or Conditions) of Carriage (COC).⁶ An airline’s COC is usually found on the airline’s website and is frequently amended.⁷

The contractual undertaking is not limited to the COC but can include any additional assumed obligation that is not otherwise precluded by the COC’s terms. This includes frequent flyer programs, entertainment, medical supplies, escort or wheelchair services, security preferences, preferred seating, and other ancillary services agreed to between the airline and the customer.⁸ An airline’s data collection practices, mobile applications, and corresponding obligations of privacy are likewise a source of potential contractual disputes.⁹

⁴ Matthew J. Kelly, *Federal Preemption by the Airline Deregulation Act of 1978: How Do State Tort Claims Fare?*, 49 CATH. U. L. REV. 873, 874 (2000) (“Congress included a preemption clause in the [Airline Deregulation Act of 1978 (ADA)] that prevents the states from enacting or enforcing any law or regulation relating to the prices, routes, or services of an airline. The clause, however, has resulted in uncertainties in the application of the ADA.”).

⁵ Prior to the ADA, carriers filed their Contracts (or Conditions) of Carriage (COC) in tariffs, which were reviewed by the Civil Aeronautics Board and approved if “just and reasonable.” Civil Aeronautics Act of 1938, ch. 601, § 404(a), 52 Stat. 973, 993 (repealed 1978). After deregulation, COCs were no longer subjected to governmental review and approval. Airline Deregulation Act of 1978 § 1601(a)(1), 49 U.S.C. § 1301. However, provisions in the carriers’ COCs were void if they conflicted with federal law or regulation. *Id.* § 105(a)(1).

⁶ See generally Richard Ritorto & Stephan A. Fisher, *Exploring Airline Contracts of Carriage and European Union Flight Delay Compensation Regulation 261 (EU 261)—A Bumpy But Navigable Ride*, 82 J. AIR L. & COM. 561, 562 (2017) (describing and discussing the contractual relationship between carrier and passenger).

⁷ *Id.*

⁸ See, e.g., *Petersen v. U.S. Airways*, Nos. SUCV201203737BLS1, SUCV201300546BLS1, 2013 WL 7196329, at *1 (Mass. Super. Ct. Nov. 19, 2013) (claim based on online shopping mall and purchase of computer storage space).

⁹ See *In re JetBlue Airways Corp. Priv. Litig.*, 379 F. Supp. 2d 299, 305 (E.D.N.Y. 2005); *Pena v. Brit. Airways, PLC (UK)*, No. 18-cv-6278, 2020 WL 3989055, at *1

The contractual relationship between a passenger and an airline is further impacted by technology such as websites, chat sites, electronic reservation, booking, and pricing systems, as well as practices such as “ticketless” travel and “clickwrap” contracts.¹⁰ Not only do offerings via websites and social media raise the specter of potential contractual disputes,¹¹ but it refines the circumstances in which common law contractual principles otherwise apply. Similarly, the advent of robotics, electronic baggage tracking, facial recognition, and other technologies, as well as the use of intermediaries, contractors, marketers, and agents adds a layer of potential complication as to the potential contractual relationship in the modern setting.¹²

Against the backdrop of the applicable contracts between the airline and the passenger is the myriad of common law contract principles. A viable breach of contract claim requires evidence of an enforceable contract (offer, acceptance, and meeting of the minds), the defendant’s breach, and damages caused by the breach.¹³ This includes state common law principles pertaining to express as well as implied (in fact or law) contracts¹⁴ and exists against the backdrop that the fundamental terms of the

(E.D.N.Y. Mar. 30, 2020) (claims against airlines for breaches of data privacy policies).

¹⁰ See, e.g., Ticketless Travel: Passenger Notices, 62 Fed. Reg. 19,473, 19,476 (Apr. 22, 1997); Cullinane v. Uber Techs., Inc., 893 F.3d 53, 61 n.10 (1st Cir. 2018) (explaining that a “clickwrap” contract requires a user to indicate affirmative assent to a contract but does not require the user to view the contract to which she is assenting).

¹¹ See, e.g., Watson v. United Airlines, Inc., No. 16-00400, 2017 WL 6060173, at *3, *6 (D. Haw. Apr. 14, 2017).

¹² See, e.g., Gordon v. Amadeus IT Grp., 194 F. Supp. 3d 236, 239 (S.D.N.Y. 2016) (ticket purchasers’ action against operator of global distribution systems which provided fare and schedule information to travel agents).

¹³ See, e.g., Rodriguez v. Mass. Bay Transp. Auth., 80 N.E.3d 365, 368 (Mass. App. Ct. 2017) (“It is axiomatic that to create an enforceable contract, there must be agreement between the parties on the material terms of that contract, and the parties must have a present intention to be bound by that agreement.”). Put another way, “An enforceable agreement requires (1) terms sufficiently complete and definite, and (2) a present intent of the parties at the time of formation to be bound by those terms.” Targus Grp. Int’l, Inc. v. Sherman, 922 N.E.2d 841, 848 (Mass. App. Ct. 2010). Whether contract terms are complete and definite is a question of law. See Duff v. McKay, 52 N.E.3d 203, 209 (Mass. App. Ct. 2016).

¹⁴ See generally RESTATEMENT (SECOND) OF CONTRACTS § 4 (AM. L. INST. 1981). “As opposed to the inferred from fact (‘implied in fact’) contract, the ‘implied in law’ quasi-contract is no contract at all, but a form of the remedy of restitution.” *Id.* § 4 rep.’s note, cmt. b. “Quasi-contracts have often been called implied contracts or contracts implied in law; but, unlike true contracts, quasi-contracts are not based on the apparent intention of the parties to undertake the perform-

COC are usually set by the airline unilaterally and are not the product of negotiation.¹⁵

In addition to contract formation, there is a robust host of contract principles that inform and govern the contractual relationship. This includes various contract interpretation principles such as ambiguity, vagueness, construction against the drafter, course of dealing and usage, and the parol evidence rule.¹⁶ It also includes concepts pertaining to scope and enforceability, such as capacity, assent, agency, standing, duress, undue influence, implied terms, promissory estoppel, illegality, repudiation, mistake, impracticability, frustration of purpose, material breach, discharge, accord and satisfaction, fraudulent inducement, and unconscionability.¹⁷

Contractual obligations embodied in the covenant of good faith and fair dealing have engendered recent dispute and debate in passenger-commercial airline relations.¹⁸ There is also a large body of state common law rules pertaining to contractual remedies and damages, including but not limited to, reliance, restitution, mitigation, unjust enrichment, quantum meruit, and specific performance.¹⁹ The breadth of potential state common law principles that may apply to any contract claim between passengers and airlines is expansive and exists against the ADA pre-

ances in question, nor are they promises. They are obligations created by law for reasons of justice.” *Id.* § 4 cmt. b.

¹⁵ See, e.g., *Delta Domestic General Rules Tariff*, DELTA (last modified Jan. 11, 2021), <https://www.delta.com/content/dam/delta-www/pdfs/dl-dgr-master%2011jan2021.pdf> [<https://perma.cc/Y4W7-GFWL>] (“When you buy a ticket from or travel on Delta [Air Lines (Delta)], you enter into a contract with us, and you agree to be bound by its terms.”).

¹⁶ See *Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc.*, 747 A.2d 564, 567–68 (D.C. 2000) (“[I]f, after applying the rules of contract interpretation, the terms still are not subject to one definite meaning, . . . the ambiguities [will] be construed strongly against the drafter.”) (internal citations and quotations omitted); 12 SAMUEL WILLISTON, WILLISTON ON CONTRACTS § 34:5 (4th ed. 2019) (“It is currently the widely accepted rule that custom and usage may be proved to show the intention of the parties to a written contract or other instrument in the use of phrases of a peculiar technical meaning which, when unexplained, are susceptible of two or more plain and reasonable constructions.”). The parol evidence rule bars consideration of “any previous oral representations or agreements” that purport to “vary, modify, or supersede the written contract.” *Genesis Bio-Pharms., Inc. v. Chiron Corp.*, 27 F. App’x 94, 99 (3d Cir. 2002) (applying New Jersey law) (internal citations omitted).

¹⁷ See RESTATEMENT (SECOND) OF CONTRACTS §§ 12, 18, 174, 177, 151, 266, 162.

¹⁸ See discussion *infra* Part III.C.2.

¹⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 345.

emption backdrop, where the line between self- and state-imposed obligation remains a fine one.

II. ADA PREEMPTION

In 1992, and again in 1995, the Supreme Court made clear that an exception to the broad preemption provision of the Airline Deregulation Act of 1978 (ADA)²⁰ resides in routine contractual undertakings.²¹ According to the Supreme Court, “the ADA’s preemption prescription bars state-imposed regulation of air carriers,” but does not encompass “court enforcement of contract terms set by the parties themselves.”²² This exception is no “waif in the wilderness,”²³ representing a narrow exclusion to

²⁰ The preemption provision of the ADA is found at 49 U.S.C. § 41713(b)(1). It was enacted in 1978 and currently provides: “Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.” *Id.* Prior to its revision in 1994, the preemption provision read: “[N]o State or political subdivision thereof . . . 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 . . .” Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 4(a), 92 Stat. 1705, 1707–08 (amended 1994). The ADA was amended in 1994 and, as a part of this recodification, the preemption provision was reworded. Act of July 5, 1994, ch. 417, § 41713(b), 108 Stat. 745, 1143. The purpose of the revised preemption provision remained to “ensure that the States would not undo federal deregulation [of the airline industry] with regulation of their own.” *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992). While the rewording did not repeat the words “rule” and “standard,” the revised language was not meant to effect any substantive change. *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 n.1 (1995); *see also* H.R. Rep. No. 103–677, at 83 (1994) (Conf. Rep.).

²¹ *Morales*, 504 U.S. at 378; *Wolens*, 513 U.S. at 222.

²² *Wolens*, 513 U.S. at 222.

²³ *Brown v. United Airlines, Inc.*, 720 F.3d 60, 65 (1st Cir. 2013). In *Brown*, the First Circuit affirmed the dismissal of unjust enrichment and tortious interference claims brought by skycaps based on the airlines’ imposition and retention of baggage handling fees for curbside service. *Id.* at 62. The skycaps argued that the common law claims were not preempted by the ADA regardless of the relationship of the claims to “prices, routes or services.” *Id.* at 62–63. The court rejected the assertion which centered on the argument that the common law is not a “state law, regulation, or other provision having the force and effect of law.” *Id.* at 63. According to the court: “Even though a suit at common law is most often brought by one private party against another, that suit is backed by the weight of the state judiciary enforcing state law. Common law, like positive law, can effectively strong-arm regulated entities to alter their business practices. We think it clear, therefore, that the common law—no less than positive law—has the force and effect of law.” *Id.* at 65.

the otherwise expansive scope of ADA preemption.²⁴ Nearly twenty-five years after the Supreme Court first announced this seemingly clear exception for self-imposed obligations, litigation as to its scope and parameters continues.²⁵

A. FEDERAL OR STATE LAW AND CHOICE OF LAW

The *Wolens* contractual exception to preemption is largely determined by state contract law absent express federal regulations. Congress has not given the federal courts the power to develop the substantive law as to contractual claims and disputes relating to airline rates, routes, and services.²⁶ According to the Court, it is improper to “foist on the [Department of Transportation] work Congress has neither instructed nor funded the Department to do.”²⁷

The lack of a breach of contract action under federal law as it pertains to airlines’ prices, routes, and services “is not contrary to the marketplace principles adopted in the ADA. It is the way disputes between private contracting parties are decided in a deregulated marketplace.”²⁸ The Court was not concerned that allowing breach of contract actions under state law would pose

²⁴ *Id.* at 70.

²⁵ See *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 35–37 (1st Cir. 2007); see also *Schneberger v. Air Evac EMS, Inc.*, 749 F. App’x 670, 678 (10th Cir. 2018) (quoting *Wolens*, 513 U.S. at 222) (“[T]he plaintiffs have failed to make an adequate showing that the narrow *Wolens* exception for claims relating to ‘voluntarily undertaken’ contractual obligations applies to save the plaintiffs’ claims from preemption.”); *Cox v. Spirit Airlines, Inc.*, 340 F. Supp. 3d 154, 159 (E.D.N.Y. 2018); *Chanze v. Air Evac EMS, Inc.*, No. 18CV89, 2018 WL 5723947, at *5 (N.D. W.Va. Nov. 11, 2018); *Martin v. United Airlines, Inc.*, No. CIV-16-1042-F, 2017 WL 3687347, at *2–5 (W.D. Okla. Apr. 18, 2017); *W. Parcel Express v. United Parcel Serv. of Am., Inc.*, No. C96-1526, 1996 WL 756858, at *2 (N.D. Cal. Dec. 3, 1996); *Gee v. Sw. Airlines, Co.*, No. C94-03983, 1995 WL 652463, at *5 (N.D. Cal. Oct. 31, 1995). For an example from a state court, see *Tanen v. Sw. Airlines, Co.*, 187 Cal. Rptr. 3d 743, 746 (Cal. Ct. App. 2010).

²⁶ *Wolens*, 513 U.S. at 232 (“Nor is it plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes or services. The ADA contains no hint of such a role for the federal courts.”); see also *Musson Theatrical, Inc. v. Fed. Express Corp.*, 89 F.3d 1244, 1251 (6th Cir. 1996) (“[T]he Supreme Court has expressly rejected the possibility that the ADA leaves room for a federal common law cause of action against air carriers, at least in regard to breach of contract claims.”).

²⁷ *Wolens*, 513 U.S. at 234.

²⁸ *Ferrell v. Air Evac EMS, Inc.*, 900 F.3d 602, 610 (8th Cir. 2018). This is otherwise consistent with the recognition that the situations calling for the creation of federal common law are rare. *Atherton v. Fed. Deposit Ins. Corp.*, 519 U.S. 213, 218 (1997).

any serious risk of nonuniform adjudication in the enforcement of a nationwide contract by the various states.²⁹ According to the *Wolens* Court, “[C]ontract law is not at its core ‘diverse, nonuniform, and confusing.’”³⁰

Nonetheless, federal common law has been deemed applicable in certain discreet circumstances pertaining to contract claims involving airlines’ prices, routes, and services. For instance, it has been held that federal common law applies to “a cause of action against an interstate air carrier for [a] claim for property lost or damaged in shipping”³¹ The Fifth Circuit reasoned that this was a long-standing, limited federal common law cause of action otherwise preserved by the ADA’s savings clause.³²

It has also been recognized that contract claims relating to liability limitations for air carriers are governed by federal common law,³³ including the reasonable communicative test.³⁴ This is consistent with ADA deregulation and preemption because “[a]llowing states to decide individually whether a common air carrier may limit its liability would ‘significantly impact federal deregulation,’ and would ‘adversely affect the economic deregulation of the airlines and the forces of competition within the

²⁹ *Wolens*, 513 U.S. at 233 n.8 (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 529 (1992)).

³⁰ *Id.*

³¹ *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 929 n.16 (5th Cir. 1997).

³² *SVT Corp. v. Fed. Express Corp.*, 156 F.3d 1238, 1238 (9th Cir. 1998) (citing 49 U.S.C. § 40120(c)).

³³ *Treiber & Straub, Inc. v. United Parcel Serv.*, 474 F.3d 379, 386–87 (7th Cir. 2007); *see also King Jewelry v. Fed. Express Corp.*, 316 F.3d 961, 965 (9th Cir. 2003) (“[C]ourts must use [federal common law] to evaluate limited liability clauses in carrier contracts, but the [ADA] does not preempt contract claims premised upon state law that do not attempt to alter the scope of carriers’ liability for lost or damaged goods.”); *Read–Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1197 (9th Cir. 1999); *Sam L. Majors Jewelers*, 117 F.3d at 929 n.15.

³⁴ *See Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 152 (D. Mass. 2019). “Before and after the passage of the ADA in 1978, we have held that Congress has preserved the federal common law applicable to the limited liability provisions of air carrier contracts.” *Ins. Co. of N. Am. v. Fed. Express Corp.*, 189 F.3d 914, 925 (9th Cir. 1999) (citing *Klicker v. Nw. Airlines, Inc.*, 563 F.2d 1310, 1313 (9th Cir. 1977) (“[W]hether a tariff is against public policy is ultimately a judicial question requiring the application of federal common law.”); then citing *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1365 (9th Cir. 1987) (“The federal common law applicable to carriers was not changed with the advent of regulation air carriers [and] the subsequent deregulation of air carriers in 1978 did not change the applicability or substantive content of the relevant federal common law.”); then citing *Read–Rite Corp.*, 186 F.3d at 1195 (“[F]ederal common law applies to loss of or damage to goods by interstate common carriers by air.”)).

airline industry.’”³⁵ Not only does federal common law govern such issues, but it also preempts any state law governing the validity of limited liability contracts of air carriers.³⁶

It is not uncommon for COCs to contain choice of law provisions,³⁷ with the Federal Aviation Regulations (FAR) otherwise invalidating any COC containing a choice of forum clause.³⁸ State law will, in turn, honor the choice of law provision unless there is no reasonable basis for doing so or, alternatively, if it would be contrary to a fundamental forum state policy which has a materially greater interest.³⁹ This is the approach taken by

³⁵ *Ins. Co. of N. Am.*, 189 F.3d at 926 (quoting *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1265, 1261 (9th Cir. 1998)).

³⁶ *See, e.g., Read-Rite Corp.*, 186 F.3d at 1195 (noting that “federal common law applies to loss of or damage to goods by interstate common carriers by air.”).

³⁷ *See, e.g., Zamber v. Am. Airlines, Inc.*, No. 20-cv-00114, 2020 WL 3163037, at *11 (N.D. Tex. June 11, 2020); *Robinson v. Am. Airlines, Inc.*, 743 F. App’x 233, 236 (10th Cir. 2018); *Benjamin v. Am. Airlines, Inc.*, No. CV 213-150, 2015 WL 8968297, at *3 (S.D. Ga. Dec. 15, 2015). Choice of law must be distinguished from choice of forum. Pursuant to federal regulation, carriers are prohibited from imposing a choice of forum provision that precludes a passenger from bring suit in any court of competent jurisdiction including the jurisdiction of the passenger’s residence. 14 C.F.R. § 253.10 (2019).

³⁸ 14 C.F.R. § 253.10.

³⁹ *See Benjamin*, 2015 WL 8968297, at *3; *see also Hengle v. Asner*, 433 F. Supp. 3d 825, 856 (E.D. Va. 2020) (refusing to follow contractual choice of law provision as contrary to strong public policy of forum state as to unregulated lending usurious loans). The R2d Conflicts sets out a “most significant” relationship test as follows:

- (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.
- (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
 - (a) the place of contracting,
 - (b) the place of negotiation of the contract,
 - (c) the place of performance,
 - (d) the location of the subject matter of the contract, and
 - (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

- (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188 (AM. L. INST. 1971). The comments to Section 188 emphasize the importance of two contacts, the place of importance and the situs of the subject matter of the contract, in determining

the influential Second Restatement of Conflict of Laws (R2d Conflicts) which also provides that “questions involving the effect of misrepresentation, duress, undue influence and mistake upon a contract are determined by the law chosen by the parties.”⁴⁰ As such, choice of law provisions will be enforced unless the selected jurisdiction has no significant or substantial relationship to the transaction “or there is a fundamental policy difference in the laws of another jurisdiction which has a more substantial interest in the parties or the transaction.”⁴¹

In the absence of a choice of law provision, a federal court, pursuant to diversity jurisdiction, will usually apply the forum’s choice of law rules.⁴² Some courts, like the Second Circuit, apply federal common law to choice of law issues.⁴³ Most approaches require that the court first determine if there is any conflict between competing jurisdictions.⁴⁴ If there is no dispute, then no conflicts analysis is required.

Under the traditional *lex loci contractus* rule, the place of contracting governs.⁴⁵ Under this approach, a court looks to where the last act necessary for creation of the contract takes place.⁴⁶

the proper choice of law. *Id.* § 188 cmt e. Comment e, addressing the place of performance, states, “The state where performance is to occur under a contract has an obvious interest in the nature of the performance and in the party who is to perform.” *Id.*

⁴⁰ RESTATEMENT (SECOND) CONFLICT OF LAWS § 201 cmt. a.

⁴¹ *United States ex rel. Tusco, Inc. v. Clark Constr. Grp., LLC*, 235 F. Supp. 3d 745, 752 n.9 (D. Md. 2016) (citing *Jackson v. Pasadena Receivables, Inc.*, 921 A.2d 799, 803–05 (Md. 2011)); RESTATEMENT (SECOND) CONFLICT OF LAWS § 187. New York’s rule has been recently stated as follows:

Choice-of-law clauses will be enforced so long as the chosen law bears a reasonable relationship to the parties or the transaction. Courts will not enforce agreements where the chosen law violates some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal. This public policy exception is reserved for those foreign laws that are truly obnoxious. The party seeking to invoke the exception bears a heavy burden of proving that application of [the chosen] law would be offensive to a fundamental public policy of this State.

Askari v. McDermott, Will & Emery, LLP, 114 N.Y.S.3d 412, 428 (N.Y. App. Div. 2019) (internal citations and quotations omitted).

⁴² *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 497 (1941).

⁴³ *In re Gaston & Snow*, 243 F.3d 599, 605–06 (2d Cir. 2001).

⁴⁴ *Robinson v. Am. Airlines, Inc.*, 743 F. App’x 233, 236 (10th Cir. 2018) (finding no conflict in contractual rules between Oklahoma and Texas).

⁴⁵ 16 AM. JUR. 2d *Conflict of Laws* § 82 (2020).

⁴⁶ *Clements v. Emery Worldwide Airlines, Inc.*, 44 F. Supp. 2d 1141, 1145 (D. Kan. 1999) (citing *Gillespie v. Seymour*, 876 P.2d 193, 200 (Kan. 1994) (“For purposes of contract construction, Kansas follows the theory of *lex loci contractus*—

Many states will apply *lex loci contractus* unless displaced by a more significant interest of another jurisdiction.⁴⁷ Notably, the R2d Conflicts has adopted a specific provision for common carriers, which identifies the state of departure as governing issues pertaining to the validity of the contract absent some other state having a more significant relationship to the contract and the parties.⁴⁸ The R2d Conflicts otherwise provides that “[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties.”⁴⁹

A review of the existing case law reveals little to no dispute over choice of law provisions or true conflict between competing states or jurisdictions pertaining to contract claims.⁵⁰ There is much more litigation over choice of law in tort cases because even with a choice of law provision, it may be deemed to not govern such claims.⁵¹ The lack of reported case law as to con-

the place of the making of the contract controls. Under this approach, the court looks to where the last act necessary for the creation of the contract takes place, and that state’s law controls.”)).

⁴⁷ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1).

⁴⁸ *Id.* § 197. According to the Restatement:

This place [of departure] will naturally loom large in the minds of the parties, and it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of this place would be applied to determine many of the issues arising under the contract. The state of departure or of dispatch also has a natural interest in the contract of transportation and in many instances has a greater interest in the contract than the state of destination, if for no other reason than that there can be no absolute certainty at the time of the departure that the passenger or the goods will reach the latter state. The rule of this Section also furthers the choice-of-law values of certainty, predictability and uniformity of result and, since the place of departure or dispatch will be readily ascertainable, of ease in the determination of the applicable law.

Id. § 197 cmt. b.

⁴⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1).

⁵⁰ See, e.g., *Benjamin v. Am. Airlines, Inc.*, No. CV 213-150, 2015 WL 8968297, at *3 (S.D. Ga. Dec. 15, 2015).

⁵¹ Some courts have held that tort claims that are “related” to a contract claim are governed by the choice of law provision. See, e.g., *Masters Grp. Int’l, Inc. v. Comerica Bank*, 352 P.3d 1101 (Mont. 2015); see also *In re Allegheny Int’l, Inc.*, 954 F.2d 167, 178 (3d Cir. 1992) (applying the law selected in a generic choice-of-law clause to fraud claims related to a contract). Others hold that in order for tort claims incident to a contract to fall within the choice of law provision, the provision must be sufficiently broad. See *Krock v. Lipsay*, 97 F.3d 640, 645 (2d Cir. 1996) (citing *Turtur v. Rothschild Registry Int’l, Inc.*, 26 F.3d 304, 309–10 (2d

tractual-based conflict of law disputes is likely due to the difficulty in overcoming the choice of law provision usually contained in COC and the fact that there are, most often, no material differences in applicable contract principles between the states in dispute.

B. THE EXCEPTION: “THE MIDDLE COURSE”

As explained by the *Wolens* Court:

The ADA’s preemption clause . . . stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an [air carrier] dishonored a term the [air carrier] itself stipulated. This distinction between what the State dictates and what the [air carrier] itself undertakes confines courts, in breach-of-contract actions, to the parties’ bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.⁵²

The Court, in addressing whether claims pertaining to an airline’s retroactive changes to the terms and conditions of its frequent flyer program were preempted, noted that “[a] remedy confined to a contract’s terms simply holds parties to their agreements—in this instance, to the business judgment an airline made public about its rates and services.”⁵³ As the ADA was crafted with the goal of “maxim[izing] reliance on competitive market forces,” excluding private contractual agreements from

Cir. 1994) (explaining that, under New York conflict-of-laws rules, “in order for a choice-of-law provision to apply to claims for tort arising incident to the contract, the express language of the provision must be ‘sufficiently broad’ as to encompass the entire relationship between the contracting parties.”). In a somewhat modified view, only those tort claims “closely related to the interpretation of contracts” may be encompassed in a generic choice of law provision. *Nw. Airlines v. Astraea Aviation Servs.*, 111 F.3d 1386, 1392 (8th Cir. 1997); *see also Superior Edge, Inc. v. Monsanto Co.*, 964 F. Supp. 2d 1017, 1032 (D. Minn. 2013) (concluding that claims for fraud, deceptive trade practices, and misappropriation of trade secrets were so closely related to the contract claim that they were covered by a choice-of-law provision, but a claim for tortious interference was not so “intertwined”).

⁵² *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33 (1995). In *Wolens*, the Supreme Court held that the plaintiff’s claims for breach of contract, which were based on an airline’s retroactive changes to the terms and conditions of its frequent flyer program, were not preempted by the ADA because “the ADA’s preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves.” *Id.* at 221.

⁵³ *Id.* at 229.

preemption served this fundamental purpose.⁵⁴ As such, while the Court found the claim under the Illinois consumer fraud statute to be preempted, the common law breach of contract claim was not.⁵⁵

The majority opinion in *Wolens* was sandwiched between the concurring and dissenting opinions of Justice Stevens and Justice O'Connor (with whom Justice Thomas joined). Justice Stevens took the view that ADA preemption did not apply to both the contract and consumer protection claims,⁵⁶ while Justice O'Connor believed preemption applied to both the contract and the consumer protection statute claims.⁵⁷ Indeed, the majority found its holding to be the "middle course" between the dissenting justices.⁵⁸

Justice Stevens disagreed with the majority's distinction between tort and contract actions, particularly when the actions are grounded in the exact same conduct and presumably the same impact on prices, routes, or services.⁵⁹ He saw "no reason why the ADA should pre-empt a claim that the airline defrauded its customers in the making and performance of that very same agreement."⁶⁰ Justice Stevens, in fact, was rather emphatic stating that "[s]urely Congress did not intend to give airlines free rein to commit negligent acts subject only to the supervision of the Department of Transportation, any more than it meant to

⁵⁴ *Id.* at 230 ("Market efficiency requires effective means to enforce private agreements."). The Court in *Wolens* also cited RICHARD POSNER, AN ECONOMIC ANALYSIS OF LAW 90–91 (4th ed. 1992) ("[L]egal enforcement of contracts is more efficient than a purely voluntary system.").

⁵⁵ *Wolens*, 513 U.S. at 221. The Court explained that the frequent flyer program related to rates because the airline gave mileage credits for free tickets, upgrades, services and because the program provided access to flights and service class upgrades regardless of capacity controls and blackout dates. *Id.* at 226. The Court noted the Illinois Consumer Fraud Act was prescriptive and served as a means of policing the marketing practices of airlines. *Id.* at 228. Given the text and purpose of the Illinois Consumer Fraud Act, it was preempted by the ADA. *Id.* The Court concluded that it "need not dwell on the question whether plaintiffs' complaints state claims 'relating to [air carrier] rates, routes, or services,' since plaintiffs' claims arise out of dissatisfaction with "access to flights and class-of-service upgrades unlimited by retrospectively applied capacity controls and blackout dates." *Id.* at 226.

⁵⁶ *Id.* at 235 (Stevens, J., concurring in part and dissenting in part).

⁵⁷ *Id.* at 238 (O'Connor, J., concurring in judgment in part and dissenting in part).

⁵⁸ *Id.* at 234 (Stevens, J., concurring in part and dissenting in part).

⁵⁹ *Id.* at 236.

⁶⁰ *Id.*

allow airlines to breach contracts with impunity.”⁶¹ Fundamental to Justice Stevens’ argument was the lack of “a meaningful difference”⁶² between contractual duties and those imposed either by consumer protection statutes or general negligence actions, as they both represent “general background rule[s] against which all individuals order their affairs.”⁶³

Justice O’Connor, in turn, believed the majority was impermissibly substituting its view for that of Congress and otherwise failed to appreciate fundamental “assumptions about the nature of contract law.”⁶⁴ Her view as to the nature of contract is notable: “The doctrinal underpinnings of the notion that judicial enforcement of the intent of the parties can be divorced from a State’s public policy have been in serious question for many years.”⁶⁵ According to Justice O’Connor, contractual rules of construction that are “not essential to a function[ing] contract system” are all based on “a complex of moral, political, and social judgments.”⁶⁶ She would have held the contract claims preempted since she did not believe that courts could “realistically be confined”⁶⁷ to the parties’ bargain as “[c]ourts cannot enforce private agreements without reference to those policies, because those policies define the role of courts in deciding disputes concerning private agreements.”⁶⁸

The views of Justice Stevens and Justice O’Connor underscore the difficulty in ascertaining congressional intent regarding reconciling the preemption and savings clauses of the ADA. Not surprisingly, following *Wolens*, courts disagreed over whether the

⁶¹ *Id.* at 237.

⁶² *Id.*

⁶³ *Id.* at 236–37.

⁶⁴ *Id.* at 238 (O’Connor, J., concurring in judgment in part and dissenting in part).

⁶⁵ *Id.* at 247 (internal citations and quotations omitted).

⁶⁶ *Id.* at 248–50 (quoting CHARLES FRIED, *CONTRACT AS PROMISE* 69 (1981)). According to Justice O’Connor:

The rules laid down by contract law for determining what the parties intended an agreement to mean, whether that agreement is legally enforceable, and what relief an aggrieved party should receive, are the end result of those judgments. Our legal system has decided to allow private parties to invoke the coercive power of the State in the effort to enforce those (and only those) private agreements that conform to rules set by those state policies known collectively as “contract law.”

Id. at 249–50.

⁶⁷ *Id.* at 246.

⁶⁸ *Id.* at 250.

contractual exception was limited to just pure contract claims or to other common law claims, particularly those having a tenuous impact on airline rates, routes, or services.⁶⁹ More fundamentally, the views accentuate the tension underlying the “middle course” and differentiating between state-imposed duties mandating preemption and those that are self-imposed avoiding preemption.

As it stands, the *Wolens* exception applies to common law contract principles, but only insofar as such principles serve “to effectuate the intentions of the parties, or to protect their reasonable expectations” rather than “community standards of decency, fairness, or reasonableness.”⁷⁰ Stated differently, terms and conditions that air carriers offer and which are accepted are “privately ordered obligations” that can be enforced through a breach of contract claim, even if the claim relates to the air carrier’s rates, routes, or services.⁷¹ However, a state law claim, contractual or otherwise, will remain “pre-empted if it seeks to enlarge the contractual obligations that the parties voluntarily adopt[ed]”⁷² and relates to rates, routes or services.

The pertinent inquiry as to contractual claims and ADA preemption reduces to the following: (1) whether the claim is one seeking to enforce the parties’ bargain or involves or amounts to seeking an enlargement or enhancement of the parties self-imposed obligations based on state law or policy;⁷³ (2) if a purely contractual obligation with no enlargement or enhancement, the claim survives preemption even if it relates to rates, routes or services;⁷⁴ and (3) if the claim does seek to enhance or enlarge the parties’ bargain, it will be preempted if it sufficiently relates to price, routes, or services.⁷⁵ The inquiry is against the understanding that the contractual exception is a narrow one.⁷⁶

⁶⁹ See, e.g., *Brown v. United Airlines, Inc.*, 720 F.3d 60, 70 (1st Cir. 2013); *Bower v. EgyptAir Airlines, Co.*, 731 F.3d 85, 93 (1st Cir. 2013).

⁷⁰ *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 286 (2014).

⁷¹ *Id.* at 281.

⁷² *Id.* at 276.

⁷³ See *Wolens*, 513 U.S. at 222, 232–35.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See *Leonard v. Nw. Airlines, Inc.*, 605 N.W.2d 425, 431 (Minn. Ct. App. 2000) (breach of contract claim preempted where state laws or policies enlarged or enhanced a passenger’s rights); *Boon Ins. Agency, Inc. v. Am. Airlines, Inc.*, 17 S.W.3d 52, 58–59 (Tex. App.—Austin Mar. 30, 2000, pet. denied) (breach of contract claim regarding a reissue fee was preempted where party relied on state law to modify the contract); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash. Ct. App. 2000) (breach of contract claim based upon airline’s refusal to provide a

C. RELATING TO PRICES, ROUTES, OR SERVICES: "THE MAW"

If there is a purely self-imposed undertaking, a breach of contract claim will survive preemption even if it relates to prices, routes, or services.⁷⁷ Most privately-ordered airline obligations concern prices, routes, or services, so this requirement for preemption is usually not an issue where the dispute centers on a contractual-based claim, although there remains some variance between the courts as to the scope and definition of services. Nonetheless, if the contractual claim is seeking to enhance or enlarge the contractual obligation, it will only be preempted if it sufficiently relates to prices and routes of services.⁷⁸

The component of ADA preemption related to prices, routes, or services has received extensive treatment. The Supreme Court has confirmed that a claim relates to rates, routes, and services when it "has a connection with, or reference to," rates, routes, and services.⁷⁹ In *Ginsberg*, the Court confirmed that contract claims pertaining to an alleged breach of an airline's frequent flyer program are sufficiently connected to, or have reference to, rates, routes, and services.⁸⁰ Awarding mileage credits for the purpose of redeeming for tickets or upgrades affects the rate the customer pays with the program and relates to the services offered, such as access to flights and higher service categories.⁸¹

The Court in *Ginsberg* loosely referenced a potential instance where a breach of contract claim as to a frequent flyer program may not have a sufficient connection to prices, routes, or services.⁸² It noted that the argument had been made that frequent flyer programs since *Wolens* had changed in that mileage is earned without any connection or use of airlines services.⁸³ It

refund for a nonrefundable ticket was preempted because of reference to state laws).

⁷⁷ See *Ginsberg*, 572 U.S. at 276.

⁷⁸ *Id.* at 289–90.

⁷⁹ *Id.* at 284.

⁸⁰ *Id.*

⁸¹ *Id.* The Court in *Ginsberg* rejected the argument that the relationship to rates, routes, and services was different than in *Wolens* as the claim was not a challenge as to "access to flights and upgrades or the number of miles needed to obtain air tickets" but rather a challenge to the termination of his elite membership. *Id.* at 284–85. The Court found this unavailing as it ignored the reason for seeking reinstatement of the membership which was to obtain reduced rates and enhanced services. *Id.* at 285.

⁸² *Id.* at 285.

⁸³ *Id.*

proceeded to hold, however, that the contention was not applicable given that the claimant “did not assert that he earned his miles from any activity other than taking flights or that he attempted to redeem miles for anything other than tickets and upgrades.”⁸⁴

The ADA preemption question consists of two parts: the “mechanism” question and the “linkage” question.⁸⁵ The mechanism question pertains to whether the claims are state law claims, and the linkage question asks whether and to what degree the claims are related to price, route, or service of air carriers.⁸⁶

The linkage question remains the central area of dispute, with courts differing as to the scope and meaning of “related to” and “service.” As to service, there are two general views. The first is led by the Ninth Circuit and sets out a narrow scope for services as to ADA preemption.⁸⁷ Under this limited view, service encompasses “the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail,” but not the “provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.”⁸⁸ It refers to the “frequency and scheduling of transportation, and to the selection of markets to or from which transportation is provided.”⁸⁹ Other circuits, including the First, Second, Fourth, Fifth, and Seventh, have taken a broader view, holding that services includes ticketing, boarding procedures, provision of beverage and food, and luggage handling in addition to the transportation itself.⁹⁰

⁸⁴ *Id.*

⁸⁵ *Brown v. United Airlines, Inc.*, 720 F.3d 60, 63 (1st Cir. 2013); *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 453 (1st Cir. 2014).

⁸⁶ *Brown*, 720 F.3d at 63.

⁸⁷ *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998).

⁸⁸ *Id.* at 1261; *see also* *Duncan v. Nw. Airlines, Inc.*, 208 F.3d 1112, 1114–15 (9th Cir. 2000) (quoting *Charas*, 160 F.3d at 1265–66); *Taj Mahal Travel, Inc. v. Delta Air Lines Inc.*, 164 F.3d 186, 194 (3d Cir. 1998).

⁸⁹ *Charas*, 160 F.3d at 1265–66.

⁹⁰ *Tobin*, 775 F.3d at 453 (citing *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 93–95, 98 (1st Cir. 2013)) (finding ticketing, check-in, and boarding procedures are services under ADA); *Hodges v. Delta Air Lines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995) (en banc) (quoting panel decision in *Hodges v. Delta Air Lines*, 4 F.3d 350, 354 (5th Cir. 1993)); *Air Transp. Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223–24 (2d Cir. 2008) (holding that the provision of amenities during a lengthy ground stay was a service under ADA § 41713(b)(1)); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (holding that “boarding procedures are a service rendered by an airline”); *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248,

Under the more narrow formulation, there are three elements that must be present before a particular service is deemed subject to preemption: (1) the service “must fit within the limited range of services over which airlines compete”; (2) the service “must be bargained for”; and (3) “the bargained-for exchange must be between an air carrier and its consumers.”⁹¹ Under the broader view,⁹² a service likewise encompasses a “bargained-for or anticipated provision of labor from one party to another.”⁹³ This includes “[m]atters ‘appurtenant and necessa-

1256–57 (11th Cir. 2003) (stating that the broader definition of services is more compelling); *Arapahoe Cnty. Pub. Airport Auth. v. Fed. Aviation Admin.*, 242 F.3d 1213, 1222 (10th Cir. 2001) (concluding that a ban on scheduled passenger and ADA service is preempted); *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996) (adopting the Fifth Circuit’s definition of services).

⁹¹ *Amerijet Int’l, Inc. v. Mia-Dade Cnty., Fla.*, 627 F. App’x 744, 748–49 (11th Cir. 2015).

⁹² See *Bower*, 731 F.3d at 94; *Tobin*, 775 F.3d at 454.

⁹³ *Hodges*, 44 F.3d at 336 (quoting *Hodges*, 4 F.3d at 354). Courts have differed over whether the Supreme Court’s holding in *Rowe v. N.H. Motor Transp. Ass’n*, 552 U.S. 364, 376 (2008) resolved the conflict as to the scope of services for purposes of preemption. Compare *Cuomo*, 520 F.3d at 223 (criticizing *Charas*’s approach to the definition of service as “inconsistent with the Supreme Court’s recent decision in *Rowe*”), with *Nat’l Fed’n. of the Blind v. United Airlines, Inc.*, 813 F.3d 718, 727 (9th Cir. 2016) (stating that the *Rowe* decision did not alter the court’s definition of services in *Charas*); see also *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 87–88 (1st Cir. 2011) (indicating that, post-*Rowe*, “[t]he weight of circuit court authority . . . favors the broader definition” of service to “include steps that occur before and after the airplane is actually taxiing or in flight”); *Jaganatharao v. Etihad Airways*, No. 16-cv-00510, 2016 WL 9086963, at *5 (N.D. Cal. Dec. 13, 2016) (discussing that the *Rowe* decision did not alter the *Charas* definition of services). At issue in *Rowe* “was whether a state statute regulating the delivery and sale of tobacco products was preempted by the Federal Aviation Administration Authorization Act of 1994 (“FAAAA”), which had borrowed its preemption language from the ADA.” *Id.* at *4 (citing *Rowe*, 552 U.S. at 368). “With respect to requiring retailers to only use delivery services that provided a specific recipient-verification service, the Supreme Court explained that this regulation had the effect of requiring carriers to ‘offer tobacco delivery services that differ significantly from those that, in the absence of the regulation, the market might dictate.’” *Id.* (citing *Rowe*, 552 U.S. at 372). “By requiring a carrier to check each shipment for certain markings and then compare it against the attorney general’s list, the statute ‘thereby directly regulates a significant aspect of the motor carrier’s package pickup and delivery service.’” *Id.* (citing *Rowe*, 552 U.S. at 373). According to the Court:

If federal law pre-empts state regulation of the details of an air carrier’s frequent flyer program, a program that primarily *promotes* carriage, see [*Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 226–28 (1995)], it must pre-empt state regulation of the essential details of a motor carrier’s system for picking up, sorting, and carrying goods—essential details of the carriage itself.

rily included with the contract of carriage” such as ticketing, boarding procedures, food and beverage services, and baggage handling.⁹⁴ The First Circuit, for instance, has recently reaffirmed this broad scope holding that claims, no matter how couched, which centered on the misdelivery and mislabeling of a package as well as a claimed child abduction which involved preflight documentation, verification, and status to fall within the “maw” of services and ADA preemption.⁹⁵

Even more recently, the Eleventh Circuit reaffirmed that preemption is determined “not on the type of state law claim, but on what the state law claim targeted” and, as such, reached breach of contract claims that affect services.⁹⁶ It otherwise confirmed that preemption applied to “incidents of transportation” such as “on-board food and beverage services, ticketing and the like,”⁹⁷ including allegations that the airline (1) failed to accommodate a passenger’s disability; (2) refused to provide on board food and beverages; and (3) failed to supervise and train its employees on how to respond to a disabled passenger.⁹⁸

Regarding the “related to” language within the statute, Congress intended to accord a broad interpretation.⁹⁹ While claims having a “tenuous, remote, or peripheral” impact on rates, routes, or services are not preempted, “the relevant inquiry is whether enforcement of the plaintiff’s claims would impose some obligation on” an airline’s service, rate, or route.¹⁰⁰ If the

Id. at *5 (citing *Rowe*, 552 U.S. at 373) (emphasis in original). The Ninth Circuit has maintained that the decision does not reject the view that services is limited to the transport. *Nat’l Fed’n of the Blind*, 813 F.3d at 727–28.

⁹⁴ *Hodges*, 44 F.3d at 336; see also *Fawemimo v. Am. Airlines, Inc.*, 751 F. App’x 16, 19 (2d Cir. 2018) (finding that a claim challenging the sign and position of monitors providing safety instructions and size, arrangement, and spacing as to seats was preempted by the ADA); *Cuomo*, 520 F.3d at 223 (“A majority of the circuits to have construed ‘service’ have held that the term . . . encompasses matters such as boarding procedures, baggage handling, and food and drink—matters incidental to and distinct from the actual transportation of passengers.”).

⁹⁵ See *Tobin*, 775 F.3d at 449–56; *Bower*, 731 F.3d at 88; see also *David v. United Cont’l Holdings, Inc.*, No. 2:15-cv-01926, 2015 WL 7573204, at *3 (D.N.J. Nov. 24, 2015) (concluding that the sale of DirecTV and Wi-Fi are services under the ADA).

⁹⁶ *Mennella v. Am. Airlines, Inc.*, 824 F. App’x 696, 703 (11th Cir. 2020).

⁹⁷ *Id.* (quoting *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2003)).

⁹⁸ *Id.* at 704.

⁹⁹ *Tobin*, 775 F.3d at 454 (“The Supreme Court has instructed that the ‘related to’ language of the ADA is meant to be construed broadly, consistent with Congress’s intention that ADA preemption should have an expansive reach.”).

¹⁰⁰ *Id.*; see also *Bower v. EgyptAir Airlines Co.*, 731 F.3d 85, 95 (1st Cir. 2013).

claim has a “connection with, or reference to” prices, routes, or services, preemption will apply as long as the challenged law or claim has a “forbidden significant effect.”¹⁰¹ The broad construction serves to promote “‘efficiency, innovation, and low prices’ as well as ‘variety [and] quality’ of services.”¹⁰²

A recent decision from the District Court of Utah noted the differing views as to services and also noted that the Tenth Circuit had not yet addressed the issue.¹⁰³ It proceeded to apply the broader view of services and held that claims for negligence and breach of contract arising out of injuries suffered during beverage services were preempted.¹⁰⁴ In so holding, it emphasized that the passenger’s claim included the specific assertion that the airline was in the business of providing a beverage service, that performance of that service is part of the bargained for contractual responsibilities, and that the allegations centered on how the airline trains its flight attendants and conducts the provision of beverages to its passengers.¹⁰⁵ It found that the effect was not “tenuous, remote, or peripheral” to services as the “claims expressly seek determination and regulation of how [the airline] should properly perform its service” and that to permit the claims would “undermine the [ADA’s] regulatory aim and ‘significantly impact’ Congress’s objectives of ‘efficiency, innovation, and low prices’ as well as ‘variety and quality . . . of services.’”¹⁰⁶

While ADA preemption disputes primarily involve services, claims relating to either routes or prices are equally preempted. Recently, in *Román v. Spirit Airlines, Inc.*,¹⁰⁷ claimants who entered into a “short-cut” security service agreement offered by the airline brought claims for fraud due to the alleged failure to provide such security short-cut services.¹⁰⁸ The Southern District

¹⁰¹ *Tobin*, 775 F.3d at 454 (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384, 388 (1992)).

¹⁰² *Id.* at 455.

¹⁰³ *Day v. SkyWest Airlines, Inc.*, No. 4:20-cv-00013, 2020 WL 6899501, at *4 (D. Utah Nov. 24, 2020).

¹⁰⁴ *Id.* at *5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (internal citations omitted); *see also* *Mennella v. Am. Airlines, Inc.*, 824 F. App’x 696, 704 (11th Cir. 2020) (holding that negligence claims premised on assertions of failure to provide appropriate wheelchair assistance and beverage and food services, false accusation of being a drunk, and wrongful diversion of the plane all related to services and were preempted).

¹⁰⁷ No. 19-CIV-61461, 2020 WL 255202 (S.D. Fla. Jan. 14, 2020).

¹⁰⁸ *Id.* at *1–2.

of Florida held that the consumer fraud claim was preempted under the ADA, as the security service offering was for purposes of being able to offer reduced ticket prices and operate as a “budget” airline.¹⁰⁹ According to the court, “ancillary fees or services sold by airlines necessarily influence the prices that airlines charge consumers. And, to the extent a state law has a significant effect on those prices, that state law is preempted by the ADA.”¹¹⁰

While the primary issue of contention pertaining to contract claims centers on either viability or preemption, there are some circumstances where contractual-based claims have been found not to relate to price, rates, or services. For instance, in two recent cases involving travel insurance, it was held preemption did not apply.¹¹¹ In one, the court held that a breach of contract claim based on an airline’s offering of travel insurance through a third party did not relate to service under the ADA,¹¹² while in the other, the court held that the claim was too attenuated from price, route, or service.¹¹³ In yet another ruling, the Southern District of Florida found that there was no authority supporting ADA preemption where claims related to price or service were marketed by the airline but provided or sold by an independent third party.¹¹⁴ Other courts have held that “ADA preemption is not limited to claims brought directly against air carriers.”¹¹⁵

¹⁰⁹ *Id.* at *7.

¹¹⁰ *Id.* at *3.

¹¹¹ *Flores v. United Airlines*, 426 F. Supp. 3d 520, 532 (N.D. Ill. 2019); *Vallarta v. United Airlines, Inc.*, No. 19-cv-05895, 2020 WL 6271151, at *7 (N.D. Cal. Oct. 26, 2020).

¹¹² *Flores*, 426 F. Supp. 3d at 532. In *Flores*, the claimant purchased travel insurance from the airline’s website and, upon learning that the airline received a share of the payment, initiated suit claiming a Racketeer Influenced and Corrupt Organizations (RICO) Act violation, a state consumer statute violation, and unjust enrichment. *Id.* at 525–26. The court, on the issue of preemption, held that the claim related to rates for third-party travel insurance, not airline rates. *Id.* at 532 (citing *Dolan v. JetBlue Airways Corp.*, 385 F. Supp. 3d 1338, 1345–46 (S.D. Fla. 2019)). In *Dolan*, the court questioned whether travel insurance was an item that airlines competed over which is a necessary element to constitute an ADA preempted service. 385 F. Supp. 3d at 1345 (quoting *Branche v. Airtran Airways, Inc.*, 342 F.3d 1248, 1258 (11th Cir. 2003)) (“[W]ithout more, the Court does not find, at least at this stage of the litigation, that the offering of trip insurance, as part of the online ticket-purchasing process, is either ‘part of the customer’s experience of air travel’ or ‘considered in evaluating the quality of their flight.’”).

¹¹³ *Vallarta*, 2020 WL 6271151, at *7.

¹¹⁴ *Zamber v. Am. Airlines, Inc.*, 282 F. Supp. 3d 1289, 1302 (S.D. Fla. 2017).

¹¹⁵ *See, e.g., Lyn–Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 287 n.8 (5th Cir. 2002); *Am. Airlines, Inc. v. Travelport Ltd.*, No. 4:11-CV-244Y, 2012 WL

D. SELF-IMPOSED UNDERTAKING OR STATE ENHANCEMENT: "THE MUDDLE"

Under *Wolens*, a line is drawn between what the airline undertakes and what obligations result from state-based enlargement or enhancement of the parties' bargain.¹¹⁶ If the source of the obligation is a state-imposed law or policy, preemption applies, while conversely, if the source of the obligation is a voluntary undertaking, then the claim for enforcement of the obligation survives preemption.¹¹⁷ Not surprisingly, contract-based claims routinely survive preemption attacks, as enforcing private obligations pursuant to the parties' bargain is not the prohibited state enforcement of policy or law that would otherwise require preemption.¹¹⁸

Despite what appears to be a relatively straightforward rule, there remains conflict as to what are considered privately ordered obligations and those imposed by the state. Looming loudly is Justice O'Connor's concern that courts cannot "realistically be confined" to the parties' bargain because the courts "cannot enforce private agreements without reference to [state] policies, because those policies define the role of courts in de-

12507645, at *3 (N.D. Tex. Feb. 28, 2012); *Manassas Travel, Inc. v. Worldspan, L.P.*, No. 2:07-CV-701, 2008 WL 1925135, at *2 (D. Utah Apr. 30, 2008); *Frontier Airlines, Inc. v. United Air Lines, Inc.*, 758 F. Supp. 1399, 1408 (D. Colo. 1989).

¹¹⁶ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995) ("This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.").

¹¹⁷ *Id.* at 232-33.

¹¹⁸ See *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996) (finding plaintiff's claim that defendant breached its agreement to honor confirmed reservations of plaintiff's clients was not preempted as a self-imposed undertaking); *In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133, 1140 (D. Minn. 1999) (finding plaintiffs' claim that Federal Express (FedEx) breached its contract with customers by continuing to collect an amount equal to expired tax was not preempted); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am.*, 972 F. Supp. 665, 672-73 (N.D. Ga. 1997) (finding plaintiff's claim that United Parcel Service (UPS) did not follow contractual provisions for determining packages' weight was not preempted); *Chrissafis v. Cont'l Airlines, Inc.*, 940 F. Supp. 1292, 1297-98 (N.D. Ill. 1996) (finding plaintiff's claim regarding passenger's right to re-board plane was not preempted); *Seals v. Delta Air Lines, Inc.*, 924 F. Supp. 854, 858 (E.D. Tenn. 1996) (finding plaintiff's claim that contract required Delta to provide wheelchairs at airports was not preempted); *Chukwu v. Bd. of Dirs. Varig Airline*, 880 F. Supp. 891, 895 (D. Mass. 1995) (finding plaintiff's claim alleging failure to transport was not preempted); *Blackner v. Cont'l Airlines, Inc.*, 709 A.2d 258, 260 (N.J. Super. Ct. App. Div. 1998) (dismissing breach-of-contract claims arising from surcharge of sixty dollars to replace lost ticket).

ciding disputes concerning private agreements.”¹¹⁹ The line between self-imposed and state-imposed obligations is a fine one, recognizing that breach of contract claims can be preempted.¹²⁰ Conversely, even where an airline might act extra-contractually, it does not mean there has been a violation of a state-imposed obligation as opposed to a potential breach of the airlines’ self-imposed obligation.¹²¹

The Western District Court of Oklahoma recently noted the distinction between self- and state-imposed obligations, holding portions of the breach of contract claim preempted and others not.¹²² There, claims for breach of contract for failure of consideration and failure to fulfill reasonable expectations, as well as a tortious breach of the covenant of good faith, were asserted and stemmed from the claimants’ cancellation of nonrefundable tickets and payment for upgraded seats for a trip between Newark, New Jersey, and Puerto Rico, where the airline offered money credits subject to certain conditions.¹²³ Among the allegations was the assertion that the airline charged a fee for the use of the money credits and did not include the extra charge for the upgraded seats; that a service representative did not un-

¹¹⁹ *Wolens*, 513 U.S. at 246, 250 (O’Connor, J., concurring in judgment in part and dissenting in part).

¹²⁰ *See, e.g., Lyn-Lea Travel Corp.*, 283 F.3d at 288 (preempting plaintiff’s breach of contract claim); *Smith v. Comair, Inc.*, 134 F.3d 254, 258–59 (4th Cir. 1998) (preempting plaintiff’s breach of contract claim to the extent it addressed boarding procedures); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 542 (7th Cir. 1993) (preempting plaintiff’s breach of contract claim pertaining to cancellation policy); *Breiting U.S.A. Inc., v. Fed. Express Corp.*, 45 F. Supp. 2d 179, 186–87 (D. Conn. 1999) (preempting plaintiff’s breach of contract claim arising from contract to transport watches); *Leonard v. Nw. Airlines, Inc.*, 605 N.W.2d 425, 431 (Minn. Ct. App. 2000) (preempting plaintiff’s breach of contract claim regarding a reissue fee); *Blackner*, 709 A.2d at 260 (plaintiff’s breach of contract claim was preempted because it constituted enlargement of passenger’s rights based on state laws); *Boon Ins. Agency, Inc. v. Am. Airlines, Inc.*, 17 S.W.3d 52, 58–59 (Tex. App.—Austin 2000, pet. denied) (preempting plaintiff’s breach of contract claim regarding a reissue fee); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash. Ct. App. 2000) (preempting plaintiff’s breach of contract claim regarding the refund of a nonrefundable ticket).

¹²¹ *See All World Pro. Travel Servs., Inc. v. Am. Airlines, Inc.*, 282 F. Supp. 2d 1161, 1168 (C.D. Cal. 2003) (holding that a breach of contract claim based on the airline allegedly requiring the travel agency to pay a fee for processing refunds for unused tickets in the days after the September 11th, 2001 attacks was not preempted even though it was alleged that the airline acted extra-contractually).

¹²² *Martin v. United Airlines, Inc.*, No. CIV-16-1042, 2017 WL 3687347, at *5 (W.D. Okla. Apr. 18, 2017).

¹²³ *Id.* at *1.

derstand when efforts were made to purchase tickets with the money credits; that the airline denied a request for more time to use the money credits or receive a refund; and that the airline had kept the money that had been previously paid for the airfare, security fees, facility charges, and upgraded seats without providing any transportation.¹²⁴ As to the breach of contract assertions, it was argued that the airline breached: (1) the nonrefundable terms of the COC “by handling plaintiffs’ payment as if it was forfeitable”; and (2) “Rule 1 of the [COC] that discusses the term ‘Normal Fare’ by confiscating and keeping plaintiffs’ payment without providing them anything in return.”¹²⁵

Addressing the airline’s preemption defense as to the breach of contract claims,¹²⁶ the court held that, to the extent the breach of contract claims sought to revise the COC based upon the rules of law governing adhesion contracts (doctrines of unconscionability, reasonable expectations, and implied covenant of good faith and fair dealing), they were preempted, but, to the extent they were “based upon an enforcement of the alleged ‘primary purpose and intent’ of the tickets/e-tickets (transportation on an aircraft and upgraded seats),” they were not preempted.¹²⁷ The court went on to dismiss the breach of contract claim, finding that it otherwise failed as a matter of law given the terms of the ticket and COC.¹²⁸

In a class action where a group of passengers asserted a violation of European Union Regulation 261, which provides standardized compensation to passengers experiencing delays and cancellations,¹²⁹ the airline argued for dismissal on the grounds that permitting the claim would amount to state enforcement of

¹²⁴ *Id.*

¹²⁵ *Id.* at *3.

¹²⁶ *Id.* (“Plaintiffs argue that they are seeking a determination of whether defendant’s contract authorized it to do what it did. According to plaintiffs, the [COC] is an adhesion contract subject to the doctrines of reasonable expectations, unconscionability and breach of the implied covenant of good faith and fair dealing. Plaintiffs also point out that one of the alternative remedies they seek is to have the primary purpose and intent of the contract between plaintiffs and defendant (payment for transportation) enforced.”).

¹²⁷ *Id.* at *5.

¹²⁸ *Id.*

¹²⁹ Regulation 261/2004, of the European Parliament and of the Council, on Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No 295/91, 2004 O.J. (L 46) (EC).

a foreign regulation.¹³⁰ The district court rejected the contention, finding that ADA preemption required that the law being enforced be state law, not a foreign regulation.¹³¹

Adding to the difficulty is that the law of contract can be expansive, involving implied duties and terms, notions and rules of reasonable expectations, and covenants of good faith, as well as quasi-contractual claims such as promissory estoppel, fraudulent inducement, quantum meruit, and unjust enrichment. There can also be equitable based assertions such as waiver, estoppel, forfeiture, unconscionability, and unclean hands. Additionally, there may be occasions that elements or aspects of contractual remedies require preemption. All these contract-related principles, claims, and defenses can complicate the preemption and merits inquiry. The *Wolens* exception can be deemed to apply to these common law contract doctrines insofar as they serve to effectuate the intentions of the parties or to protect their reasonable expectations.¹³² Conversely, even in seemingly clear breach of contract actions, certain state contract law principles could be preempted if, and to the extent, they seek to effectuate state policy rather than the intent of the parties.¹³³

III. APPLICATION

Assessment of contract claims in the passenger and airline relationship is binary in that it requires assessment of: (1) the self-versus state-imposed obligation distinction identified in *Wolens*; and (2) absent preemption, application of common law contract rules of formation, construction, enforcement and remedy to the particular circumstances.¹³⁴

Where the claim is truly premised upon the parties' contractual undertaking, ADA preemption does not apply; this includes, in most instances, state rules pertaining to contractual formation and interpretation.¹³⁵ Such a rule is deemed by most

¹³⁰ *Volodarskiy v. Delta Air Lines, Inc.*, 987 F. Supp. 2d 784, 788 (N.D. Ill. 2013), *aff'd*, 784 F.3d 349 (7th Cir. 2015).

¹³¹ *Id.* at 792.

¹³² *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232 (1995).

¹³³ *Id.*

¹³⁴ *Id.* at 221.

¹³⁵ *Id.* at 221 (“[T]he ADA’s preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves.”); *Cox v. Spirit Airlines, Inc.*, 786 F. App’x 283, 286 (2d Cir. 2019) (“[T]he ADA’s preemption of state law does not preclude application of state-law contract interpretation principles to Plaintiffs’ breach of contract claim.”).

to make sense, as these principles of law are routinely used to adjudicate all breach of contract claims and do not constitute, in theory, any independent enhancement or enlargement of the parties' voluntary undertaking. The courts seek to resolve disputes over the intent and meaning of the parties' bargain. Interpretative rules are, for the most part, uniform and not meaningfully diverse across the states, with all generally centered on ascertaining and enforcing the terms of the parties' contract and intent.¹³⁶ As such, they do not generally raise any viable preemption issues.

This neutrality view of contractual interpretation, however, can be challenged. The majority in *Wolens* noted that "some state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties."¹³⁷ Further, as noted by Justice O'Connor in her concurring and dissenting opinion in *Wolens*, many principles of contract law including even interpretative rules may constitute matters of state policy as they are all, arguably, based on "a complex of moral, political, and social judgments."¹³⁸ Outside of preemption, common law contract rules are not always easy to apply to the rather unique nature of the contracts that can form and arise between airline customers and airlines.

A. CONTRACTUAL FORMATION

The fundamental common law principles of contract formation are relatively uniform, consisting of offer, acceptance, con-

¹³⁶ See, e.g., *Monzingo v. Alaska Air Grp., Inc.*, 112 P.3d 655, 664 (Alaska 2005) (determining meaning of mileage program by looking at course of dealing, i.e., the "sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct").

¹³⁷ *Wolens*, 513 U.S. at 233 n.8.

¹³⁸ *Id.* at 249 (O'Connor, J., concurring in judgment in part and dissenting in part) (quoting FRIED, *supra* note 66, at 69). According to Justice O'Connor:

The rules laid down by contract law for determining what the parties intended an agreement to mean, whether that agreement is legally enforceable, and what relief an aggrieved party should receive, are the end result of those judgments. Our legal system has decided to allow private parties to invoke the coercive power of the State in the effort to enforce those (and only those) private agreements that conform to rules set by those state policies known collectively as "contract law."

Id. at 250.

sideration and specification of essential or material terms.¹³⁹ The need for the meeting of the minds, assent, standing, and mutuality of obligation is equally applicable to the airline–passenger relationship. Some of the recent decisions addressing contractual formation claims and issues are addressed below.

1. *Meeting of the Minds*

A binding contractual obligation requires a “meeting of the minds,” where the parties must have the same intent or agreement as to the material terms.¹⁴⁰ Most courts agree that whether there has been a meeting of the minds is a factual determination based on all the circumstances, and that the determination must be based not on the parties’ subjective intent but by objective outward manifestations.¹⁴¹ Given that COCs and offerings are drafted exclusively by the airline, the meeting of the minds element is somewhat mooted and largely limited in most instances to the issue of notice.

Absent a meeting of the minds, there is no actionable claim.¹⁴² In *Glass v. Northwest Airlines, Inc.*, for instance, the court granted summary judgment on a breach of contract claim against a wheelchair services provider where the plaintiff’s elderly father died after falling down an escalator at an airport.¹⁴³ The plaintiff alleged that the provider failed to provide a wheelchair to the plaintiff’s father upon deplaning.¹⁴⁴ While perhaps more of a matter of standing, the court held that there was no meeting of the minds because there was no contract between the passenger and the service provider, no communications between the passenger and the service provider, and thus “no transaction,” establishing that “they did not engage in the meeting of the minds necessary to form a contract in Tennessee.”¹⁴⁵

Notably, the court found there was a contract between the passenger and the airline defendant for purposes of the wheel-

¹³⁹ RESTATEMENT (SECOND) OF CONTRACTS §§ 5, 22, 71 (AM. L. INST. 1981).

¹⁴⁰ *DeGross v. MascoTech Forming Techs.-Fort Wayne, Inc.*, 179 F. Supp. 2d 896, 903 (N.D. Ind. 2001) (citing *Wallem v. CLS Indus., Inc.*, 725 N.E.2d 880, 883 (Ind. Ct. App. 2000)).

¹⁴¹ *Crowell v. Cigna Grp. Ins.*, 410 F. App’x 788, 792 (5th Cir. 2011) (citing *Angelou v. Afr. Oversea Union*, 33 S.W.3d 269, 278 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

¹⁴² See 17A AM. JUR. 2d *Contracts* § 29 (2021).

¹⁴³ *Glass v. Nw. Airlines, Inc.*, 761 F. Supp. 2d 734, 747 (W.D. Tenn. 2011).

¹⁴⁴ *Id.* at 740.

¹⁴⁵ *Id.* at 747.

chair services and rejected the airline's defense that it could not be liable for an independent contractor.¹⁴⁶ Relying on Tennessee law, it noted that "[t]he hornbook principle of contract law is that the delegation of the performance of a contract does not, unless the obligee agrees otherwise, discharge the liability of the delegating obligor to the obligee for breach of contract."¹⁴⁷ It noted that the contract between the airline and the wheelchair service provider required the airline to relay the passenger's request for wheelchair services to the airline contractor which was allegedly not done.¹⁴⁸

In a more recent decision, the Southern District of Florida addressed a putative class action premised on the claim that the airline had breached its contract when its listed ticket fare on the airline's website increased after purchasers started the online booking process.¹⁴⁹ The court agreed there was no meeting of the minds because the advertised fare was not an offer for a binding contract.¹⁵⁰ The court found that the purchaser never completed the online booking process; the website warned that the airline had to issue a ticket before there would be a valid contract; the purchaser's decision to click "Pay Now" during the online booking process left open indefinite terms, including whether online order forms were completed with the airline's specified time frame, whether the seat identified remained available, and the price of the seat.¹⁵¹ The court held that in light of these undisputed facts, it was unreasonable as a matter of law for the purchaser to believe that by clicking the "Pay Now" entry, she was binding the airline to the advertised fare.¹⁵²

Another more direct set of cases involves the issue of whether a particular program or service is part of the contract between airline and passenger.¹⁵³ For instance, breach of contract claims involving data privacy have turned on whether the particular data protection policy was incorporated by reference into the

¹⁴⁶ *Id.* at 749.

¹⁴⁷ *Id.* (citing *Fed. Ins. Co. v. Winters*, No. E2009-02065-COA-R3-CV, 2010 WL 4065609, at *4 (Tenn. Ct. App. Oct. 18, 2010)).

¹⁴⁸ *Id.*

¹⁴⁹ *Schultz v. Am. Airlines, Inc.*, 449 F. Supp. 3d 1301, 1304–05 (S.D. Fla. 2020).

¹⁵⁰ *Id.* at 1312.

¹⁵¹ *Id.* at 1316.

¹⁵² *Id.*

¹⁵³ *See, e.g., In re JetBlue Airways Corp. Priv. Litig.*, 379 F. Supp. 2d 299, 318 (2005); *Pena v. Brit. Airways, PLC*, No. 18-cv-6278, 2020 WL 3989055, at *1 (E.D.N.Y. Mar. 30, 2020).

COC.¹⁵⁴ If not, it is not considered part of any contractual obligation.¹⁵⁵ In *Pena v. British Airways, PLC*, for instance, the Eastern District of New York found that a breach of contract claim based on a data privacy breach was not actionable because the COC did not incorporate by reference the relied-upon statements from the Privacy Policy.¹⁵⁶ The COC otherwise did not evince any intent to do so with the Privacy Policy expressly stating it did not form any part of the contract between the airline and customer.¹⁵⁷

Much of the recent case law demonstrates more of a focus on the dispute over the application of state contract formation rules to particular facts and is less concerned with the self- versus state-imposed divide. Two recent examples are *Cavalieri v. Avior Airlines C.A.*¹⁵⁸ and *Lagen v. United Continental Holdings, Inc.*¹⁵⁹

In *Cavalieri*, the Southern District of Florida rejected the contention that the failure of the airline website to disclose the existence of an “exit fee” did not create any contractual obligation, as any binding duty had to be express as to any such duty of disclosure.¹⁶⁰ “[A] contract is only illusory when it lacks all consideration and mutuality of obligation, e.g., the promisor has *no* obligations with regard to *any* parts of the contract.”¹⁶¹ It has been generally held that the unilateral right of an airline to modify the terms of a frequent flyer or mileage program does not make the plan illusory or without consideration.¹⁶²

In *Lagen*, a frequent flyer member who achieved “Million-Mile Flyer” status brought an action for breach of contract when the airline downgraded lifetime benefits after the claimant became a Million-Mile Flyer.¹⁶³ The plaintiff argued that the airline made an offer of benefits which was intended to invite accept-

¹⁵⁴ *Pena*, 2020 WL 3989055, at *6.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*; but see *In re JetBlue*, 379 F. Supp. 2d at 318 (deeming privacy policy part of COC).

¹⁵⁸ No. 17-cv-22010, 2019 WL 1102882, at *4 (S.D. Fla. Feb. 15, 2019).

¹⁵⁹ 774 F.3d 1124, 1127 (7th Cir. 2014).

¹⁶⁰ *Cavalieri*, 2019 WL 1102882, at *5; see also *Sanchez v. Aerovias De Mex., S.A. de C.V.*, 590 F.3d 1027, 1030 (9th Cir. 2010) (holding website created no duty to advise passenger of Mexican tourism tax).

¹⁶¹ *Ekin v. Amazon Servs., LLC*, 84 F. Supp. 3d 1172, 1176 (W.D. Wash. 2014).

¹⁶² See *Alaska Airlines, Inc. v. Carey*, 395 F. App'x 476, 478 (9th Cir. 2010).

¹⁶³ *Lagen*, 774 F.3d at 1126–27.

ance by conduct to form a binding contract.¹⁶⁴ The court rejected the contention, holding that the representation was not a unilateral offer which the passenger could render binding through performance.¹⁶⁵ Rather, the representation was part of the terms of the program which otherwise permitted the airline to unilaterally alter the benefits under the program.¹⁶⁶ The issue reduced to whether a reasonable customer would have interpreted the Million-Mile Flyer status to fall within the frequent flyer program.¹⁶⁷ The court found, as a matter of law, that no reasonable person would believe there were two different programs.¹⁶⁸

Despite what at first blush seem like non-policy principles, contract formation including assent has been found, at times, to require preemption of a breach of contract claim due to the imposition of state policy or external norms.¹⁶⁹ In *Schultz v. American Airlines, Inc.*,¹⁷⁰ for instance, the claimant's breach of contract action relied on the state common law and contract principle of assent in seeking to have enforced the airline's price posting on its website.¹⁷¹ The claimant conceded that the airline did not expressly assent to be bound by the terms on the website but otherwise contended that state law (Florida common law) established a binding contract because state law imputes an intent of the airline to be bound based on an "objective standard of assent."¹⁷² Under this doctrine, "the law imputes to a

¹⁶⁴ *Id.*; see also RESTATEMENT (SECOND) OF CONTRACTS § 45(1) (AM. L. INST. 1981) ("Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.").

¹⁶⁵ *Lagen*, 774 F.2d at 1125.

¹⁶⁶ *Id.*; see also *Hammarquist v. United Cont'l Holdings, Inc.*, 809 F.3d 946, 950 (7th Cir. 2016) (finding no breach of a frequent flyer program because the program allowed for unilateral changes by airline).

¹⁶⁷ *Lagen*, 774 F.2d at 1127.

¹⁶⁸ *Id.*; see also Abigail Storm, Case Note, *Busted Benefits—The Seventh Circuit Honors Explicit Contractual Terms of United's MileagePlus Benefits Program*, 81 J. AIR L. & COM. 133, 136 (2016).

¹⁶⁹ See, e.g., *Schultz v. Am. Airlines, Inc.*, No. 18-80633-CIV, 2019 WL 3428524, at *3 (S.D. Fla. Mar. 27, 2019), *report and recommendation rejected*, 2019 WL 3000448, at *5 (S.D. Fla. July 10, 2019).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at *4. It was claimed that the airline had manifested its agreement and created a "reasonable expectation" in an "objectively reasonable consumer" that American [Airlines (American)] was offering to enter into a contract and it was

person an intention corresponding to the reasonable meaning of his words and acts.”¹⁷³ According to the court,

Using state law to “impute” to [air carrier] the requisite intent to contract regarding ticket price is precisely the type of state-imposed obligation that the ADA prohibits, especially as here where [air carrier] makes clear that its “Conditions of Carriage” and ticket constitute the contract between a passenger and [an air carrier].¹⁷⁴

While it may seem that state rules as to the determination of contract creation are not subject to preemption because they are only seeking to determine whether the parties reached a binding agreement, they remain external state norms. The court in *Schultz* implicitly recognized the difference between subjective and objective assent which, in turn, informs the fine line between self- and state-imposed obligation.¹⁷⁵ “If a party’s actions, judged by a standard of reasonableness, manifested an intention to agree, the real but unexpressed state of the party’s mind was irrelevant.”¹⁷⁶ As to this objective rule of assent, one is hard-pressed not to pause as to whether contractual assent and meeting of the minds impermissibly turns on external norms and policy triggering preemption.¹⁷⁷

2. Notice

Closely tied to the contractual formation between a customer and an airline is notice. It has long been settled that a valid tariff’s terms are binding even when the customer or traveler has no notice of the provision and even when they conflict with the applicable COC.¹⁷⁸ This long-standing rule is subject to the recognition that domestic COC are federally regulated.¹⁷⁹ The

accepted by the claimant entering her payment information and clicking “Pay Now.” *Id.* at *3.

¹⁷³ *Id.* (quoting *Kolodziej v. Mason*, 774 F.3d 736, 742 (11th Cir. 2014)).

¹⁷⁴ *Id.* Crucial to the court was the fact that the claimant had not been issued a ticket. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 169 (1990).

¹⁷⁷ See *In re United Parcel Serv., Inc.*, No. 10 MDL 2153, 2011 WL 13220232, at *8 (C.D. Cal. July 28, 2011) (“[I]t is unclear if FAAA preemption applies to state common law that seeks to determine whether a contract results from a meeting of the minds.”).

¹⁷⁸ *Fontan-de-Maldonado v. Lineas Aereas Costarricenses, S.A.*, 936 F.2d 630, 631 (1st Cir. 1991); *United States v. Edwards*, 602 F.2d 458, 462 (1st Cir. 1979).

¹⁷⁹ See *Román v. Spirit Airlines, Inc.*, No. 19-CIV-61461, 2020 WL 255202, at *6 (S.D. Fla. Jan. 14, 2020). The federal regulations are at 14 C.F.R. §§ 253.4, 253.5 (2020). Section 253.4 provides:

Department of Transportation (DOT) is charged with promulgating comprehensive regulations interpreting the ADA and has

(a) A ticket or other written instrument that embodies the contract of carriage may incorporate contract terms by reference (*i.e.*, without stating their full text), and if it does so shall contain or be accompanied by notice to the passenger as required by this part. In addition to other remedies at law, an air carrier may not claim the benefit as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part.

(b) Each air carrier shall make the full text of each term that it incorporates by reference in a contract of carriage available for public inspection at each of its airport and city ticket offices.

(c) Each air carrier shall provide free of charge by mail or other delivery service to passengers, upon their request, a copy of the full text of its terms incorporated by reference in the contract. Each carrier shall keep available at all times, free of charge, at all locations where its tickets are sold within the United States information sufficient to enable passengers to order the full text of such terms.

Id. § 253.4. Section 253.5 provides:

Except as provided in § 253.8, each air carrier shall include on or with a ticket, or other written instrument given to a passenger, that embodies the contract of carriage and incorporates terms by reference in that contract, a conspicuous notice that:

(a) Any terms incorporated by reference are part of the contract, passengers may inspect the full text of each term incorporated by reference at the carrier's airport or city ticket offices, and passengers have the right, upon request at any location where the carrier's tickets are sold within the United States, to receive free of charge by mail or other delivery service the full text of each such incorporated term;

(b) The incorporated terms may include and passengers may obtain from any location where the carrier's tickets are sold within the United States further information concerning:

(1) Limits on the air carrier's liability for personal injury or death of passengers, and for loss, damage, or delay of goods and baggage, including fragile or perishable goods;

(2) Claim restrictions, including time periods within which passengers must file a claim or bring an action against the carrier for its acts or omissions or those of its agents;

(3) Rights of the carrier to change terms of the contract. (Rights to change the price, however, are governed by § 253.7);

(4) Rules about reconfirmation of reservations, check-in times, and refusal to carry;

(5) Rights of the carrier and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate air carrier or aircraft, and rerouting.

Id. § 253.5.

promulgated regulations to standardize COCs.¹⁸⁰ The COC “applies to all scheduled direct air carrier operations in interstate and overseas air transportation [and] applies to all contracts with passengers, for those operations that incorporate terms by reference.”¹⁸¹ The regulations permit a carrier to incorporate by reference, in a ticket or other written instrument, any term of the contract for providing interstate air transportation, including optional services,¹⁸² if proper notice is provided.¹⁸³ For instance, regulations govern whether and how airlines may incorporate certain terms by reference,¹⁸⁴ how airlines are to give notice of the COC and compensation for bumped passengers,¹⁸⁵ and the minimum amount an airline can limit its liability for damaged goods or baggage.¹⁸⁶ If an airline does not abide by federal regulations as to notice of, amendments to, or accessibil-

¹⁸⁰ 14 C.F.R. § 253.1 (“The purpose of this part is to set uniform disclosure requirements, which preempt any State requirements on the same subject, for terms incorporated by reference into contracts of carriage for scheduled service in interstate and overseas passenger air transportation.”).

¹⁸¹ *Id.* § 253.2.

¹⁸² An optional service is defined as any service the airline provides for a fee beyond passenger air travel such as “charges for checked or carry-on baggage, in-flight beverages, snacks and meals, pillows and blankets and seat upgrades.” *Id.* § 399.85.

¹⁸³ *Id.* §§ 253.4(a), 253.5(a); *see also* Covino v. Spirit Airlines, Inc., 406 F. Supp. 3d 147, 152–53 (D. Mass. 2019); Farag v. Sw. Airlines, Co., 2018 IL App (2d) 180113-U, ¶ 4 (finding proper notice was provided because the COC was available on the website and notice was given); United Airlines, Inc. v. McCubbins, 262 So. 3d 536, 544–46 (Miss. Ct. App. 2018) (obligating court to honor the federal regulations permitting the COC to incorporate terms by reference); Dennis v. Delta Air Lines, Inc., No. 10-CV-973, 2011 WL 4543487, at *1–2 (E.D.N.Y. Sept. 29, 2011) (rejecting the argument that a passenger was not bound by contract terms that were validly incorporated into ticket by reference even though the passenger did not review the terms); Reed v. Delta Air Lines, Inc., No. 10 Civ. 1053, 2011 WL 1085338, at *3 (S.D.N.Y. Mar. 23, 2011) (finding that “Delta’s International Conditions of Carriage were incorporated by reference in Delta’s contract of carriage with the plaintiff, and are therefore enforceable as part of the contract”); Fondo v. Delta Air Lines, Inc., No. 00 CIV. 2445, 2001 WL 604039, at *3 (S.D.N.Y. May 31, 2001) (citing 14 C.F.R. § 253.4) (“An airline ticket, as supplemented by the carrier’s tariff, embodies the contract of carriage between the airline and its passenger”); Chen v. China E. Airlines Co., Ltd., 5 N.Y.S.3d 327 (N.Y. Civ. Ct. 2014) (finding airline complied with federal regulations for incorporating terms into contract by reference).

¹⁸⁴ 14 C.F.R. § 253.4.

¹⁸⁵ *Id.* § 253.5.

¹⁸⁶ *See* Reed, 2011 WL 1085338, at *3 (finding airline complied with federal regulations for incorporating terms into the COC by making terms available for public inspection at the airport and providing passengers a “ticket notice” at check-in counters).

ity of the COC, it will be precluded from enforcing the rights, rules, or duties set forth in the COC.¹⁸⁷ Courts have otherwise upheld a variety of ways that airlines have incorporated terms, including the e-ticket itself, ticket jackets inserts, or confirming e-mails.¹⁸⁸

It remains a significant hurdle to establish lack of notice or failure to abide by the federal regulations, although there are instances where courts have found that an airline had not met its burden.¹⁸⁹ Compliance is met where the airline makes the terms available for public inspection at the airport, provides passengers with a “ticket notice” at check-in counters, provides reference and notice when tickets are purchased on the internet, or all of the above.¹⁹⁰ Further, it has been recognized that given the emergence of “ticketless travel,” it is not required that airline companies provide a paper copy of the COC or ticket.¹⁹¹ The DOT has issued a Compliance Statement that addresses the various ways airlines can provide notice of the incorporation of terms to ticketless passengers.¹⁹²

Under the federal common law, the long-standing test as to the adequacy of notice is the “reasonable communicativeness test,” that is, “[t]he adequacy of notice turns on whether the incorporation by reference of important legal rights was ‘reasonably communicate[d]’ to the passenger.”¹⁹³ The reasonable communicativeness test has two prongs where the court must consider: (1) “the facial clarity of the ticket contract and

¹⁸⁷ *Cox v. Spirit Airlines, Inc.*, 786 F. App’x 283, 285 (2d Cir. 2019); *Ritorto & Fisher*, *supra* note 6, at 565; *see also Ron v. Airtran Airways, Inc.*, 397 S.W.3d 785, 788–90 (Tex. App.—Houston [14th Dist] 2013, reh’g overruled) (denying airline’s motion for summary judgment to enforce liability limitation of COC because the full contract was not available for inspection at the airport).

¹⁸⁸ *Ritorto & Fisher*, *supra* note 6, at 566–67.

¹⁸⁹ *See, e.g., Cox*, 786 F. App’x at 285; *Onwuakpa v. United Airlines, Inc.*, 121 N.Y.S.3d 520, 522–23 (N.Y. App. Div. 2020).

¹⁹⁰ *Reed*, 2011 WL 1085338, at *8; *see also Dennis v. Delta Air Lines, Inc.*, No. 10-CV-973, 2011 WL 4543487, at *4–5 (E.D.N.Y. Sept. 29, 2011) (rejecting plaintiff’s contention of inadequate notice where tariff was available for public inspection at the airport and the airline provided notice of the incorporated COCs when plaintiff purchased the ticket on orbitz.com).

¹⁹¹ *Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 153 (D. Mass. 2019) (finding immaterial that airline failed to provide a passenger with a paper copy of its COC); *see also Ticketless Traveler: Passenger Notices*, 62 Fed. Reg. 19473, 19475–76 (Apr. 22, 1997) (rejecting proposed requirement that airlines provide paper notices to ticketless passengers with the emergence of “ticketless travel”).

¹⁹² *Ticketless Travel: Passenger Notices*, 62 Fed. Reg. at 19473, 19476.

¹⁹³ *Covino*, 406 F. Supp. 3d at 152 (citing *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861, 864 (1st Cir. 1983)).

whether . . . [it] make[s] the relevant provisions sufficiently obvious and understandable” and (2) whether the “circumstances of the passenger’s possession of and familiarity with the ticket,” show that the passenger was capable of becoming “meaningfully informed of the contractual terms at stake.”¹⁹⁴

There is some question as to whether the federal common law reasonable communicativeness test is displaced by the federal regulations.¹⁹⁵ Such an argument seems to have merits under *Wolens*,¹⁹⁶ but the fact that some courts still apply this test despite the regulations indicates that courts certainly find it informative, if not controlling.¹⁹⁷

In a recent decision as to “clickwrap,”¹⁹⁸ a federal court in Massachusetts held that, despite being unaware of any federal

¹⁹⁴ *Lousararian v. Royal Caribbean Corp.*, 951 F.2d 7, 8–9 (1st Cir. 1991) (quoting *Shankles*, 722 F.2d at 864, 866). For other cases applying or discussing the reasonable communicative test, see *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 524–25 (5th Cir. 2002); *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1364 (9th Cir. 1987); *Harger v. Spirit Airlines, Inc.*, No. 01 C 8606, 2003 WL 21218968, at *15–18 (N.D. Ill. May 20, 2003).

¹⁹⁵ See *Harger*, 2003 WL 21218968, at *14 (questioning the position that the federal common law reasonable communicative test is not displaced by federal regulations under *Wolens*); *Henderson v. Airtran Airway, Inc.*, No. 1:09-cv-00973, 2010 WL 4062503, at *13 n.2 (S.D. Ind. Oct. 14, 2010) (questioning the same); but see *Demel v. Am. Airlines, Inc.*, No. 09 Civ. 5524, 2011 WL 497930, at *5 (S.D.N.Y. Feb. 10, 2011).

¹⁹⁶ 513 U.S. 219, 232 (1995) (“Nor is it plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services.”).

¹⁹⁷ *Covino*, 406 F. Supp. 3d at 152; *Harger*, 2003 WL 21218968, at *13–16.

¹⁹⁸ See, e.g., *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 61 n.10 (1st Cir. 2018) (explaining that a “clickwrap” contract requires a user to indicate affirmative assent to a contract but does not require the user to view the contract to which she is assenting). Clickwrap agreements derive their name “by analogy to ‘shrinkwrap,’ used in the licensing of tangible forms of software sold in packages.” *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 22 n.4 (2d Cir. 2002). “Just as breaking the shrinkwrap seal and using the enclosed computer program after encountering notice of the existence of governing license terms has been deemed by some courts to constitute assent to those terms in the context of tangible software, so clicking on a webpage’s clickwrap button after receiving notice of the existence of license terms has been held by some courts to manifest an Internet user’s assent to terms governing the use of downloadable intangible software.” *Id.* (internal citations omitted). In addition to clickwrap, there is also “browsewrap.” “Browsewrap agreements are distinguishable from clickwrap agreements” in that “clickwrap agreements require affirmative action on the part of the user to manifest assent, [which leads] courts [to] regularly uphold their validity when challenged.” *Hussein v. Coinabul, LLC*, No. 14 C 5735, 2014 WL 7261240, at *2 (N.D. Ill. Dec. 19, 2014) (quoting *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770, 790 (N.D.Ill. 2011)). Browsewrap terms “do not

court decisions addressing clickwrap as to an airline's COC, such contracts have been readily enforced in other contexts.¹⁹⁹ It further confirmed that the airline's online ticketless booking system reasonably provided notice of the terms and conditions contained in the COC.²⁰⁰ Adequate notice has also been found where the COC is incorporated into an "E-ticket confirmation e-mail."²⁰¹

In another recent notice challenge, a court held that the airline had properly described its shortcut security service and fee via a link on the airline's homepage directing the user to a page on optional services.²⁰² The court rejected the contention that the shortcut security service and fee was not governed by the COC as it lacked conspicuous notice.²⁰³ The applicable FAR, 14 C.F.R. § 253.5, was deemed to contemplate the ticket incorporating by reference to the terms from the COC rather than the reverse.²⁰⁴ That is, the conspicuous notice requirement applied to the ticket incorporating the COC, but not to the shortcut security service.²⁰⁵ The court rejected the argument that the shortcut security service was a separate and distinct service from the COC.²⁰⁶

require the user to manifest assent to the terms and conditions expressly." *Id.* (internal citations and quotations omitted).

¹⁹⁹ *Covino*, 406 F. Supp. 3d at 152 (citing *Wickberg v. Lyft, Inc.*, 356 F. Supp. 3d 179, 183 (D. Mass. 2018) ("[C]lickwrap agreements . . . are generally held enforceable."); *Small Justice LLC v. Xcentric Ventures LLC*, 99 F. Supp. 3d 190, 196 (D. Mass. 2015) ("Clickwrap agreements are generally upheld because they require affirmative action on the part of the user."). See also Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) (footnote omitted) ("Because the user has 'signed' the contract by clicking 'I agree,' every court to consider the issue has held clickwrap licenses enforceable.").

²⁰⁰ *Covino*, 406 F. Supp. 3d at 152–53.

²⁰¹ *Lavine v. Am. Airlines. Inc.*, No. 2917, 2011 WL 13377948, at *4 (Md. Ct. Spec. App. Dec. 1, 2011).

²⁰² *Román v. Spirit Airlines, Inc.*, No. 19-CIV-61461, 2020 WL 5746830, at *13 (S.D. Fla. Aug. 31, 2020).

²⁰³ *Id.* at *17–18.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at *14 (stating shortcut security service "is an optional service offered only to, and in conjunction with, passengers who are parties to the COC, consistent with the FARs.").

3. Standing

For all cases, “Article III of the Constitution limits the judicial power . . . to the resolution of cases and controversies.”²⁰⁷ This is a threshold question and requires the following: (1) an injury-in-fact or an invasion of a legally protected interest, which is concrete and actual, not hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) redressability.²⁰⁸ In contract disputes, standing requires the claimant to be a party to the contract or a third-party beneficiary.²⁰⁹

Although not particularly common, there are instances of claims pertaining to standing issues. In *Diveroli v. American Airlines, Inc.*, for example, a pregnant passenger who suffered from anxiety asserted a breach of contract claim asserting that the airline had breached its agreement to allow her to have her “medically necessary comfort animal” with her in the cabin.²¹⁰ It was alleged that a flight attendant harassed the passenger and took the dog, which was in its kennel, and placed it in the aircraft bathroom for a portion of the trip.²¹¹ It was otherwise alleged that the passenger had met all of the conditions and requirements of the airline’s “Carrier Agreement” pertaining to emotional support animals and that it was a breach to have removed the animal from her presence and placed in the bathroom.²¹²

The court in *Diveroli* dismissed the claim, holding that the passenger lacked standing.²¹³ The airline argued that there was no agreement because the alleged Carrier Agreement was not a contract; there was no consideration and any obligation of the airline was “illusory.”²¹⁴ The court held that even assuming the

²⁰⁷ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 471 (1982) (internal quotations omitted).

²⁰⁸ *Id.* at 472; *see also* *Bombin v. Sw. Airlines Co.*, No. 5:20-cv-01883, 2021 WL 1174561 (E.D. Pa. Mar. 29, 2021) (defining standing as requiring injury-in-fact or invasion of a legally protected interest, traceability to defendant’s conduct, and redressability by judicial decision).

²⁰⁹ *Diveroli v. Am. Airlines, Inc.*, No. 19-cv-23251, 2019 WL 5697198, at *6–7 (S.D. Fla. Nov. 1, 2019).

²¹⁰ *Id.* at *1, *6.

²¹¹ *Id.* at *1.

²¹² It was alleged that “[i]n addition to the emotional distress allegedly experienced by Plaintiff due to Defendant’s alleged breach of the Carrier Agreement, she claims that her kennel was damaged, and her dog Simba was ‘traumatized’ by the event.” *Id.* at *7.

²¹³ *Id.*

²¹⁴ *Id.* at *6. Under Florida law, a contract is illusory “when ‘one of the promises appears on its face to be so insubstantial as to impose no obligation at

Carrier Agreement was a contract, the passenger was not a party to the agreement because it merely set out the “general terms governing travel with service and emotional support animals” with no mention of the passenger.²¹⁵

More recently, a court found that a passenger lacked standing when he claimed he was injured due to the airline’s failure to disclose that the travel insurance offered by a third-party on the airline’s website compensated the airline for such insurance purchases.²¹⁶ The court rejected the claimant’s assertion that he was injured by being “misled into paying a ‘pass-through’ charge and that he paid an inflated price.”²¹⁷ There was no dispute that the passenger received the services he bought and thus received the “benefit of the bargain.”²¹⁸ The court likewise rejected the argument that the arrangement between the airline and the third-party providing the insurance amounted to a “pass-through” arrangement as the airline “neither imposed a special fee on consumers that it represented would go to [the third party] nor collected and retained one.”²¹⁹ There was no evidence of having paid an “inflated price,” and given the lack of any demonstrated injury, there was no standing to bring suit.²²⁰

Other instances of an absence of contractual standing include a mother’s claim of a breach of an “Unaccompanied Minor Child-Care Services Request” where the contract for transportation was between the airline and the father.²²¹ The court re-

all on the promisor—who says, in effect, ‘I will if I want to.’” *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1331 (11th Cir. 2010) (quoting *Johnson Enters. of Jacksonville, Inc. v. FPL Grp., Inc.*, 162 F.3d 1290, 1311 (11th Cir.1998)). “An illusory promise does not constitute consideration for the other promise, and thus the contract is unenforceable against either party.” *Johnson Enters. of Jacksonville*, 162 F.3d at 1311.

²¹⁵ *Diveroli*, 2019 WL 5697198, at *18 n.4.

²¹⁶ *Zamber v. Am. Airlines, Inc.*, No. 4:20-cv-00114, 2020 WL 3163037, at *1, *6 (N.D. Tex. June 11, 2020).

²¹⁷ *Id.* at *6–7 (citing *Flores v. United Airlines*, 426 F. Supp. 3d 520, 532 (N.D. Ill. 2019)) (“Plaintiff has alleged she purchased travel insurance, and she alleges she received the travel insurance. So long as she received the benefit of the bargain, she was not injured.”); *Donoff v. Delta Air Lines, Inc.*, No. 18-81258-CV, 2020 WL 1226975, at *27–28 (S.D. Fla. Mar. 6, 2020) (holding that no actual injury was shown because the plaintiff “admitted that the price of the insurance was set by Allianz, that he paid Allianz, and that he received the trip insurance from Allianz”).

²¹⁸ *Zamber*, 2020 WL 3163037, at *7.

²¹⁹ *Id.* at *8.

²²⁰ *Id.* at *9.

²²¹ *Hyatt v. Trans World Airlines, Inc.*, 943 S.W.2d 292, 294, 296–97 (Mo. App. 1997).

jected the mother's contention that her payment of \$50 to change the date of departure created a separate contract with the airline because it was not a separate agreement as to the delivery of the children.²²² More recently, the court found a lack of standing regarding a refund claim where the refund was provided after the filing of the complaint.²²³ The court reiterated the necessity of demonstrating an injury and stated that the attorney's fees alone were insufficient.²²⁴

Efforts to rely on state common law third-party beneficiary principles have been generally found to run afoul of the ADA requiring preemption.²²⁵ The concern is that "applying various state agency and third-party beneficiary laws to airline contracts risks creating a 'state regulatory patchwork' in direct contravention of Congress's intent when it enacted the ADA."²²⁶ "Whether an airline could be held liable for breach of contract by a principal or third-party beneficiary would depend entirely upon the applicable state law."²²⁷

A recent example is *McGarry v. Delta Air Lines, Inc.*,²²⁸ where the claimant brought a third-party beneficiary breach of contract claim against the airline and its software services provider, alleging that personal data which had been collected and used had been subject to a "malware" breach and disclosure.²²⁹ The claimant asserted she was a third-party beneficiary to the Subscription Services Agreement (SSA) between the airline and the software services provider.²³⁰ The court found that the SSA specifically precluded third-party beneficiary or reliance.²³¹ As such, the claim did not fall within the contractual exception to preemption because pursuit or enforcement of the claim would re-

²²² *Id.*

²²³ *Castanares v. Deutsche Lufthansa AG*, No. CV 20-4261, 2020 WL 6018807, at *8-9 (C.D. Cal. Oct. 9, 2020).

²²⁴ *Id.* at *9.

²²⁵ *See, e.g., A.C.L. Computs. & Software, Inc. v. Fed. Express Corp.*, No. 15-cv-04202, 2016 WL 946127, at *4 (N.D. Cal. Mar. 14, 2016).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ No. CV 18-9827, 2019 WL 2558199, at *1 (C.D. Cal. June 18, 2019).

²²⁹ *Id.* at *1-2. Also included in the claim was the assertion that the airline's "Privacy Policy," while not a contract, "create[d] reasonable expectations on the part of [the claimant and other consumers] . . . induc[ing] them to disclose their confidential information and purchase tickets." *Id.* at *1.

²³⁰ *Id.* at *4.

²³¹ The SSA contained a provision providing that "[n]o third party is intended to benefit from, nor may any third party seek to enforce, any of the terms of this Agreement." *Id.*

quire reliance on state duties beyond the contractual terms.²³² The court noted that there was no allegation of any breach of any self-imposed obligation the airline entered into “directly” with the claimant.²³³ Other cases addressing third-party beneficiary claims have reached similar results.²³⁴ In those instances where a third-party beneficiary claim was held not preempted, the claim was premised on personal injury.²³⁵

4. Consideration

Fundamental to contract law is consideration. Consideration is a bargained-for exchange or “that which is given to induce a promise or performance in return.”²³⁶ Consideration can “consist of either a benefit to the promiser or a detriment to the promisee.”²³⁷ It is “mutuality of obligation.”²³⁸ Some states make clear that “[t]he existence of a written contract presumes” mutuality.²³⁹ Where a contract lacks consideration or all mutuality of obligation, i.e., where the promisor has no obligation as to any element or aspect of the asserted contract, it is deemed illu-

²³² According to the court: “[I]n order to determine whether Plaintiff is entitled to such status, the Court must refer to law external to the [SSA], since it is state law that would allow Plaintiff to recover as a third-party beneficiary. That is, whether an airline could be held liable for breach of contract by a principal or third-party beneficiary would depend entirely upon the applicable California law.” *Id.* at *5.

²³³ *Id.*

²³⁴ *Id.* (“*See, e.g., In re Am. Airlines, Inc., Privacy Litig.*, No. 3:04MD-1627-D, 2005 WL 3323028, at *3–4 (N.D. Tex. Dec. 7, 2005) (dismissing action and concluding that the plaintiffs’ breach of contract claim as third-party beneficiaries is preempted because they ‘seek to modify the contract to press a right that is external to its terms’) . . . ; *A.C.L. Computs. & Software, Inc. v. Fed. Express Corp.*, No. 15-cv-04202-HSG, 2016 WL 946127, at *4 (N.D. Cal. Mar. 14, 2016) (dismissing a similar claim because it would require ‘applying various state agency and third-party beneficiary laws to airline contracts . . . creating a “state regulatory patchwork” in direct contravention of Congress’s intent when it enacted the ADA’) . . .”).

²³⁵ *Seals v. Delta Air Lines, Inc.*, 924 F. Supp. 854, 859 (E.D. Tenn. 1996).

²³⁶ *Haft v. Dart Grp. Corp.*, 841 F. Supp. 549, 573 (D. Del. 1993) (citing *Affiliated Enters., Inc. v. Waller*, 5 A.2d 257, 259 (Del. Super. Ct. 1939)).

²³⁷ *First Mortg. Co. v. Fed. Leasing Corp.*, 456 A.2d 794, 795–96 (Del. 1982).

²³⁸ *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 224 (Tex. App.—Fort Worth 2009, pet. denied) (applying Texas law).

²³⁹ *Id.*

sory.²⁴⁰ It has been noted that “[t]he existence of a written contract presumes consideration for its execution.”²⁴¹

As with contract formation principles, disputes related to consideration in airline–passenger contracts have not generally invoked preemption concerns. Since consideration is a necessary element for a binding agreement, it is not deemed to enlarge upon or intrude into the self-imposed obligation. At least one court, however, has held a claim for breach of contract based on a failure of consideration to be preempted to the extent the claimants sought revision or invalidation of the governing COC.²⁴²

One area where lack of consideration contentions arise is airline frequent flyer programs. The assertion is that since the airline reserves the right to amend or modify the terms, the agreement is illusory and thus not enforceable.²⁴³ This has been rejected by a number of courts,²⁴⁴ including the Ninth Circuit,²⁴⁵ noting that “[t]he test for mutuality is applied and determined” at the time of enforcement with consideration established by part performance.²⁴⁶ Consequently, even assuming it to be illusory at time of formation, if the airline does issue tickets in exchange for reward points, it has partially performed and provided consideration.²⁴⁷ Further, the terms of the programs advise that the participants have no vested rights and that the airline has the right to modify.²⁴⁸

²⁴⁰ *But see* Alaska Airlines, Inc. v. Carey, 395 F. App’x 476, 479 (9th Cir. 2010) (holding that “Alaska Airlines’s unilateral right to modify the terms of the Mileage Plan do[es] not make the plan an illusory contract”).

²⁴¹ *Frequent Flyer Depot*, 281 S.W.3d at 224.

²⁴² Martin v. United Airlines, Inc., No. CIV-16-1042-F, 2017 WL 3687347, at *14 (W.D. Okla. Apr. 18, 2017).

²⁴³ *Frequent Flyer Depot*, 281 S.W.3d at 224.

²⁴⁴ *Id.* at 225; Mayer v. United Air Lines, Inc., No. A-2868-09T3, 2010 WL 4570206, at *10–11 (N.J. Super. Ct. App. Div. Nov. 15, 2010) (upholding the right of an airline to unilaterally change the terms of its mileage program); Monzingo v. Alaska Air Grp., Inc., 12 P.3d 655, 661–62 (Alaska 2005); Grossman v. USAir, Inc., No. 0109, 1997 WL 1433744, at *9, *12 (Pa. Com. Pl. Apr. 16, 1997); Vine v. Cont’l Airlines, No. CV95-0375030S, 1996 WL 168049, at *2, *13 (Conn. Super. Ct. Mar. 4, 1996).

²⁴⁵ *Carey*, 395 F. App’x at 479 (holding that “Alaska Airlines’s unilateral right to modify the terms of the Mileage Plan do[es] not make the plan an illusory contract”).

²⁴⁶ *Frequent Flyer Depot*, 281 S.W.3d at 224–25.

²⁴⁷ *Id.*

²⁴⁸ *See* Mayer, 2010 WL 4570206, at *10–11; *Monzingo*, 12 P.3d at 661.

B. CONTRACT INTERPRETATION

Society confers broad power upon contracting parties to shape and define the terms of their relationship and undertaking. Not surprisingly, however, disputes over the meaning and scope of contracts has long been, and continues to be, a primary subject of contractual disputes. As to the airline–customer relationship, COCs, frequent flier programs, and other related programs that constitute the governing contract are drafted entirely by the airlines with deliberate care and detail. Other more specialized agreements or those reached in more individualized settings are less precise. The result is that disputes over the meaning of many agreements or programs in the airline–passenger context are not prevalent, although they do arise.

The common law rules pertaining to interpretation are numerous. They include the myriad of rules and maxims as to construction such as *expressio unius est exclusio alterius* (“the expression of one thing is the exclusion of another”);²⁴⁹ *ejusdem generis* (“of the same kind”);²⁵⁰ *contra proferentem* (“against the profferor”);²⁵¹ the rule against surplusage;²⁵² and favoring specific terms over general terms.²⁵³ They also include those rules designed to identify the subject matter to be interpreted such as the parol evidence rule;²⁵⁴ integration;²⁵⁵ and merger;²⁵⁶ as well as the principles of contractual ambiguity;²⁵⁷ course of dealing;²⁵⁸ and custom and usage.²⁵⁹

1. *Ambiguity and Parol Evidence*

Ambiguity is a central contractual tenet and exists when a term of the contract, viewed objectively, could be interpreted in

²⁴⁹ 73 AM. JUR. 2d *Statutes* § 120 (2021).

²⁵⁰ WILLISTON, *supra* note 16, ch. 11, § 32:10.

²⁵¹ *Id.* § 32:12; *see, e.g.*, Rudolph v. United Airlines Holdings, Inc., No. 20-cv-2142, 2021 WL 534669 (N.D. Ill. Feb. 12, 2021) (interpreting COC against airline drafter given lack of clarity between force majeure event provision and schedule change and irregular operation provisions as applied to COVID-19 related cancellation and refund dispute).

²⁵² 17A C.J.S. *Contracts* § 435 (2021).

²⁵³ 82 C.J.S. *Statutes* § 482 (2021).

²⁵⁴ WILLISTON, *supra* note 16, ch. 11, § 33:14.

²⁵⁵ *Id.* § 33:23.

²⁵⁶ *Id.*

²⁵⁷ *Id.* § 30:5.

²⁵⁸ 67 AM. JUR. 2d *Sales* § 219.

²⁵⁹ *Id.*

more than one way.²⁶⁰ Ambiguity opens the door for reliance upon extrinsic evidence, such as parol evidence,²⁶¹ course of dealing,²⁶² and custom and usage.²⁶³ There is a split of authority

²⁶⁰ *Horwitz v. Weil*, 569 S.E.2d 515, 516 (Ga. 2002) (“Ambiguity in a contract is defined as duplicity, indistinctness or an uncertainty of meaning or expression.”); *Topps Co. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 68 (2d Cir. 2008) (“Ambiguity . . . is defined in terms of whether a reasonably intelligent person viewing the contract objectively could interpret the language in more than one way.”); *Capital City Mortg. Corp. v. Habana Vill. Art & Folklore, Inc.*, 747 A.2d 564, 567–68 (D.C. 2000) (internal citations and quotations omitted) (“[I]f, after applying the rules of contract interpretation, the terms still are not subject to one definite meaning, . . . the ambiguities [will] be construed strongly against the drafter.”).

²⁶¹ FARNSWORTH, *supra* note 176, at 306. “The fact that the parol evidence contradicts the language of the written document clearly does not bar its admissibility, since the gist of a reformation action is that the written document does not accurately reflect the parties’ agreement.” *Yeazel v. Burger King Corp.*, 526 S.E.2d 112, 117 (Ga. Ct. App. 1999). The parol evidence rule bars consideration of “any previous oral representations or agreements” that purport to “vary, modify, or supersede the written contract.” *Genesis Bio-Pharms., Inc. v. Chiron Corp.*, 27 F. App’x 94, 99 (3d Cir. 2002) (internal citations omitted) (applying New Jersey law). “The parol evidence rule applies to oral and written agreements made before the agreement is signed, not after. Parol evidence cannot be used to contradict express terms of the contract itself.” *Summit Transp. Corp v. Hess Energy Mktg.*, No. CV14-5119, 2019 WL 430863, at *9 (D.N.J. Feb. 1, 2019) (citing *Atl. N. Airlines v. Schwimmer*, 96 A.2d 652, 302 (N.J. 1953)). *See also Pace v. Honolulu Disposal Serv., Inc.*, 227 F.3d 1150, 1157–58 (9th Cir. 2000) (noting that the parol evidence rule “operates to bar extrinsic evidence of an agreement inconsistent with an unambiguous writing”).

²⁶² 67 AM. JUR. 2d *Sales* § 219.

²⁶³ Custom and usage has been defined as follows:

A “custom” is a practice which has by its universality and antiquity acquired the force and effect of law, in a particular place or country, in respect to the subject matter to which it relates.

* * *

The term “usage,” on the other hand, in its narrowest sense, denotes merely a uniform course of conduct in some particular business or calling, even though it is that of only one person.

* * *

Usage consists of a repetition of acts, and custom arises out of this repetition, so that while there may be usage without custom, there can be no custom without usage to accompany or proceed it.

Berman v. N.H. Jockey Club, Inc., 324 F. Supp. 1156, 1167 (D.N.H. 1971) (citing 21 AM. JUR. 2d *Customs and Usages* § 1 (1965)); WILLISTON, *supra* note 16, ch. 12, § 34:5 (“It is currently the widely accepted rule that custom and usage may be proved to show the intention of the parties to a written contract or other instrument in the use of phrases of a peculiar technical meaning which, when unexplained, are susceptible of two or more plain and reasonable constructions.”); *WH Smith Hotel Servs., Inc. v. Wendy’s Int’l, Inc.*, 25 F.3d 422, 429 (7th Cir. 1994) (“Evidence of custom and usage is relevant to the interpretation of ambiguous language in a contract.”). “Under New York law, evidence of custom and usage must establish that (1) the term in question has a fixed and invariable

over whether parol evidence can still be considered regarding intent as long as it does not vary or contradict the agreement,²⁶⁴ but considerable authority rejects the position that parol evidence cannot be considered absent ambiguity.²⁶⁵ Course of dealing and custom and usage are available when the agreement is ambiguous or when there is “the use of phrases of a peculiar technical meaning which, when unexplained, are susceptible of two or more plain and reasonable constructions.”²⁶⁶

Despite the rather slim line between self- and state-imposed obligations, parol evidence is largely an interpretative rule and thus viewed as simply ascertaining and declaring the meaning of the parties’ undertaking and not any imposition of state policy.²⁶⁷ As noted by the court in *Fondo v. Delta Air Lines, Inc.*:²⁶⁸

An overly expansive reading of *Wolens* might lead to the conclusion that reference to an external agreement that modifies the terms of a written contract is an impermissible reference to a source of law outside of the contract. However, ascertaining whether an oral agreement modified the terms of a written contract of carriage is part and parcel of identifying the parties’ intent and allows enforcement of the agreement according to those terms.²⁶⁹

The Second Circuit in *Cox v. Spirit Airlines, Inc.* also recently confirmed that state contract interpretation rules were not preempted by the ADA.²⁷⁰ There, the court reversed the district court’s dismissal of a class action breach of contract claim pertaining to carry-on luggage fees where the dismissal had been

usage and (2) that the party sought to be bound was aware of the custom, or that the custom’s existence was so notorious that it should have been aware of it.” WILLISTON, *supra* note 16, ch. 12, § 34:1.

²⁶⁴ TIMOTHY MURRAY, 6 CORBIN ON CONTRACTS § 25.2 (2020); Taylor v. State Farm Mut. Auto. Ins. Co., 854 P.2d 1134, 1138 (Ariz. 1993) (citing ARTHUR L. CORBIN, 3 CORBIN ON CONTRACTS §§ 576, 579 (1960); then citing RESTATEMENT (SECOND) OF CONTRACTS § 214(c) & cmt. b (1981)) (“Antecedent understandings and negotiations may be admissible . . . for purposes other than varying or contradicting a final agreement. Interpretation is one such purpose.”).

²⁶⁵ See State Farm Mut. Auto. Ins. Co. v. Wilson, 782 P.2d 727, 733 (Ariz. 1989) (recognizing the lack of logic in requiring ambiguity, which may be fortuitous, to prove the true terms of an agreement).

²⁶⁶ WILLISTON, *supra* note 16, ch. 12, § 34:5.

²⁶⁷ See *Fondo v. Delta Air Lines, Inc.*, No. 00 Civ. 2445, 2001 WL 604039, at *3 (S.D.N.Y. May 31, 2001), *aff’d in an unpublished opinion*, 25 F. App’x 82, 83 (2d Cir. 2002) (holding parol evidence inadmissible as terms of ticket are clear and unambiguous).

²⁶⁸ *Id.*

²⁶⁹ *Id.* at *2 n.3.

²⁷⁰ *Cox v. Spirit Airlines, Inc.*, 786 F. App’x 283, 285–86 (2d Cir. 2019).

based on ADA preemption.²⁷¹ In holding that preemption did not apply, the court found that the dispositive issue turned on state contract interpretation principles as to ambiguity and the airline's contractual obligations regarding the plaintiffs' carry-on items.²⁷²

As to merits application, courts have addressed claims pertaining to disputes over the meaning of airline passenger agreements, including conflict as to ambiguity and parol evidence—ambiguity has been found in certain contracts between airline and passengers, requiring a trial.²⁷³

For example, in *Han v. United Continental Holdings, Inc.*,²⁷⁴ the Seventh Circuit addressed the parties' reliance on various Illinois state rules of construction regarding a dispute over the meaning of an airline's frequent-flyer program.²⁷⁵ Participants in an airline's frequent-flyer program brought a putative class action alleging that the airline breached the contract when it credited the participants for mileage "determined by the distance between the airports, instead of the number of miles" ac-

²⁷¹ *Id.*

²⁷² *Id.*; see also *Hughes v. Sw. Airlines, Co.*, 409 F. Supp. 3d 653, 655–57 (N.D. Ill. 2019) (applying Texas common law contract principles to a breach of contract action against an airline based on its failure to carry or have sufficient deicer); *Robinson v. Am. Airlines, Inc.*, 743 F. App'x 233, 236 (10th Cir. 2018) (applying both Oklahoma and Texas common law contract rules to a claim of alleged failure to refund full ticket prices for unused tickets); *Alatortev v. JetBlue Airways, Inc.*, No. 3:17-cv-04859, 2018 WL 784434, at *12–13, *15 (N.D. Cal. Feb. 7, 2018) (applying California contract interpretation rules to claim as to dispute as to baggage fees); *Pratt v. Air Evac Lifeteam*, 329 F. Supp. 3d 722, 727, 731 (W.D. Mo. 2018) (holding membership agreement with medical emergency services carrier was ambiguous regarding coverage); *Gordon v. United Cont'l Holding, Inc.*, 73 F. Supp. 3d 472, 479 (D.N.J. 2014) (applying New Jersey contract construction rules as to the claim pertaining to alleged overcharging under frequent flyer program).

²⁷³ See *Pratt*, 329 F. Supp. 3d at 731 (holding membership agreement of emergency air evacuation carrier ambiguous as to the amounts collectible from a passenger outside of the applicable insurance); *Bombin v. Sw. Airlines Co.*, No. 5:20-cv-01883, 2021 WL 1174561, at *5–7 (E.D. Pa. Mar. 29, 2021) (finding COC did not unambiguously vest airline with discretion to select between credit and refund upon flight cancellation as irreconcilable conflict between COC and service commitment provision); *Rudolph v. United Airlines Holdings, Inc.*, No. 20-cv-2142, 2021 WL 534669, at *7 (N.D. Ill. Feb. 12, 2021) (finding COC ambiguous as to whether COVID-19 cancellation and refund dispute is governed by force majeure provision or by provisions governing schedule change and irregular operations).

²⁷⁴ 762 F.3d 598 (7th Cir. 2014).

²⁷⁵ *Id.* at 600–02.

tually flown.²⁷⁶ The airline acknowledged that the terms and conditions of the program did not specify how the amount of mileage credit for any particular flight would be determined, arguing that such silence precluded the court from adding new terms or conditions.²⁷⁷ The court found that because the program was silent on the method the airline used to calculate mileage credit, the contract was ambiguous concerning the meaning of mileage.²⁷⁸

The court in *Han* also found that the contract principle of construing the ambiguity against the drafter and the assertion that the claimants had a more reasonable interpretation—mileage means miles flown as opposed to distance between airports based on the airline’s web page—did not apply.²⁷⁹ The established common law interpretation principle that “Illinois will not interfere with the rights of two parties to contract with one another if they freely and knowingly enter into the agreement” was applied.²⁸⁰ Because the mileage program expressly gave the airline discretion to interpret the terms of that contract, any viable breach of contract claim required an allegation of unreasonable interpretation, and not simply that a term was ambiguous and supported by extrinsic evidence.²⁸¹ The court held, as a matter of law, that the airline’s interpretation of mileage as the total distance-in-miles between the airports was not unreasonable, defeating the claim.²⁸²

²⁷⁶ *Id.* at 600.

²⁷⁷ *Id.* at 601.

²⁷⁸ *Id.*; see also *Dilldine v. Am. Airlines, Inc.*, No. 3:18-cv-178, 2019 WL 3821789, at *5–6 (S.D. Ohio Aug. 15, 2019) (interpreting a provision in COC, which exempts from liability restriction for loss, damage, or delay of “wheelchairs or other assistive devices,” to plausibly include medications).

²⁷⁹ *Han*, 762 F.3d at 601–03.

²⁸⁰ *Id.* at 602 (internal quotations omitted).

²⁸¹ *Id.* at 602–03.

²⁸² *Id.* at 603 (“Rather, it is entirely reasonable for an airline to use a standard measure of miles for all flights between the same airports. It is quicker, cheaper, easier, and more predictable, and allows customers to readily determine the number of miles they will earn per flight. Conversely, *Han*’s interpretation of ‘mileage’ as the total distance flown to arrive at the destination airport would require an airline to track the exact miles for every flight flown and to credit customers[‘] accounts based on that information. While it might be possible for an airline to do that, that does not make United’s interpretation of mileage as the actual distance between airports an unreasonable interpretation of the contract. Nor does any of the language from other parts of United’s website render its interpretation of ‘mileage’ in the Mileage-Plus Program Rules unreasonable.”).

The Tenth Circuit, in *Robinson v. American Airlines, Inc.*,²⁸³ also recently addressed state contractual ambiguity principles as to a claim that the COC was breached when the airline failed to refund the full ticket price for unused nonrefundable tickets.²⁸⁴ Relying on the accepted understanding of ambiguity to require the contract to be “genuinely subject to more than one meaning after applying the pertinent rules of contract interpretation,”²⁸⁵ the court found no ambiguity because the COC made clear “that the tickets were nonrefundable and that the airline travel had to be taken within one year of purchase,” with the claimants otherwise conceding that they had not booked airline flights within the one year.²⁸⁶ As such, the court rejected the passenger claimant’s attempt to resort to the doctrine of reasonable expectations,²⁸⁷ wherein passengers argued that “in purchasing nonrefundable tickets, [the passengers] expected their airline tickets never to expire or to receive refunds if they did not use their nonrefundable tickets.”²⁸⁸ The court found the doctrine inapplicable when there was no ambiguity.²⁸⁹

More recently, the Ninth Circuit employed the contractual canons of interpreting the contract as a whole and construing it in a manner to prevent absurd results to reject a passenger’s

²⁸³ 743 F. App’x 233 (10th Cir 2018). Other states utilize “reasonable expectations” in ascertaining the parties’ intent even without ambiguity. *See, e.g.*, *Monzingo v. Alaska Air Grp., Inc.*, 112 P.3d 655, 664 (Alaska 2005) (holding that the plain language of mileage plan and reasonable expectations of parties indicated their intent to allow changes to the plan with reasonable notice); *Norville v. Carr-Gottstien Foods Co.*, 84 P.3d 996, 1004 (Alaska 2004) (stating that under Alaska law, “[t]he objective of contract interpretation is to determine . . . the reasonable expectations of the parties.”).

²⁸⁴ *Robinson*, 743 F. App’x at 234.

²⁸⁵ *Id.* at 236.

²⁸⁶ *Id.*; *see also* *Factor v. Mall Airways, Inc.*, No. 89 CIV. 0946, 1991 WL 196419, at *3 n.3 (S.D.N.Y. Sept. 23, 1991) (stating there was no significant ambiguity with the COC); *Martin v. United Airlines, Inc.*, 727 F. App’x 459, 462 (10th Cir. 2018) (finding no ambiguity in COC as to restrictions on a nonrefundable ticket).

²⁸⁷ Reasonable expectations is a legal principle wherein the provisions of a contract are to be interpreted according to what a reasonable person would interpret them to mean. *See* WILLISTON, *supra* note 16, ch. 16 § 49:20. It has been noted that it is applicable in adhesion contracts favoring the objectively reasonable expectations of the weaker party. *Id.* It is most readily recognized in the insurance policy context but has spilled over, according to some states, to contracts in general. *Id.*; *see also* *Monzingo*, 112 P.3d at 660, 664.

²⁸⁸ *Robinson*, 743 F. App’x at 237.

²⁸⁹ *Id.*

breach of contract claim.²⁹⁰ There, the passenger sought a refund of a \$25 baggage service fee after the baggage was delayed claiming that the airline breached the COC by not transporting the baggage on the same aircraft.²⁹¹ The passenger relied on the language in the COC, which provided that “[s]ubject to the restrictions set forth below, Carrier will check the baggage of a fare-paying Passenger for the flight on which the Passenger is traveling.”²⁹² The passenger argued this sentence “required that the baggage ultimately fly on the same aircraft as its owner in every instance.”²⁹³ The court made short work of the contention, finding that this language did not mandate such construction particularly because the language stated that the airline “must check the baggage ‘for’ the flight—not ‘on’ the flight.”²⁹⁴

As to parol evidence, courts have been reluctant to allow plaintiffs to resort to parol evidence, such as purported oral assurances of an airline agent, where it would contradict the terms of the ticket or COC.²⁹⁵ A common provision in a COC is a provision making clear that the terms of the COC cannot be orally modified by any agent or changed unless in writing.²⁹⁶ In *Fondo*,

²⁹⁰ *Alatortev v. JetBlue Airways Corp.*, 795 F. App’x 503, 504–05 (9th Cir. 2019).

²⁹¹ *Id.* at 504.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* On the issue of avoiding an absurd construction, the court stated: “But imposing such a duty would yield absurd outcomes, such as an automatic baggage fee refund whenever a bag precedes a passenger to his or her destination. JetBlue’s construction avoids these types of absurdities.” *Id.* at 505.

²⁹⁵ *See, e.g., Hanson v. Am. W. Airlines, Inc.*, 544 F. Supp. 2d 1038, 1043 (C.D. Cal. 2008) (finding agent’s promise that passenger’s bag would be sent to San Francisco for pick up did not bind the airline even though agent worked at the baggage claim station because the COC expressly stated that no employee could waive the conditions).

²⁹⁶ *Id.*; *Fondo v. Delta Air Lines, Inc.*, No. 00 Civ. 2445, 2001 WL 604039, at *7 (S.D.N.Y. May 31, 2001) (finding a breach of contract claim based on the oral assurance of an airline agent misleading a passenger into believing the ticket included a destination other than on the ticket was extrinsic to the ticket); *Clemente v. Phil. Airlines*, 614 F. Supp. 1196, 1199 (S.D.N.Y. 1985) (finding oral assurance by airline’s agent could not vary the express terms of the COC); *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168 (2d Cir.1997) (finding a round trip ticket was unambiguous as to final destination and could not be altered or varied by parol evidence); *Lippiello v. Am. Airlines, Inc.*, No. 18-ADCV-64WE, 2019 WL 6492379, at *3–5 (Mass. App. Div. Nov. 13, 2019) (holding that the implied covenant claim was not actionable because the claim was premised on alleged oral statement of an agent, where the COC provided that no agent or representative of airline can bind the company “by any statements or representation as to the dates or times of departure or arrival, or of the operation of any flight.”).

for instance, the passenger brought claims asserting that he believed he had purchased a ticket from New York to the Republic of Congo but was provided a ticket indicating that Cameroon was the destination; and, despite oral representations by an airline agent, he subsequently experienced a series of cancellations and never reached the Republic of Congo.²⁹⁷ The court found no viable breach of contract claim because the ticket supplemented by the applicable tariffs constituted the binding contract, and there was no dispute that the face of the ticket provided that it was a flight between New York and Cameroon, not the Republic of Congo.²⁹⁸ According to the court, “Because the ticket as accepted by Plaintiff objectively manifests the parties’ intent that he be flown to Cameroon, Plaintiff cannot offer parol evidence to vary its terms.”²⁹⁹

C. IMPLIED CONTRACTS AND TERMS

The law pertaining to contracts includes both contractual formation and certain terms by implication. An implied contract is “founded upon a meeting of the minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.”³⁰⁰ As to implied terms, the general rule is that where the contract has left matters open, a “court may imply terms either that are reasonable or that may be gathered from the subsequent course of performance.”³⁰¹

Recent cases addressing issues of ADA preemption and implied contracts have reached mixed results. Consistent with the contractual exception to preemption, resolution turns on whether, in fact, there is an implied contract and whether the claim seeks to enhance or enlarge the agreed upon obligation or merely enforce a voluntary undertaking. Stated differently,

²⁹⁷ *Fondo*, 2001 WL 604039, at *1–5.

²⁹⁸ *Id.* at *8.

²⁹⁹ *Id.*; see also *Migdelany v. Am. Airlines Corp.*, No. 11-CV-6405, 2013 WL 4403930, at *6–7 (W.D.N.Y. Aug. 15, 2013) (“Plaintiffs['] failure to confirm their itinerary prior to arriving at the airport in Buenos Aires does not constitute a breach of contract on the part of [the airline].”).

³⁰⁰ *Balt. & Ohio R.R. v. United States*, 261 U.S. 592, 597 (1923); *Popponeset Beach Ass’n v. Marchillo*, 658 N.E.2d 983, 987 (Mass. App. Ct. 1996) (“An implied-in-fact contract comes into being when, notwithstanding the absence of a written agreement or verbal agreement expressing mutual obligations, the conduct or relations of the parties imply the existence of a contract.”).

³⁰¹ *America’s Growth Capital, LLC v. PFIP, LLC*, 73 F. Supp. 3d 127, 150 (D. Mass. 2014); *Lawrence v. City of Cambridge*, 664 N.E.2d 1, 4 (Mass. 1996).

the issue becomes whether the implied term is “use[d] . . . ‘to effectuate the intentions of parties or to protect their reasonable expectations’ . . . [or] to ensure that a party does not ‘violate community standards of decency, fairness, or reasonableness.’”³⁰²

While an implied-in-fact contract will evade preemption if based on the parties’ voluntary undertaking, the existence of an implied contract is not an easy burden, especially given the express conditions and rights set out in the COC and tariffs.³⁰³ In *Schultz v. United Airlines, Inc.*, for example, the court found insufficient evidence of any implied contract as to timely delivery of baggage upon payment of a checked baggage fee.³⁰⁴ It noted that the COC governed the parties’ obligations with no evidence as to any distinct self-imposed undertaking.³⁰⁵ Neither the payment of the checked baggage fee nor the aspirational wording as to the baggage delivery on the website of the airline created any viable and independent implied contract.³⁰⁶

In *Hughes v. Southwest Airlines Co.*, the Seventh Circuit affirmed the dismissal of a passenger’s claim that the failure of the airline to have sufficient deicer constituted a breach of an implied term of the COC.³⁰⁷ The district court applied Texas common law, noting that Texas law disfavored the implication of terms into the parties’ bargain; that such terms are not to be implied for the purpose of making the contract “fair, wise, or just”; and that no implied terms can be imposed which contradict the express terms of the parties’ agreement.³⁰⁸ It found no basis in the COC to imply the airline would always have sufficient deicer to operate its flights.³⁰⁹ It also found that the COC expressly disclaimed implied terms.³¹⁰

³⁰² *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 286 (2014) (internal quotations omitted).

³⁰³ See, e.g., *Schultz v. United Airlines, Inc.*, 797 F. Supp. 2d 1103, 1107 (W.D. Wash. 2011).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*; see also *Alatortev v. JetBlue Airways, Inc.*, No. 3:17-cv-04859, 2018 WL 784434, at *5–6 (N.D. Ca. Feb. 7, 2018) (finding no express or implied contractual obligation to ensure timely delivery of baggage in airline’s COC statement in that it would “endeavor” for such delivery).

³⁰⁷ *Hughes v. Sw. Airlines Co.*, 961 F.3d 986, 987, 989 (7th Cir. 2020).

³⁰⁸ *Hughes v. Sw. Airlines Co.*, 409 F. Supp. 3d 653, 657 (N.D. Ill. 2019), *aff’d*, 961 F.3d 986 (7th Cir. 2020).

³⁰⁹ *Id.*

³¹⁰ *Id.* at 658.

More recently, a federal court held that New York’s contractual “prevention doctrine,” which prevents a party from relying on a condition precedent where it has been frustrated or prevented by the other party, was not preempted.³¹¹ The court readily acknowledged that the state-based contract claim pertaining to the failure to provide a refund for a COVID-19 cancellation was based on the implied contractual obligation of a party not to frustrate its counterparty’s ability to perform a condition precedent.³¹² The court found no preemption because the “prevention doctrine” was intended to effectuate the intention of the parties and not to “promote ‘community standards of decency, fairness, and reasonableness.’”³¹³

The Seventh Circuit essentially agreed, stating that since the airline did not breach its contract in canceling the flight, “it would be strange to hold that the circumstances underlying the cancellation somehow constituted a breach of an unstated contractual duty.”³¹⁴ Further, regarding the argument that de-icing planes should be considered an implicit term of the contract because it is a necessary condition for flying in cold climates, the court found that having sufficient deicer was not “so clearly within the contemplation of the parties” that it did not need to be expressed.³¹⁵ “To hold otherwise would be to implicitly add countless terms to airlines’ contracts of carriage; not only to ensure sufficient deicer, but adequate staff and fuel . . . luggage movers and space, and so on. It is not our place to rewrite contracts.”³¹⁶

A series of cases involving air ambulances and challenges to charges for transportation have also invoked disputes as to ADA preemption of implied contracts with somewhat mixed results. In *Scarlett v. Air Methods Corp.*, plaintiff patients argued that they entered into an implied contract with the air ambulance defendant when the air ambulance “transported them without specifying a price for the service, thereby implicitly agreeing to ‘a price to be determined by operation of law.’”³¹⁷ Plaintiffs argued that

³¹¹ *Ide v. Brit. Airways, PLC*, No. 20-CV-3542, 2021 WL 1164307, at *7 (S.D.N.Y. Mar. 26, 2021).

³¹² *Id.*

³¹³ *Id.* (quoting *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 286 (2014)).

³¹⁴ *Hughes*, 961 F.3d at 989.

³¹⁵ *Id.* at 990.

³¹⁶ *Id.*

³¹⁷ *Scarlett v. Air Methods Corp.*, No.16-cv-02723, 2018 WL 2322075, at *3 (D. Colo. May 22, 2018), *aff’d in part, rev’d in part and remanded*, 922 F.3d 1053 (10th Cir. 2019).

the request for the court to “supply the missing price term in their implied contract [was] merely a request to vindicate the parties’ understanding.”³¹⁸ The court disagreed.³¹⁹ It held that the claim was “based on ‘a state-imposed obligation,’ not ‘one . . . the parties [voluntarily] undertook.’”³²⁰ In so holding, the court rejected the contention that the request for the court to supply the missing price was “consistent with non-policy-based gap-filling” routinely undertaken in contract actions.³²¹ The court found that it was being asked “to first impose the existence of an agreement, and then to supply and enforce a reasonable price term according to each state’s law.”³²² The court viewed the “implied contract” claim as “better understood as a request that the [c]ourt invoke state law that implies an obligation to pay for a service in order to achieve equity and avoid injustice.”³²³ Since the claim was largely predicated on the lack of agreement, the claim sought to enlarge or enhance the parties’ voluntary undertaking, mandating ADA preemption.³²⁴

Other courts have reached similar results. In *Schneberger v. Air Evac EMS, Inc.*, the court found that the claimant’s request to have the court supply a reasonable price term was merely “masquerading as [a claim] for breach of contract” when it was in fact a request that the court impose a reasonable price term as determined by state policy.³²⁵ The court noted that if the claimants had been “simply attempting to enforce a specific term of the contract, their claims could proceed.”³²⁶ Similarly, in *Stout v. Med-Trans Corp.*,³²⁷ the court emphasized that “requiring the air carrier to accept less than the full amount of charges billed because of a policy-based inquiry—what’s a reasonable rate for air ambulance services?—necessarily imposes upon them a rate that ‘the state dictates’ rather than one that ‘the air carrier itself un-

³¹⁸ *Id.* at *7.

³¹⁹ *Id.*

³²⁰ *Id.* (internal quotations omitted) (quoting *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 286 (2014)).

³²¹ *Id.* at *8.

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ *Schneberger v. Air Evac EMS, Inc.*, No. CIV-16-843, 2017 WL 1026012, at *11–14 (W.D. Okla. Mar. 15, 2017).

³²⁶ *Id.* at *12.

³²⁷ 313 F. Supp. 3d 1289 (N.D. Fla. 2018).

dertakes’”³²⁸ and that “[i]mposing state-policy based rates is exactly what the ADA’s preemption provision seeks to prevent.”³²⁹

Other courts in similar circumstances have reached contrary conclusions and rejected ADA preemption. They have done so on the grounds that the allegations sufficiently alleged an implied-in-fact contract between the parties and thus was not subject to preemption.³³⁰ For instance, in *Medical Mutual of Ohio v. Air Evac EMS, Inc.*, an air ambulance provider brought a breach of an implied contract claim against an insurer which had failed to pay the air ambulance’s full rate for transportation of insured patients.³³¹ The court found that ADA preemption did not apply since the air ambulance provider alleged the existence of an implied-in-fact contract, based on the insurer’s “past conduct of paying [the provider’s] billed charges” and an alleged “definite price term . . . the full charges billed to [the insurer].”³³² Since the claim was not seeking to enforce a contract or determine a price term by operation of law, the claim met the contractual exception to preemption.³³³

In *Wagner v. Summit Air Ambulance, LLC*, the court went a step further.³³⁴ There, it was alleged that the defendant air ambulance company “knowingly incorporated a consideration term of ‘reasonable worth’ by their self-imposed and voluntary undertaking to omit a specific consideration term.”³³⁵ It was also alleged that the air ambulance company had previously transported numerous patients within the state, knew that a con-

³²⁸ *Id.* at 1298 (quoting *Schneberger*, 2017 WL 1026012, at *5). In *Stout*, the claimants alleged that the air ambulance service breached an implied contract by charging prices or rates that had no reasonable relationship to the services provided. *Id.* at 1296–97. It was argued that the air ambulance provider consciously elected not to disclose its rates and, as such, voluntarily entered an implied contract “with an undefined essential term that would have to be determined by a court if their rates ‘were excessively high and unreasonable.’” *Id.* at 1297.

³²⁹ *Id.* at 1298; see also *Dyer v. Air Methods Corp.*, No. 9:20-cv-2309, 2020 WL 7398711, at *24–28, *32 (D.S.C. Dec. 17, 2020); *Odell v. Critical Care Medflight*, No. 20-2060, 2020 WL 6939761, at *9, *16–18, *21–22 (D. Kan. Nov. 25, 2020) (following holding of *Scarlett*).

³³⁰ See *Med. Mut. of Ohio v. Air Evac EMS, Inc.*, 341 F. Supp. 3d 771, 781–83 (N.D. Ohio 2018); *Wagner v. Summit Air Ambulance, LLC*, No. CR-17-57-BU, 2017 WL 4855391, at *4–6 (D. Mont. Oct. 26, 2017) (citing *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33 (1994); then citing *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 288 (2014)).

³³¹ *Air Evac EMS*, 341 F. Supp. 3d at 774.

³³² *Id.* at 782–83.

³³³ *Id.* at 783.

³³⁴ See *Wagner*, 2017 WL 4855391, at *9.

³³⁵ *Id.* at *14.

tract was being formed, and opted not to specify the price term—an essential element of the contract—with the knowledge that state law imposes a reasonable rate absent a specified price.³³⁶ The court found the implied contract claim not to be preempted, emphasizing that “[n]othing in the ADA prohibits an air carrier from opting for a default term of consideration”³³⁷ and otherwise observing that the air carrier sought to “wield preemption as a cudgel to gain all the protections of a valid contract yet dodge liability for breach of contract claims by omitting essential terms.”³³⁸

1. Federal Regulations as Implied Terms

In *Wolens*, the Supreme Court noted that since the FAA “pre-supposes the vitality of contracts governing transportation by air carriers[,]” airlines are authorized to “incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage” to the extent allowed by the DOT.³³⁹ In many instances, principles of implied terms have been relied upon for the argument that applicable regulations are implicitly incorporated into the contract.³⁴⁰ This is notable as the federal regulations do not provide for a private right of action.³⁴¹ Given the broad scope of ADA preemption, use of and reliance upon federal regulations even under the auspices of a contract claim have resulted in conflict. The use, reliance, or incorporation of federal regulations makes the line between self-imposed obligations and external duties or enlargement potentially blurred. Courts have appeared to distinguish between those instances where the federal regulations are expressly incorporated and

³³⁶ *Id.* at *7–8, *14.

³³⁷ *Id.* at *9.

³³⁸ *Id.* at *11. The court in *Wagner* relied on the common law default rule of consideration under Montana law. *Id.* at *13–14. Specifically, under Montana law “‘the consideration must be so much money as the object of the contract is reasonably worth’ where a contract’s terms fail to specify consideration.” *Id.* (quoting MONT. CODE ANN. § 28-2-813).

³³⁹ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 230 (1995).

³⁴⁰ *See, e.g., Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36–37 (1st Cir. 2007).

³⁴¹ *Cavaliere v. Avior Airlines C.A.*, No. 17-cv-22010, 2019 WL 1102882, at *5 (S.D. Fla. Feb. 15, 2019) (holding that 14 C.F.R. § 253.5 does not create a private right of action); *Shrem v. Sw. Airlines Co.*, No. 15-CV-04567, 2017 WL 1478624, at *5–8 (N.D. Cal. Apr. 25, 2017) (dismissing the plaintiff’s breach of contract claim against an airline because no private right of action exists under 14 C.F.R. § 253).

those where they are not but are relied upon as being implied terms.³⁴²

Delta Air Lines, Inc. v. Black is an example of a breach of contract claim wherein the COC expressly incorporated federal regulations as terms of the parties' bargain but where the claim was otherwise still found to be preempted.³⁴³ There, a husband and wife purchased first-class tickets for a round-trip flight between Dallas and Las Vegas; however, prior to departure, they learned that while the husband had been assigned a first-class seat for both flights, the wife had not.³⁴⁴ The airline was unable to accommodate both passengers for two first-class seats because the seats had been sold. Instead of accepting various options offered by the airline, including coach seats on the same flight, the husband and his wife opted to charter a private jet to and from Las Vegas, subsequently bringing an action asserting, inter alia, breach of contract and seeking reimbursement for the cost of the chartered jet.³⁴⁵

The claimants relied upon the federal regulations governing "oversales," which had been expressly incorporated into the COC.³⁴⁶ These regulations require airlines to compensate any passenger involuntarily denied boarding due to an over-sold flight; however, a passenger is not required to accept this compensation.³⁴⁷ Rather, the passenger can instead "decline the payment and seek to recover damages in a court of law or in some other manner."³⁴⁸ The claimants argued that since the regulations were incorporated into the contract, they had a right to bring an action in court for damages, namely the cost of the chartered flight.³⁴⁹

The court found that the regulations were not applicable, as the passengers had not been denied boarding under the terms of the regulations because they were expressly offered other accommodations on the same flight and refused.³⁵⁰ The court went on to hold that the contractual claim being made was preempted because the claimants were seeking to modify the con-

³⁴² See, e.g., *Buck*, 476 F.3d at 36–37.

³⁴³ *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 755 (Tex. 2003).

³⁴⁴ *Id.* at 747.

³⁴⁵ *Id.* at 747–48.

³⁴⁶ *Id.* at 754–55 (citing 14 C.F.R. § 250.1–.9).

³⁴⁷ *Id.* at 754 (citing §§ 250.5, 250.9).

³⁴⁸ *Id.* (citing § 250.9).

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 755.

tract terms, i.e., the regulations incorporated into the contract, to allow the passengers to forego the federal regulatory remedies and proceed to seek damages in court.³⁵¹ According to the court, “Nothing in the contract entitles [the claimants] to the external remedy of reimbursement for the cost of a private chartered jet.”³⁵² At bottom, *Black* stands for the proposition that a breach of contract claim will be preempted where the claim seeks to enlarge the federal rights that were incorporated into the contract.³⁵³

While federal regulations may be expressly incorporated into the contract between passenger and airline and thus present a basis for a breach of contract action, courts have been reluctant to find that the parties “impliedly” incorporated such regulations into their bargain. For example, the First Circuit has rejected the argument that federal regulations can be deemed implied terms of the parties’ bargain and thus meet the contractual exception to preemption under *Wolens*.³⁵⁴

In *Buck v. American Airlines, Inc.*, purchasers of nonrefundable airline tickets that were never used brought an action against

³⁵¹ *Id.* The court held that there was no breach of the federal regulations (i.e., contract) as there was no denial of boarding as intended under the regulations. *Id.* Since the airline offered the wife another seat on the same flight, she had not been denied boarding. *Id.* Further, the court found that even if the wife was deemed to have been denied first-class boarding, there remained no valid claim under the regulations for “denied boarding compensation.” *Id.* The regulations expressly provided that denied boarding compensation did not have to be provided where the airline offers accommodation in another section of the aircraft at no charge. *Id.* (citing 14 C.F.R. § 250.6). As such, since the passengers were not entitled to denied boarding compensation, “they could not possibly decline this compensation and ‘seek to recover damages in a court of law.’” *Id.* (citing § 250.9).

³⁵² *Id.* According to the court:

The fact that federal regulations expressly address airline boarding procedures strengthens our conclusion that Black’s breach of contract claims resulting from Delta’s boarding and seating procedures are preempted by the ADA. To hold otherwise could create extensive multi-state litigation, launching inconsistent assaults on federal deregulation in the airline industry, every time an airline re-assigned a passenger’s seat.

Id. at 756.

³⁵³ *Id.* at 755; see also *Volodarskiy v. Delta Air Lines, Inc.*, 987 F. Supp. 2d 784, 793 (N.D. Ill. 2013); *In re Am. Airlines, Inc., Priv. Litig.*, 370 F. Supp. 2d 552, 565–66 (N.D. Tex. 2005) (holding that plaintiffs’ breach of contract claim was not preempted where airline promised “to be bound by its privacy policy except as required by law” because “the laws that [the airline] maintain[ed] [were] external to the contract [and were] expressly incorporated into it”).

³⁵⁴ *Buck v. Am. Airlines, Inc.*, 476 F.3d 29, 36–37 (1st Cir. 2007).

the airline seeking to recover various fees and taxes that had been collected as part of the original ticket prices.³⁵⁵ It was argued that ADA preemption did not apply because the contract claim was premised on various federal regulations and particularly “federal regulatory guidelines relating to the disclosure of terms in airline contracts[,]” which were contended to constitute “federally mandated terms of their air travel contracts.”³⁵⁶ The argument was rejected on the grounds that the ADA does not provide for a private right of action and that there is a marked difference between regulations that are expressly incorporated into the parties’ contract and those that are claimed to be impliedly incorporated.³⁵⁷ According to the court, “construing all federal regulations touching upon air travel as automatically incorporated into every airline’s contracts of carriage would allow litigants freely to skirt the implied right of action doctrine.”³⁵⁸ Courts have held similarly where the contract claim is premised on allegations that the airline violated foreign laws that were implicitly incorporated into the contract.³⁵⁹

³⁵⁵ *Id.* at 31.

³⁵⁶ *Id.* at 36. The claimants relied upon 14 C.F.R. § 253.7, a federal regulation “prohibiting the imposition of monetary penalties without clear notice.” *Id.*

³⁵⁷ *Id.* at 37–38. The First Circuit emphasized, “[W]e do not think it ‘inexplicable’ that Congress might view certain regulations as sufficiently important to warrant their promulgation, yet ‘not sufficiently important to permit private enforcement in any court.’” *Id.*; see also *Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 525 (5th Cir. 2002) (stating that permitting a private litigant to bring a claim that relies upon 14 C.F.R. § 254.4 would “circumvent the conclusion that the ADA, and therefore the regulations enacted pursuant to it, creates no private right of action”).

³⁵⁸ *Buck*, 476 F.3d at 37. According to the First Circuit:

At bottom, the plaintiffs would have us believe that the implied right of action doctrine contains a gaping aperture that allows federal regulations, promulgated pursuant to a statute that creates no right of private enforcement, to be privately enforced through state-law mechanisms. We cannot imagine that the Supreme Court, which has devoted nearly three decades to cabining the implied right of action doctrine, would approve so vagarious a course.

Id. (internal citations omitted); see also *G.S. Rasmussen & Assocs., Inc. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 901–02 (9th Cir. 1992) (holding there is no implied private right of action under the Federal Aviation Act); *Casas*, 304 F.3d at 525 (holding that there is no private right of action under the ADA).

³⁵⁹ See, e.g., *Daversa-Evdyriadis v. Norwegian Air Shuttle ASA*, No. EDCV 20-767, 2020 WL 5625740, at *9 (C.D. Cal. Sept. 17, 2020) (agreeing with majority of decisions holding that “boilerplate contractual language guaranteeing compliance with international or domestic aviation laws does not incorporate extraneous law into the terms of an airfare contract”); *Onoh v. Nw. Airlines, Inc.*, 613 F.3d 596, 600–01 (5th Cir. 2010) (preempting claim premised on violations of Dutch law, which plaintiffs alleged was implicitly incorporated in contract by ge-

Another category of cases raising the issue of preemption based on federal law are those breach of contract actions in which the airline's defense is premised on federal law. Two examples of courts addressing this presentation are *Smith v. Comair, Inc.*,³⁶⁰ and *Aloha Airlines, Inc. v. Mesa Air Group, Inc.*³⁶¹

In *Smith*, the court held that a breach of contract claim based on a refusal to board was preempted when the airline's defense relied upon a federal statute and related law allowing broad discretion for such actions if "inimical to safety."³⁶² According to the court, "Because [the airline] invokes defenses provided by federal law, [the claimant's] contract claim can only be adjudicated by reference to law and policies external to the parties' bargain and, therefore, is preempted under the ADA."³⁶³

In *Aloha Airlines*, the opposite conclusion was reached on different facts.³⁶⁴ Specifically, two airlines entered into negotiations about potential investment by one into the other, which was in bankruptcy, agreeing to certain confidentiality agreements.³⁶⁵ An action ensued alleging breach of the confidentiality agreements after the defendant airline began offering below-cost flights over five years with the defendant asserting preemption based on the following "federal" defenses: (1) 49 U.S.C. § 40101(a)(13) permits the airline to enter the market in public interest, and (2) 14 C.F.R. § 253.7 permits price changes upon compliance with notice requirements.³⁶⁶ The court rejected the preemption argument finding that the federal-based defenses

neric obligation to comply with applicable laws); *McMullen v. Delta Air Lines, Inc.*, No. 08-1523, 2008 WL 4449587, at *2-3, *8-11 (N.D. Cal. Sept. 30, 2008) (preempting contract claim premised on implicit incorporation of Mexican law).

³⁶⁰ 134 F.3d 254, 258-59 (4th Cir. 1998).

³⁶¹ No. 07-00007, 2007 WL 842064, at *16-17 (D. Haw. Mar. 19, 2007).

³⁶² *Smith*, 134 F.3d at 258 (citing 49 U.S.C. § 44902(b) ("Permissive refusal. Subject to regulations of the Administrator . . . an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.")). See also *Lu v. AirTran Airways, Inc.*, 631 F. App'x 657, 661-62 (11th Cir. 2015) (holding that since claims related to removal from airline and propriety of such under 49 U.S.C. § 44902(b), they were preempted).

³⁶³ *Smith*, 134 F.3d at 258. As noted by the court: "If passengers could challenge airlines' boarding procedures under general contract claims alleging failure to transport, we would allow the fifty states to regulate an area of unique federal concern—airlines' boarding practices" and "[a]irlines might hesitate to refuse passage in cases of potential danger for fear of state law contract actions claiming refusal to transport." *Id.* at 258-59.

³⁶⁴ *Aloha Airlines*, 2007 WL 842064, at *3-5, *18.

³⁶⁵ *Id.* at *3.

³⁶⁶ *Id.* at *4-5, *16.

only indirectly related to the breach of contract claim.³⁶⁷ In so holding, it determined that to hold otherwise “would permit an airline to think of creative federal defenses external to the terms of the contract, in any contract case involving airlines, to invoke the ADA’s preemption provision and to avoid the *Wolens* breach of contract exception.”³⁶⁸ The concern was that such a result “would undermine the exception carved out in *Wolens*, as it would provide an avenue for airlines to argue preemption through invocation of federal defenses anytime that someone brings a contract claim against them.”³⁶⁹

2. *Covenant of Good Faith and Fair Dealing*

One of the most prominent and primary implied terms is the covenant of good faith and fair dealing. Virtually every state has recognized the covenant of good faith and fair dealing.³⁷⁰ There is some variance in meaning, with most holding that the obligation of good faith and fair dealing is inherent and applicable to every contract.³⁷¹ It is most readily defined as the implied obligation to refrain from engaging in conduct that has the effect of preventing the other party “from receiving the fruits of the bargain.”³⁷² It has been defined as an implied duty obligating the parties to the contract “to cooperate with each other so that each may obtain the full benefit of performance.”³⁷³ Its essence is the obligation of “good faith,” or the absence of “bad faith,”³⁷⁴ in the performance and enforcement of the contract and has

³⁶⁷ *Id.* at *18.

³⁶⁸ *Id.* at *18–19.

³⁶⁹ *Id.* at *19.

³⁷⁰ Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 377 (1986).

³⁷¹ *Kuroda v. SPJS Holdings, L.L.C.*, 971 A.2d 872, 888 (Del. Ch. 2009).

³⁷² *Id.*; see, e.g., *T.W. Nickerson, Inc. v. Fleet Nat’l Bank*, 924 N.E.2d 696, 704 (Mass. 2010) (quoting *Anthony’s Pier Four, Inc. v. HBC Assoc.*, 583 N.E.2d 806, 820 (Mass. 1991)). See also Tory A. Weigand, *The Duty of Good Faith and Fair Dealing in Commercial Contracts in Massachusetts*, 88 MASS. L. REV. 174, 176 (2004).

³⁷³ *Est. of Carter v. Carden*, 455 P.3d 197, 202 (Wash. Ct. App. 2019).

³⁷⁴ *Alexandru v. Strong*, 837 A.2d 875, 883 (Conn. App. Ct. 2004) (citing *Gupta v. New Britain Gen. Hosp.*, 687 A.2d 111 (1996)). “Bad faith” in this context is defined as implying “both ‘actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive’ . . . Bad faith means more than mere negligence; it involves a dishonest purpose.” *Habetz v. Condon*, 618 A.2d 501, 504 (Conn. 1992).

been noted to have particular applicability to discretionary rights set out in the contract.³⁷⁵ Some states tie the duty directly to “public policy”³⁷⁶ as well as community standards of “decency, fairness or reasonableness.”³⁷⁷ The duty is deemed to have limitations such as not being “free floating,”³⁷⁸ but only arising in connection with the terms of the contract and cannot be used to re-write the terms of the bargain.³⁷⁹

As the covenant of good faith and fair dealing is usually either an express or implied term of a contract, it poses ADA preemption issues in the aviation context. In *Northwest, Inc. v. Ginsberg*, the Supreme Court addressed the question of whether a claim for breach of the covenant of good faith and fair dealing under Minnesota law was preempted.³⁸⁰ The claimant asserted that the defendant airline breached the covenant of good faith and fair dealing when the airline revoked the customer’s membership in the airline’s frequent flyer program.³⁸¹ The termination was premised on a provision of the governing frequent flyer program granting the airline sole discretion to revoke a participant’s membership where the participant had “abused the pro-

³⁷⁵ See *McCleary v. Wells Fargo Sec., LLC*, 29 N.E.3d 1087, 1093 (Ill. App. Ct. 2015) (“Disputes involving the exercise of good faith arise when one party is given broad discretion in performing its obligations under the contract.”); *Bike Fashion Corp. v. Kramer*, 46 P.3d 431, 435 (Ariz. Ct. App. 2002) (noting “that a party can breach the implied covenant of good faith and fair dealing . . . by exercising express discretion in a way inconsistent with a party’s reasonable expectations”).

³⁷⁶ *PHH Mortg. Corp. v. Barker*, No. 15-19-01, 2019 WL 7049680, at *8 (Ohio Ct. App. Dec. 23, 2019) (“The duty of good faith and fair dealing by each of the parties in performance and enforcement of the contract are implied covenants dictated by public policy.”). See *Anthony’s Pier Four*, 583 N.E.2d at 820 (stating that the party’s use of a discretionary right as a pretext justified the judge’s finding of breach of good faith and fair dealing); *Robert & Ardis James Found. v. Meyers*, 48 N.E.3d 442, 451 (Mass. 2019) (stating that the breaching party “had taken an extreme and unwarranted view of his rights under the contract”).

³⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. L. INST. 1981); *Tanzer v. MyWebGrocer, Inc.*, 203 A.3d 1186, 1199 (Vt. 2018).

³⁷⁸ *Badgett v. Sec. State Bank*, 807 P.2d 356, 360 (Wash. 1991).

³⁷⁹ *Clement v. Farmers Ins. Exch.*, 766 P.2d 768, 770 (Idaho 1988) (explaining an implied covenant of good faith and fair dealing cannot override an express provision in a contract). The covenant of good faith and fair dealing can be expressly set out in the parties’ contract or be implied. *Id.* While some courts treat the covenant as a matter of tort, others have recognized the doctrine as a means to effectuate the intentions of the parties or to otherwise protect contractual expectations. See Chutorian, *supra* note 370, at 377, 379–80.

³⁸⁰ *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 276 (2014).

³⁸¹ *Id.* at 278.

gram.”³⁸² Based on the Minnesota law, it was claimed that the revocation was without valid cause and was taken in contravention of “reasonable expectations.”³⁸³

Applying the *Wolens* preemption rule, the Court stated that the issue turned on whether the claim related to rates, routes, and services, and if so, whether it enlarged the contractual obligations the claimant and the airline undertook.³⁸⁴ The claim was found to relate to both rates and services.³⁸⁵ The plaintiff sought reinstatement to the frequent flyer program and the benefits of flight upgrades and mileage credits.³⁸⁶ As such, the claim was found to have sufficient connection to rates given the mileage credits sought and that such credits would either eliminate or reduce the price of a particular ticket establishing the necessary nexus.³⁸⁷ It was also sufficiently connected to services, as the claim centered on “access to flights and to higher service categories.”³⁸⁸

As to whether the implied covenant claim was a voluntary undertaking or a state-imposed obligation, the Court examined Minnesota law and found the claim preempted because Minnesota rendered the covenant a state-imposed duty.³⁸⁹ Under Minnesota law, “parties cannot contract out of the covenant.”³⁹⁰ As such, “[w]hen the law of a State does not authorize parties to free themselves from the covenant, a breach of the covenant is pre-empted under the reasoning of *Wolens*.”³⁹¹ Notably, the Court also found as “an additional, independent basis” for preemption the fact that, under Minnesota law, the covenant is implied in “every contract” except for employment contracts.³⁹² Since state policy concerns were the reason the implied covenant was exempted from certain contracts and not others, preemption applied otherwise.³⁹³ According to the Court: “When the application of the implied covenant depends on state policy, a breach of the implied covenant claim cannot be viewed as sim-

³⁸² *Id.* at 279.

³⁸³ *Id.* at 278.

³⁸⁴ *Id.* at 284.

³⁸⁵ *Id.*

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 285–87.

³⁹⁰ *Id.* at 287.

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.*

ply an attempt to vindicate the parties' implicit understanding of the contract."³⁹⁴

Ginsberg is notable because the Court refused to impose a blanket preemption on all implied covenant claims.³⁹⁵ It relied on the fact that an airline can avoid any "patchwork of rules" and resulting frustration of the deregulation purpose of the ADA by the airline specifying in the parties' agreement that the covenant does not apply in those states which allow the parties to contract around the covenant.³⁹⁶ Since implied covenant claims will only escape preemption if state law allows the parties to contract around the covenant, airlines control their own destiny.

Absent an airline modifying its COC to eliminate implied covenant claims in those states that allow contractual parties to do so, whether such claims are preempted will have to be determined on a state-by-state basis. Yet, a careful parsing of *Ginsberg* reveals that an implied covenant claim will be preempted if: (1) the covenant imposed by the particular state's common law cannot be expressly disavowed; or (2) application of the covenant is based on state policy.³⁹⁷

Courts since *Ginsberg* have generally found implied covenant of good faith and fair dealing claims to be preempted.³⁹⁸ Certainly, in those states where the covenant of good faith and fair dealing is considered a tort and not contractual, or where the claim seeks to impose "community standards of decency," it will be preempted assuming it relates to prices, routes, or services.³⁹⁹

Even if contractual, preemption will likely be mandated—assuming sufficient relation to prices, routes, or services—as the doctrine is usually implied in all contracts and otherwise based on state policy. For instance, an Illinois appellate court recently

³⁹⁴ *Id.* at 288.

³⁹⁵ *See id.* at 288–89.

³⁹⁶ *Id.* at 288.

³⁹⁷ *Spadoni v. United Airlines, Inc.*, 47 N.E.3d 1152, 1164–65 (Ill. App. Ct. 2015).

³⁹⁸ *See, e.g., Shin v. Am. Airlines Grp. Inc.*, No. 17-CV-2234, 2017 WL 3316129, at *11 (E.D.N.Y. Aug. 3, 2017) (holding that New York does not allow disavowal of the implied covenant requiring preemption under the ADA).

³⁹⁹ *See Martin v. United Airlines, Inc.*, 727 F. App'x 459, 461 (10th Cir. 2018) (noting that the plaintiffs conceded that their breach of the implied covenant of good faith and dealing claim, a tort claim under Oklahoma law, was preempted); *Stout v. Med-Trans Corp.*, 313 F. Supp. 3d 1289, 1296–98 (N.D. Fla. 2018) (stating that under the Florida law, implied covenant imposes "community standards of decency" and was thus preempted by ADA).

held that even though there was no reported decision in Illinois addressing whether the implied covenant could be disavowed by the parties as a matter of contract, since Illinois law was clear that the covenant was implied in every contract, the covenant was not a voluntary undertaking, mandating preemption.⁴⁰⁰ Courts in both California and Massachusetts have likewise recently held that implied covenant claims are preempted, as they are implied in every contract.⁴⁰¹

The Eleventh Circuit held a passenger's claim for breach of contract or implied covenant to be preempted because the claim centered on the assertion that he was wrongfully removed from the aircraft.⁴⁰² Since such removal was regulated through Section 44902(b), controlling federal law and regulations were external to the parties' agreement, mandating preemption of the breach of contract claim.⁴⁰³ A similar result was also reached by the Fourth Circuit as to a passenger's breach of contract claim against the airline for its refusal to transport because the refusal was premised on applicable federal regulations.⁴⁰⁴

Other holdings regarding breach of implied covenant claims include: rejecting an implied covenant claim challenging an airline policy favoring more lucrative cargo over passenger baggage on the same aircraft because under Illinois law the covenant could not be disavowed;⁴⁰⁵ rejecting implied covenant claims for cancelled non-refundable tickets under either Oklahoma or Texas law because claimants sought to contravene express terms of the tickets;⁴⁰⁶ rejecting an implied covenant

⁴⁰⁰ *Spadoni*, 47 N.E.3d at 1159.

⁴⁰¹ *Pica v. Delta Air Lines, Inc.*, No. CV 18-2876, 2018 WL 5861362, at *6 (C.D. Cal. Sept. 18, 2018); *Lippiello v. Am. Airlines*, No. 18-ADCV-64WE, 2019 WL 6492379, at *3–5 (Mass. App. Div. Nov. 13, 2019).

⁴⁰² *Lu v. AirTran Airways, Inc.*, 631 F. App'x 657, 659, 662 (11th Cir. 2015).

⁴⁰³ *Id.* at 660–61.

⁴⁰⁴ *See Smith v. Comair, Inc.*, 134 F.3d 254, 258 (4th Cir. 1998) (holding that a contract claim for refusal to transport was preempted where the refusal decision was based on the passenger's failure to comply with FAA regulations, which implicated federal law external to the parties' agreement).

⁴⁰⁵ *Spadoni*, 47 N.E.3d at 1155–56, 1159–60 (stating implied covenant of good faith and fair dealing is imposed on every contracting party, regardless of the parties' true intent). The court in *Spadoni* also noted that, under Illinois law, the claimant had not and "could not allege[] that, absent application of the implied covenant of good faith and fair dealing, [the airline] violated the express terms of the Contract of Carriage where those terms gave [the airline] sole discretion over whether to transport passengers with their checked baggage on the same aircraft." *Id.* at 1156.

⁴⁰⁶ *Robinson v. Am. Airlines, Inc.*, 743 F. App'x 233, 234–35, 237–38 (10th Cir. 2018).

claim pertaining to lost baggage or failure to provide a refund fee as contrary to express terms of the COC;⁴⁰⁷ finding an implied covenant claim under Massachusetts law to be preempted because the claim related to flight cancellation and availability of alternative flights;⁴⁰⁸ rejecting an implied covenant claim arising from the airline's failure to warn regarding New York's gun laws after the plaintiff had declared his firearm to a ticket agent;⁴⁰⁹ and rejecting an implied covenant claim as to restrictions on non-refundable tickets.⁴¹⁰

D. CONTRACT ENFORCEMENT

Common law contract principles include enforcement or avoidance-related doctrines. These are addressed below.

1. Repudiation

Repudiation is a contractual doctrine that allows a party to repudiate its duty or obligations under the contract.⁴¹¹ Virtually all states allow the non-repudiating party to seek damages for total breach.⁴¹² There needs to be a clear and unequivocal refusal to perform.⁴¹³ Repudiation is a material breach and must touch on the entire performance, a material aspect, or the es-

⁴⁰⁷ *Alatortev v. JetBlue Airways, Inc.*, No. 3:17-cv-04859, 2018 WL 784434, at *6 (N.D. Cal. Feb. 7, 2018); *Schultz v. United Airlines, Inc.*, 797 F. Supp. 2d 1103, 1106–07 (W.D. Wash. 2011).

⁴⁰⁸ *Lippiello v. Am. Airlines, Inc.*, No. 18-ADCV-64WE, 2019 WL 6492379, at *3–5 (Mass. App. Div. Nov. 13, 2019); *see also Blackner v. Cont'l Airlines, Inc.*, 709 A.2d 258, 259–60 (N.J. Super. Ct. App. Div. 1998) (finding preemption where the appellant argued that a surcharge to replace a lost ticket violated the implied covenant of good faith and fair dealing because the contract actually authorized such surcharges).

⁴⁰⁹ *Benedetto v. Delta Air Lines, Inc.*, 917 F. Supp. 2d 976, 979, 984 (D.S.D. 2013); *see also A.I.B. Express, Inc. v. FedEx Corp.*, 358 F. Supp. 2d 239, 253 (S.D.N.Y. 2004) (preempting a breach of implied covenant of good faith and fair dealing claim premised on the contract being purportedly modified by the New York state law).

⁴¹⁰ *Martin v. United Airlines, Inc.*, 727 F. App'x 459, 463 (10th Cir. 2018).

⁴¹¹ *Thermo Electron Corp. v. Schiavone Constr. Co.*, 958 F.2d 1158, 1164 (1st Cir. 1992); *see also Rudolph v. United Airlines Holding, Inc.*, 20-cv-2142, 2021 WL 534669, at *8 (N.D. Ill. Feb. 12, 2021).

⁴¹² Massachusetts may be the only state that does not recognize anticipatory repudiation. *Daniels v. Newton*, 114 Mass. 530, 530–33, 541 (Mass. 1874); *K.G.M. Custom Homes, Inc. v. Prosky*, 10 N.E.3d 117, 123 (Mass. 2014) (quoting *Cavanagh v. Cavanagh*, 598 N.E.2d 677, 679 (Mass. App. Ct. 1992)). It does have a limited exception in that if the anticipatory repudiation is accompanied by an actual breach, then an action can be brought. *Cavanagh*, 598 N.E.2d at 679 n.6.

⁴¹³ WILLISTON, *supra* note 16, ch. 23, § 63:45.

sence of an agreement.⁴¹⁴ Since repudiation centers on the parties' obligations, it seems to impose state obligations beyond the terms of the contract.

In *Paradis v. Ghana Airways, Ltd.*, a passenger brought an action against an airline after it canceled a return flight. The passenger was anxious to return to the United States due to a commitment and searched for other flights.⁴¹⁵ He allegedly spoke with an agent from the airline about other flights and compensation for the canceled flight and the agent allegedly told him that "finding a way back to New York was 'your problem.'"⁴¹⁶ The claimant was concerned about being stranded if he waited until the next day with no guaranteed seats and used his remaining cash on accommodations.⁴¹⁷ The passenger booked a return flight with another airline.⁴¹⁸ He proceeded to bring a claim seeking reimbursement for the substitute flight.⁴¹⁹

The passenger claimed not only that the airline breached its contractual obligations but also that the carrier "repudiated any future performance when its agent referred to [the passenger's] travel complications as 'your problem.'"⁴²⁰ The court restated New York law as to repudiation and found that the agent's statement was not, in fact, a repudiation, but simply a refusal to reimburse the passenger for the full cost of procuring replacement tickets.⁴²¹ As such, the comment was made in response to a request as to an obligation the airline was not contractually obligated to provide.⁴²² According to the court, "The contract made no provision for reimbursement of the cost of more punctual, alternative transportation in the event of a flight cancellation."⁴²³ Thus, there was no repudiation as a matter of law.

More recently, a court applied Illinois state contract law to hold that a passenger failed to adequately allege airline repudiation as to a claim centering on the alleged failure to provide

⁴¹⁴ *Bucciero v. Drinkwater*, 434 N.E.2d 1315, 1318 (Mass. App. Ct. 1982).

⁴¹⁵ *Paradis v. Ghana Airways, Ltd.*, 348 F. Supp. 2d 106, 108–09 (S.D.N.Y. 2004).

⁴¹⁶ *Id.* at 109.

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.* at 112.

⁴²¹ *Id.* at 112–13.

⁴²² *Id.* at 113.

⁴²³ *Id.*

proper refunds following a cancellation due to COVID-19.⁴²⁴ The court determined that the airline's public announcements of cuts in flight schedules and plans for a decrease of domestic bookings in the weeks to come were "indefinite statements" and thus insufficient to constitute repudiation allowing the passenger to treat the contract as ended.⁴²⁵

2. *Fraudulent Inducement*

Fraudulent inducement "is a particular species of fraud" and is intended to shield a party from liability in a contract action when another party has procured the alleged contract wrongfully.⁴²⁶ It requires "a misrepresentation or omission that pertains to an essential term of a contract and the intent to convince a plaintiff to enter the contract."⁴²⁷ The existence of a contract and reasonable reliance is required.⁴²⁸ As with all fraud, it must be alleged with particularity.⁴²⁹

Fraudulent inducement is one of those principles Justice O'Connor had in mind in her dissent in *Wolens* regarding the difficulty of a clear distinction between self and state-imposed obligations.⁴³⁰ Courts have proceeded to resolve the issue by examining how the inducement assertion is being made, particularly whether it is being used in tort as a means for damages or a defense to the enforceability of the contract.⁴³¹

⁴²⁴ Rudolph v. United Airlines Holdings, Inc., No. 20-cv-2142, 2021 WL 534669, at *8 (N.D. Ill. Feb. 12, 2021).

⁴²⁵ *Id.*

⁴²⁶ Bohnsack v. Varco, L.P., 668 F.3d 262, 277 (5th Cir. 2012); United States v. Texarkana Trawlers, 846 F.2d 297, 304 (5th Cir. 1988).

⁴²⁷ *In re* U.S. Off. Prods. Co. Sec. Litig., 251 F. Supp. 2d 77, 101 (D.D.C. 2003); Bohnsack, 668 F.3d at 277.

⁴²⁸ Bohnsack, 668 F.3d at 277; IAS Servs. Grp., L.L.C. v. Jim Buckley & Assocs., Inc., 900 F.3d 640, 647 (5th Cir. 2018). The party seeking relief must show that "(1) the other party made a material misrepresentation, (2) the representation was false and was either known to be false when made or was made without knowledge of the truth, (3) the representation was intended to be and was relied upon by the injured party, and (4) the injury complained of was caused by the reliance." *Id.*

⁴²⁹ *See, e.g.*, W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc., No. 07-13421, 2008 WL 2845215, at *2 (11th Cir. July 24, 2008).

⁴³⁰ Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 241-42 (1995) (O'Connor, J., concurring in judgment in part and dissenting in part).

⁴³¹ *See, e.g.*, Lyn-Lea Travel Corp. v. Am. Airlines, Inc., 283 F.3d 282, 284-85 (5th Cir. 2002); United Airlines, Inc. v. Mesa Airlines, Inc., 219 F.3d 605, 611 (7th Cir. 2000).

In *Lyn-Lea Travel Corp. v. American Airlines, Inc.*, for example, a travel agency asserted various claims, including a fraudulent inducement defense against an airline as to a contract to use the airline's computer reservations system.⁴³² The court distinguished between when fraud is asserted as a tort and relied upon as a defense to the enforceability of a contract.⁴³³ When used as a defense, it was found to be one of the "core" contractual concepts because it related to mutual assent and did not reflect state policy seeking to expand or enlarge the parties' agreement.⁴³⁴ As such, it was found not to be preempted.⁴³⁵

The Seventh Circuit reached a similar result in an action between airlines regarding a code-sharing agreement.⁴³⁶ The defendant brought counterclaims in tort, including an assertion that it had been fraudulently induced to purchase airplanes and an extension of the code-sharing agreement.⁴³⁷ The court found that reliance on fraud in the inducement principles was not an attempt to enforce the parties' bargain but "a plea for the court to replace those bargains with something else."⁴³⁸ Crucial to the court's reasoning was the fact that fraudulent inducement was not being relied upon to simply cancel a contract but also to seek damages.⁴³⁹ The Eighth Circuit recently reaffirmed the position that fraud in the inducement is not preempted when asserted as a defense to a contract action.⁴⁴⁰

⁴³² *Lyn-Lea Travel*, 283 F.3d at 284–85.

⁴³³ *Id.* at 287–88.

⁴³⁴ *Id.* at 288–90.

⁴³⁵ *Id.* at 290.

⁴³⁶ *See United Airlines, Inc.*, 219 F.3d at 611.

⁴³⁷ *Id.* at 609.

⁴³⁸ *Id.* (citing RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* 82–85 (1998)) ("Doubtless the institution of contract depends on truthfulness; the staunchest defenders of private institutions and limited government believe that public bodies must enforce rules against force and fraud.").

⁴³⁹ *Id.* at 610; *see also* *State ex rel. Grupp v. DHL Express (USA), Inc.*, 970 N.E.2d 391, 393 (N.Y. 2012) (finding preemption under ADA and FAAAA of plaintiffs' fraudulent misrepresentation claims premised on alleged practices relating to improper imposition of fuel surcharges by DHL where plaintiffs did not sue for breach of contract but, instead, brought *qui tam* action under New York's False Claims Act).

⁴⁴⁰ *See Ferrell v. Air Evac EMS, Inc.*, 900 F.3d 602, 604, 609 (8th Cir. 2018) (noting that parties billed for emergency air services could defend breach of contract claim by carrier asserting no contract formed).

3. Unconscionability and Adhesion

Contracts of adhesion are generally considered “the product of gross inequality of bargaining power.”⁴⁴¹ Adhesion almost always involves standard form contracts on a “take-it-or-leave-it” basis with circumstances indicating unfairness and oppression.⁴⁴² It is a principle that is usually premised on public policy, including “fair play” and “represents a serious challenge to orthodox contract law.”⁴⁴³ It permits the party subject to the fraud to void the contract.⁴⁴⁴

Some courts divide unconscionability and adhesion into either substantive or procedural categories.⁴⁴⁵ Procedural unconscionability looks at the circumstances of the contract formation, particularly the parties’ respective bargaining power, while substantive unconscionability examines the terms of the agreement and whether it is so one-sided that they are fundamentally unfair or conscience-shocking.⁴⁴⁶ The nature of the agreement, possibility of unfair surprise, lack of notice, unequal bargaining power, and substantive unfairness are factors that influence such decisions.⁴⁴⁷

At bottom, adhesion contracts are enforceable but are generally subject to scrutiny by the courts, with some jurisdictions utilizing the doctrine of reasonable expectations in addition to standard contract interpretation tools in order to protect consumer expectations.⁴⁴⁸ Although primarily limited to contracts

⁴⁴¹ *Aviall, Inc. v. Ryder Sys., Inc.*, 913 F. Supp. 826, 831 (S.D.N.Y. 1996); *see also* *Shipwash v. United Airlines, Inc.*, 28 F. Supp. 3d 740, 755 (E.D. Tenn. 2014) (applying Tennessee law).

⁴⁴² *Aviall*, 913 F. Supp. at 831; *Shipwash*, 28 F. Supp. 3d at 755. In *Shipwash*, the court defined an adhesion contract under Tennessee law as “a standardized contract form offered to customers of goods and services on essentially a ‘take it or leave it’ basis, without affording the customer a realistic opportunity to bargain and under such conditions that the customer cannot obtain the desired product or service without acquiescing to the form of the contract. ‘[T]he essence of an adhesion contract is that bargaining positions and leverage enable one party to select and control risks assumed under the contract . . . [so] that the weaker party has no realistic choice as to its terms.’” *Id.* (internal citations omitted) (quoting *Buraczynski v. Eyring*, 919 S.W.2d 314, 320 (Tenn. 1996)).

⁴⁴³ *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 168, 169 (2d Cir. 1997).

⁴⁴⁴ *See* *Maxam v. Kucharczyk*, 29 N.Y.S.3d 683, 685 (N.Y. App. Div. 2016) (holding that the plaintiff failed to establish that the contract was invalid because she failed to state a cause of action for fraudulent inducement).

⁴⁴⁵ *See, e.g.*, *Blanchard v. Blanchard*, 148 A.3d 277, 282 (Me. 2016).

⁴⁴⁶ *Id.* at 282–83.

⁴⁴⁷ *See id.*

⁴⁴⁸ *See, e.g.*, *Woodruff v. Bretz, Inc.*, 218 P.3d 486, 491 (Mont. 2009).

of insurance,⁴⁴⁹ the doctrine of reasonable expectations has been utilized to invalidate clauses of a contract if the clause was outside of the reasonable, objective expectations of the person who did not draft the contract.⁴⁵⁰

While the related doctrine of unconscionability differs somewhat from state to state, it is generally understood to be a contract which “no person in his senses, not under delusion would make, on the one hand, and which no fair and honest [person] would accept on the other.”⁴⁵¹ It requires examination of the circumstances “at the time of the making of the contract, and in light of the general commercial background and commercial needs of a particular case, clauses are so one-sided as to oppress or unfairly surprise one of the parties.”⁴⁵² Unconscionability requires an “absence of meaningful choice” and “contractual terms which are unreasonably favorable to the other party.”⁴⁵³

In the airline–passenger context, COCs and frequent-flyer programs arguably meet the usual definitions of adhesion contracts and would otherwise be subject to attack based on unconscionability because they are unilaterally written and the product of unequal bargaining power.⁴⁵⁴ Despite seeming like state policy and thus triggering preemption, there is some recognition that unconscionability can be deemed a matter pertaining to contract formation and thus beyond the preemptive

⁴⁴⁹ Roger C. Henderson, *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 844–47 (1990) (advocating a focus on “the objectively determinable reasonable expectations of the insured” when interpreting reasonableness of adhesive terms of insurance policy).

⁴⁵⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. L. INST. 1981). Comment f provides: “Although customers typically adhere to standardized agreements and are bound by them without even appearing to know standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.” *Id.* § 211 cmt. f. Comment e provides further:

One who assents to standard contract terms normally assumes that others are doing likewise and that all who do so are on an equal footing. . . . [C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it. The result may be to give the advantage of a restrictive reading to some sophisticated customers who contracted with knowledge of an ambiguity or dispute.

Id. § 211 cmt. e.

⁴⁵¹ *Barnes v. Helfenbein*, 548 P.2d 1014, 1020 (Okla. 1976).

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ See Ann Morales Olazabal, Howard Marmorstein & Dan Sarel, *Frequent Flyer Programs: Empirically Assessing Consumers’ Reasonable Expectations*, 51 AM. BUS. L.J. 175, 221–22 (2014).

scope of the ADA.⁴⁵⁵ Justice O'Connor, in *Wolens* no less, noted that "a determination that a contract is 'unconscionable' may in fact be a determination that one party did not intend to agree to the terms of the contract" and thus is "far from being a purely 'policy-oriented' doctrine that courts impose over the will of the parties, instead demonstrates that state public policy cannot easily be separated from the methods by which courts are to decide what the parties 'intended.'"⁴⁵⁶ Despite Justice O'Connor's concern, most courts addressing the issue in the airline-passenger context have held that such assertions are preempted or otherwise inoperative.⁴⁵⁷

In *Shipwash v. United Airlines, Inc.*,⁴⁵⁸ for instance, a passenger claimed that the COC was unenforceable because the airline engaged in deceptive conduct by canceling his flight.⁴⁵⁹ The court, applying Tennessee common law, agreed that the COC was an adhesion contract, as it was "standardized" and did not allow any opportunity for bargaining by the passenger.⁴⁶⁰ Nonetheless, such contracts are not per se unenforceable, with the inquiry requiring a determination of whether "the terms of the contract are beyond the reasonable expectations of an ordinary person or oppressive or unconscionable."⁴⁶¹ The court went on to hold that while the COC limited the amount and manner in which damages could be sought, the terms were not "unconscionable or oppressive, but 'are valid and binding on passengers as part of the contract of carriage where . . . the passenger receives notice thereof either on or with the passenger's ticket.'"⁴⁶²

⁴⁵⁵ See *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O'Connor, J., concurring in judgment in part and dissenting in part).

⁴⁵⁶ *Id.* ("[P]rocedural unconscionability is broadly conceived to encompass not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power.").

⁴⁵⁷ See, e.g., *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 169 (2d Cir. 1997). The Second Circuit has identified certain factors to consider as to whether there is an unconscionable contract of adhesion which "include whether the 'coerced' party was on notice of the offending provision; whether the 'coercing' party achieved agreement by fraud or overreaching; and whether any alternatives existed for the 'coerced' party." *Id.*

⁴⁵⁸ 28 F. Supp. 3d 740 (E.D. Tenn. 2014).

⁴⁵⁹ *Id.* at 746-47.

⁴⁶⁰ *Id.* at 755.

⁴⁶¹ *Id.* (quoting *Webb v. First Tenn. Brokerage, Inc.*, No. E2012-00934, 2013 WL 3941782, at *7 (Tenn. Ct. App. June 18, 2013)).

⁴⁶² *Id.* at 756 (quoting *Wells v. Am. Airlines, Inc.*, No. 88 Civ. 5729, 1991 WL 79396, at *4 (S.D.N.Y. May 9, 1991)); see also *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 930 (5th Cir. 1997) ("Carriers are allowed to limit their liability in the contract of carriage.").

In *Klos v. Polskie Linie Lotnicze*, the Second Circuit, applying New York law, rejected a passenger's claim of adhesion.⁴⁶³ Surviving relatives of passengers who were killed on an international flight that crashed in Poland while en route to New York brought a wrongful death action against a Polish airline under the Warsaw Convention.⁴⁶⁴ Plaintiffs alleged that although the passengers had round-trip tickets, they intended to remain in the United States, making New York their "place of final destination" for purposes of establishing jurisdiction under the Warsaw Convention.⁴⁶⁵ The court rejected the contention, holding that there was no unconscionable contract of adhesion as, pursuant to Polish government policy, the "decedents were not free to purchase one-way tickets to New York" from the Polish airline.⁴⁶⁶ The passengers were therefore "on full notice" that they had to purchase round-trip tickets if they chose to travel to the United States.⁴⁶⁷ The court likewise found no evidence that the round-trip tickets were sold in circumstances of fraud or deceit, emphasizing that there were several transportation alternatives.⁴⁶⁸

More recently, a passenger asserted that the airline's frequent-flyer program was a contract of adhesion mandating that the terms of the program be construed against the airlines.⁴⁶⁹ Utilizing the Texas state law definition of adhesion, which requires a showing that "the forces of circumstance [were] so compelling that [her] free will was subverted to the point of its incapacity,"⁴⁷⁰ the court found no such circumstances, noting that the terms of the program gave the airline "the 'sole right to interpret and apply' the contract terms."⁴⁷¹

Courts have likewise rejected claims of unconscionability or adhesion-related to non-refundable tickets on the grounds that

⁴⁶³ *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 169 (2d Cir. 1997). The court remarked that the notion of adhesion "introduces the serpent of uncertainty into the Eden of contract enforcement." *Id.* at 168.

⁴⁶⁴ *Id.* at 166.

⁴⁶⁵ *Id.* at 167. "While all three decedents boarded the flight with round-trip tickets from Warsaw to New York, plaintiffs claim that not one of them intended to return to Warsaw. Instead, plaintiffs claim, decedents intended to flee Communist Poland and start a new life in the United States." *Id.* at 166.

⁴⁶⁶ *Id.* at 169.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Johnson v. United Airlines, Inc.*, No. 4:14-cv-00646, 2016 WL 3030158, at *8 (S.D. Tex. Apr. 20, 2016).

⁴⁷⁰ *Id.* (quoting *Industria Fotografica Interamericana S.A. de C.V. v. M.V. Jalisco*, 903 F. Supp. 18, 20 (S.D. Tex. 1995)).

⁴⁷¹ *Id.*

such doctrines seek to impose state-policy principles beyond the express terms of the tickets or contract.⁴⁷² Indeed, the Tenth Circuit has set the underlying rationale in rather emphatic terms:

Every day, thousands of travelers have a choice between purchasing a refundable ticket or a significantly cheaper non-refundable ticket from a variety of airlines. Few are out of their senses or delusional. Contracts made on competitive markets are seldom unconscionable. Although the market for air travel is not a model of perfect competition, the commercial context here also argues against finding unconscionability. Airlines can compete against each other, and an airline could certainly obtain a competitive advantage in obtaining customers by making all tickets fully refundable or, as some do, by reducing the burden of exchanging the ticket, but the cost to an airline of doing so may constrain such an effort. Further, there is certainly no procedural unfairness present here. Airlines are hardly oppressive or coercive in offering travelers the choice of cheaper non-refundable tickets. And we see nothing morally reprehensible or exploitive in the ultimate contract—a contract that is pervasive in modern society. In short, the terms of [the airline’s] nonrefundable tickets do not confront travelers with an absence of choice or unfair surprise and are not oppressively one-sided in light of commercial realities.⁴⁷³

Notably, it has been held that when state contract law, or other law, precludes the limiting of an otherwise applicable statute of limitations by contract as part of a standardized agreement, the law would be preempted.⁴⁷⁴ In *Covino v. Spirit Airlines Inc.*,⁴⁷⁵ a federal district court in Massachusetts noted that both Florida⁴⁷⁶ and Massachusetts⁴⁷⁷ law invalidate any contractual reduction in a limitations period; however, since such reductions

⁴⁷² See *Martin v. United Airlines, Inc.*, 727 F. App’x 459, 464 (10th Cir. 2018); *Robinson v. Am. Airlines, Inc.*, 743 F. App’x 233, 238 (10th Cir. 2018); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901, 905 (Wash. Ct. App. 2000); *Tanen v. Sw. Airlines Co.*, 114 Cal. Rptr. 3d 743, 744 (Cal. Ct. App. 2000); *Ragonese v. Rosenfeld*, 722 A.2d 991, 992 (N.J. Super. Ct. Law Div. 1998) (noting customer’s unconscionability claim in connection with failure to deliver ticket at boarding gate).

⁴⁷³ *Martin*, 727 F. App’x at 463–64.

⁴⁷⁴ See, e.g., *Covino v. Spirit Airlines, Inc.*, 406 F. Supp. 3d 147, 153 (D. Mass. 2019).

⁴⁷⁵ *Id.*

⁴⁷⁶ See FLA. STAT. § 95.03 (2020) (“Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.”).

⁴⁷⁷ *Creative Playthings Franchising, Corp. v. Reiser*, 978 N.E.2d 765, 770 (Mass. 2012) (“Any contractual reduction in a limitations period that is unreasonable or

of limitation periods are specifically sanctioned by federal regulation, any conflicting state law would be preempted.⁴⁷⁸ Accordingly, the six-month limitations period in the carrier's COC, properly incorporated through the airline's online "ticketless" booking system, was valid and enforceable.⁴⁷⁹

4. *Mistake, Impossibility, and Frustration of Purpose*

The doctrines of mistake, impossibility, and frustration of purpose are all largely equitable principles.⁴⁸⁰ They are devices that have evolved to allow a party to avoid a contractual obligation.⁴⁸¹ At their core, they recognize that there has been a failure of a basic assumption under the agreement.⁴⁸²

a. Mistake

The mistake doctrine in the law of contracts allows a party to seek reformation or rescission where there is an erroneous belief—"a belief that is not in accord with the facts."⁴⁸³ There is conflict among the states about whether the mistake doctrine encompasses both factual and legal mistakes.⁴⁸⁴ The mistake doctrine does not include misunderstandings over the meaning

not subject to negotiation by the parties, such as in a contract of adhesion, will be unenforceable.").

⁴⁷⁸ *Covino*, 406 F. Supp. 3d at 153–54; *see, e.g.*, *Miller v. Delta Air Lines, Inc.*, No. 4:11-CV-10099, 2012 WL 1155138, at *4 (S.D. Fla. Apr. 5, 2012) ("Plaintiff cannot use Florida law to expand Delta's undertaking in the Contract of Carriage by exposing it to claims made within five years, rather than the one-year expressly provided in the Contract of Carriage."); *O'Connell v. Paquet Cruises, Inc.*, No. 88-1481, 1989 WL 83205, at *1–2 (D. Mass. July 7, 1989) (enforcing a cruise ship's contractually shortened claim limitations period incorporated by reference in its COC).

⁴⁷⁹ *Covino*, 406 F. Supp. 3d at 154.

⁴⁸⁰ *See* 30A C.J.S. *Equity* § 42 (2021); WILLISTON, *supra* note 16, ch. 30, § 77:95.

⁴⁸¹ *See* 30A C.J.S. *Equity* § 42 (2021); WILLISTON, *supra* note 16, ch. 30, § 77:95.

⁴⁸² *See* RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. a (AM. L. INST. 1981).

⁴⁸³ RESTATEMENT (SECOND) OF CONTRACTS § 151; *see* *Schumacher v. Tyson Fresh Meats, Inc.*, 434 F. Supp. 2d 748, 754 (D.S.D. 2006) ("Under South Dakota law, where there has been a mutual mistake of fact, 'no contract results because there is no meeting of the minds.'").

⁴⁸⁴ *Compare* *Estate of Spry v. Greg & Ken, Inc.*, 749 N.E.2d 1269, 1275 (Ind. Ct. App. 2001) ("[R]eformations for mistakes are only available if they are mistakes of fact, not if they are mistakes of law."), *and* *High Knob Assocs. v. Douglas*, 457 S.E.2d 349, 355 (Va. 1995), *and* *Hous. Auth. of College Park v. Macro Hous., Inc.*, 340 A.2d 216, 219–220 (Md. 1975), *with* *Ahsan v. Homebridge Fin. Servs., Inc.*, 405 F. Supp. 3d 208, 215 (D. Mass. 2019) (explaining that under Massachusetts law, mistake can be one of fact or law). The R2d Contracts clarifies that it does "not draw the distinction that is sometimes made between 'fact' and 'law.'" RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. b. Rather, it "treat[s] the law in

of the contract or a poor prediction, but a mistake about the facts as they existed at the time the contract was made.⁴⁸⁵

Reformation and rescission are available, in some instances, for either a mutual or unilateral mistake; although, relief for a unilateral mistake is severely limited, with many jurisdictions precluding any relief at all unless the mistake is mutual.⁴⁸⁶ Unilateral mistake is usually only available where the non-mistaken party acted fraudulently in causing the mistaken party to hold that erroneous belief or where the non-mistaken party was or should have been aware that a mistake had been made but did nothing to correct the error.⁴⁸⁷

Relief for mistake usually requires mutuality, where the mistake-claiming party's assumption is shared by the other party.⁴⁸⁸ The Second Restatement of Contracts (R2d Contracts) has set out three requirements for relief based on mutual mistake: (1) the mistake goes "to a basic assumption on which the contract was made"; (2) the mistake "has a material effect on the agreed exchange of performances"; and (3) the mistake is one of which that party "bears the risk."⁴⁸⁹ The risk-bearing element includes when a party enters a contract with "only limited knowledge" and when it is deemed reasonable to place upon the party seeking relief.⁴⁹⁰

existence at the time of the making of the contract as part of the total state of facts at that time." *Id.*

⁴⁸⁵ *Sec. Alarm Fin. Enters., LP v. Citizens Bank N.A.*, No. 19 Civ. 2679, 2020 WL 408351, at *3 (S.D.N.Y. Jan. 23, 2020) (stating the reformation or rescission of a contract based on mutual mistake is not available where a party is seeking to avoid consequences of own negligence); *McMinnville v. Rhea*, 316 S.W.2d 46, 50 (Tenn. Ct. App. 1958) ("A mistake may be defined to be an act which would not have been done, or an omission which would not have occurred, but from ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition, and it must be mutual or fraudulent.").

⁴⁸⁶ *See Praxair, Inc. v. Hinshaw & Culbertson*, 235 F.3d 1028, 1034–35 (7th Cir. 2000); *Tony Downs Foods Co. v. United States*, 530 F.2d 367, 373 (Ct. Cl. 1976); *Anderson Bros. Corp. v. O'Meara*, 306 F.2d 672, 676–77 (5th Cir. 1962); *see also* *Mistretta v. Liberty Mut. Ins. Co.*, No. 87-5779, 1988 WL 88085, at *4 (E.D. Pa. Aug. 22, 1988) (under Pennsylvania law) ("If the mistake is not mutual, but unilateral, and not due to the fault of the party not mistaken, but to the negligence of the party acting under the mistake, no basis for relief has been afforded.").

⁴⁸⁷ *See Allen v. WestPoint–Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991); *see also* *AMEX Assurance Co. v. Caripides*, 316 F.3d 154, 162 (2d Cir. 2003) (finding that reformation for the purpose of unilateral mistake requires a finding of fraud).

⁴⁸⁸ 76 C.J.S. *Reformation of Instruments* § 39 (2021).

⁴⁸⁹ RESTATEMENT (SECOND) OF CONTRACT § 152.

⁴⁹⁰ *Id.* § 154.

Assertions of mistake are not particularly common in the airline-passenger context. As to preemption, the issue raised is whether invocation of a mistake constitutes the imposition of state policy or enhancement or is otherwise centered on the parties' self-imposed obligation. In one decision outside of the passenger-airline context, it was held that a common law mistake claim under New York law was preempted wherein it was claimed "[t]hat due to the Defendant's mistake and/or the plaintiffs' mistake in its failure to increase its liability for plaintiff's packages/shipments, plaintiff is entitled to reimbursements of the Declared Valuation Fees."⁴⁹¹ The affirmative claim of mistake was deemed separate from the breach of contract claim, and to the extent it imposed state common law obligations beyond the contract, it was preempted.⁴⁹²

As to the merits, when a mistake has been raised, it has been treated as a difficult burden consistent with application in other contexts. In *Cruz v. American Airlines, Inc.*, for instance, the court rejected the effort of passengers to rescind releases of airline liability for lost luggage based on mutual mistake.⁴⁹³ The court found that there was no erroneous meeting of the minds that would constitute a "mutual mistake" since the passenger claimants did not mistakenly believe liability was capped, particularly given the unsettled nature of the law, and that the asserted mistake concerning applicability of caps was a mistake of law, not fact.⁴⁹⁴

In *Benedetto v. Delta Air Lines, Inc.*, the passenger claimant brought various claims, including a breach of contract after he was arrested by Port Authority Police for illegal possession of a firearm.⁴⁹⁵ The passenger purchased round-trip tickets between South Dakota and New York, declared to the ticket agent that his firearm, licensed in South Dakota, was in his baggage, and was given a red tag to place on his carry-on.⁴⁹⁶ The ticket agent then notified the Port Authority Police in New York, who arrested him for illegal possession upon the flight's arrival.⁴⁹⁷

⁴⁹¹ *Gen. Refining Corp. v. Fed. Express Co.*, No. CV 11-2778, 2014 WL 3734534, at *1 (E.D.N.Y. July 28, 2014).

⁴⁹² *Id.* at *2.

⁴⁹³ *Cruz v. Am. Airlines*, 150 F. Supp. 2d 103, 117 (D.D.C. 2001).

⁴⁹⁴ *Id.* at 116–17.

⁴⁹⁵ *Benedetto v. Delta Air Lines, Inc.*, 917 F. Supp. 2d 976, 978–79 (D.S.D. 2013).

⁴⁹⁶ *Id.* at 979.

⁴⁹⁷ *Id.*

The passenger's breach of contract action alleged that the airline failed to transport him according to the terms of his ticket (round trip between South Dakota and New York), while the airline asserted the defense of impossibility.⁴⁹⁸ The airline contended there was a mutual assumption that declaring the firearm would be sufficient under New York law and that both parties were mistaken.⁴⁹⁹ The court held, without discovery or additional facts, that it was unable to determine whether the arrest of the passenger in New York was a "basic assumption" of the contract or was otherwise foreseeable.⁵⁰⁰

Other similar holdings include the rejection of a mistake contention where there was mistaken reliance on prior conversations with UPS agents,⁵⁰¹ and where a shipper's mistake in entering the value of furs being shipped in the zip code box⁵⁰² were both ruled unilateral, not mutual, mistakes.

In one recent decision, the court found that even assuming a binding agreement had been reached between the airline and the passenger, who asserted that clicking "Pay Now" during the online booking process formed a binding contract, the airline would still be entitled to invalidate the contract based on unilateral mistake.⁵⁰³ The passenger's assertion was that since the airline could not "eliminate the possibility of error in its computer code," resulting in the offering of a price no longer available, a binding contract arose.⁵⁰⁴ After finding the contention suspect, the court applied Florida common law as to unilateral mistake,⁵⁰⁵ holding that all of the elements were met, as (1) there

⁴⁹⁸ *Id.* at 982–83.

⁴⁹⁹ *See id.* at 983.

⁵⁰⁰ *Id.* (citing *A&S Transp. Co. v. Cnty. of Nassau*, 546 N.Y.S.2d 109, 111 (N.Y. App. Div. 1989)) ("Under New York law, the 'law of impossibility provides that performance of a contract will be excused if such performance is rendered impossible by intervening governmental activities, but only if those activities are unforeseeable.'").

⁵⁰¹ *Chafetz v. United Parcel Serv., Inc.*, 1992 Mass. App. Div. 67, at *5 (Mass. App. Div. 1992).

⁵⁰² *Hopper Furs, Inc. v. Emery Air Freight Corp.*, 749 F.2d 1261, 1265 (8th Cir. 1984); *Thomas v. Trans World Airlines, Inc.*, 457 F.2d 1053, 1056 (3d Cir. 1972) ("[W]hen no question of fraud, bad faith, or inequitable conduct is involved and the right to reform an instrument is based solely on a mistake, it is necessary that the mistake be mutual. . . . Mere failure to read an instrument, thus giving rise to plaintiff's unilateral mistake, is insufficient to obtain relief.").

⁵⁰³ *Schultz v. Am. Airlines, Inc.*, 449 F. Supp. 3d 1301, 1304, 1317 (S.D. Fla. 2020).

⁵⁰⁴ *Id.* at 1316–17.

⁵⁰⁵ *Id.* at 1317. Under Florida law, the doctrine of unilateral mistake allows the setting aside of an otherwise valid contract where (1) the mistake was not the

was no evidence suggesting that the airline's "operation of a robust online ticketing system that properly services millions of passengers every single year somehow constitutes an inexcusable lack of due care"; (2) since the airline never intended to offer the passenger the asserted fare, it "would be, almost by definition, inequitable"; and (3) neither the passenger nor the airlines "changed their positions in any meaningful way as a result of the alleged 'contract,'" given that the passenger "went on to purchase a ticket for the very same flight at the then-prevailing rate."⁵⁰⁶

b. Impossibility, Impracticability, and Frustration

The doctrines of impossibility, impracticability, and frustration are based on events after the formation of the contract. Impossibility, also called "commercial frustration,"⁵⁰⁷ is "equated with an inability to perform as promised due to intervening events, such as an act of state or destruction of the subject matter of the contract."⁵⁰⁸ It is generally understood to include three elements: (1) the unexpected occurrence of an intervening act; (2) that occurrence was of such a character that its non-occurrence was a basic assumption of the agreement of the parties; and (3) that occurrence made performance impracticable.⁵⁰⁹ "Impossibility of performance of a contract 'is determined by whether an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract.'"⁵¹⁰ It is a restrictive standard limited by some to the "destruction of the means of performance by an act of God, *vis major*, or by law."⁵¹¹ A party's

result of an inexcusable lack of due care; (2) denial of release from the contract would be inequitable; and (3) the other party to the contract has not so changed its position in reliance on the contract that rescission would be unconscionable. *Deprince v. Starboard Cruise Servs.*, 271 So. 3d 11, 20 (Fla. Dist. Ct. App. 2018).

⁵⁰⁶ *Schultz*, 449 F. Supp. 3d at 1317.

⁵⁰⁷ *Burlington N. & Santa Fe Ry. Co. v. Kansas City Southern Ry. Co.*, 45 F. Supp. 2d 847, 850 (D. Kan. 1999).

⁵⁰⁸ *United States v. Gen. Douglas MacArthur Senior Vill., Inc.*, 508 F.2d 377, 381 (2d Cir. 1974).

⁵⁰⁹ RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. L. INST. 1981).

⁵¹⁰ *In re Wood*, 35 So. 3d 507, 514 (Miss. 2010) (emphasis omitted) (quoting *Hendrick v. Green*, 618 So.2d 76, 79 (Miss. 1993)).

⁵¹¹ *407 E. 61st Garage v. Savoy Fifth Ave. Corp.*, 244 N.E.2d 37, 41 (N.Y. 1968); *see also VJK Prods., Inc. v. Friedman/Meyer Prods., Inc.*, 565 F. Supp. 916, 920 (S.D.N.Y. 1983) (stating the defense of impossibility of performance "is available only when the inability to perform results from an act of God, *vis major* or opera-

own economic hardship or motivation is not a basis for the impossibility defense.⁵¹²

Impracticability has been generally understood to apply when contractual performance “has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption of the contract when made.”⁵¹³

Impossibility and frustration have not arisen with much frequency in reported case law adjudicating disputes between passengers and airlines. Where it has been raised, it has been found to be preempted. In *Howell v. Alaska Airlines Inc.*, a putative class-action suit was brought as to nonrefundable tickets, asserting that the ticket contracts were void on the grounds of frustration of purpose, impossibility, or both.⁵¹⁴ The court found that ADA preemption applied as reliance on such state doctrines sought to invalidate the contract under state law and policy external to the agreement.⁵¹⁵ More recently, due to the cancellations resulting from COVID-19, courts have recognized plaintiff “frustration of purpose” claims regarding their efforts to obtain refunds.⁵¹⁶

Where impossibility and frustration have been addressed on the merits, courts have revealed the difficulty in prevailing on such grounds. In *Wein Air Alaska v. Bubbel*, for example, an airline entered into a contract with the plaintiff pilot during a strike.⁵¹⁷ The airline later sought to be excused from the contract on grounds of impossibility due to pressure and a recom-

tion of law”); *Goodyear Publ’g Co. v. Mundell*, 427 N.Y.S.2d 242, 243 (N.Y. App. Div. 1980).

⁵¹² 407 E. 61st Garage, 244 N.E.2d at 41. As the court explained, “where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused.” *Id.*

⁵¹³ U.C.C. § 2-615 (AM. L. INST. & UNIF. L. COMM’N 1977).

⁵¹⁴ *Howell v. Alaska Airlines, Inc.*, 994 P. 2d 901, 902, 905 (Wash. Ct. App. 2000).

⁵¹⁵ *Id.* at 905.

⁵¹⁶ *See, e.g., Ide v. Brit. Airways, PLC*, No. 20-CV-3542, 2021 WL 1164307, at *6 (S.D.N.Y. Mar. 26, 2021) (recognizing plaintiff’s allegation that airline removing refund claims forms from website and channeling refund requests to inadequate call center frustrated ability to get refunds and prevented reliance on condition precedent); *Herrera v. Cathay Pac. Airways, Ltd.*, No. 20-cv-03019, 2021 WL 673448, at *15 (N.D. Cal. Feb. 21, 2021) (recognizing plaintiff’s allegation that airline rendered it “functionally impossible to specifically request refunds [instead of] vouchers [or] coupons by inaccessibility of customer service, with wait times of more than two hours frequently reported’ and that [airline] ‘obscure[ed] [sic] passengers’ right to a monetary refund’”).

⁵¹⁷ *Wien Air Alaska v. Bubbel*, 723 P.2d 627, 628 (Alaska 1986).

mentation from a Presidential Emergency Board for the airline to settle the strike.⁵¹⁸ The claimant relied on R2d Contracts that where a duty is made impracticable by the need to comply with a governmental regulation or order, that order or regulation is a sufficient event to excuse performance.⁵¹⁹ The court rejected the contention on the grounds that it only applied when the government regulation or order was mandatory and not merely advisory.⁵²⁰ Other courts have likewise rejected such defenses.⁵²¹

5. *Material Breach and Rescission*

A material breach is a breach which is so substantial that it goes to the root of the parties' agreement, or otherwise "defeat[s] the purpose of the entire transaction," relieving the non-breaching party of its duty to perform under the contract."⁵²² It has been similarly defined as a breach of "an essential and inducing feature of the contract."⁵²³ The R2d Contracts has identi-

⁵¹⁸ *Id.* at 630.

⁵¹⁹ *Id.* The R2d Contracts provides: "If the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made." RESTATEMENT (SECOND) OF CONTRACTS § 264 (AM. L. INST. 1981).

⁵²⁰ *Bubbel*, 723 P.2d at 629.

⁵²¹ *Trans World Airlines, Inc. v. Skyline Air Parts, Inc.*, 193 A.2d 72, 74-75 (D.C. Cir. 1963) (rejecting an impossibility defense in breach of contract action against a seller of a good, as the seller "knew, or should have known," that it did not have the right to convey the goods); *Hunter v. Deutsche Lufthansa AG*, 863 F. Supp. 2d 190, 212 (E.D.N.Y. 2012) (dismissing a breach of contract claim alleging the airline's failure to deliver the plaintiff to the destination after the plaintiff was detained by authorities because the claim was more appropriately tied to a negligence claim); *Rivas Paniagua, Inc. v. World Airways, Inc.*, 673 F. Supp. 708, 714-15 (S.D.N.Y. 1987) (rejecting frustration of purposes defense in a breach of contract action by a publisher against an airline where the airline failed to give 120 days' notice of termination because the decision not to cancel all commercial flights was not unforeseeable or "cataclysmic" enough to warrant frustration of purpose of the contract).

⁵²² *Watermill Ventures, Ltd. v. Cappello Cap. Corp.*, 671 F. App'x 492, 493 (9th Cir. 2016) (quoting *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 895 (2d Cir. 1976)); *see also* *Fed. Deposit Ins. Corp. v. Air Fla. Sys., Inc.*, 822 F.2d 833, 840 (9th Cir. 1987) (finding breach is material if it goes to the essence of the agreement).

⁵²³ *Gamage v. Bd. of Regents of Nev. Sys. of Higher Educ.*, No. 2:12-cv-00290, 2014 WL 250245, at *12 (D. Nev. Jan. 21, 2014) (citing RESTATEMENT (SECOND) OF CONTRACTS § 237); *see also* *Mitchell v. Straith*, 698 P.2d 609, 612 (Wash. Ct. App. 1985) (stating that a material breach of contract is "often defined as one that substantially defeats the purpose of the contract"); *Specialized Com. Servs., Inc. v. Welsh*, No. 1-CA-CV-08-0181, 2009 WL 532603, at *3 (Ariz. Ct. App. Mar. 3, 2009) ("A generally accepted definition of *material* breach is a breach that goes to

fied circumstances to consider in determining whether a breach was material, including:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.⁵²⁴

Where there is a material breach, the non-breaching party may cancel the contract or otherwise be relieved of its obligations through rescission.⁵²⁵ Further, the materially breaching party is no longer permitted to enforce the contract.⁵²⁶

Rescission is considered an equitable remedy permitting a party to contract to undo or abrogate the agreement for a legally sufficient reason, thus returning the parties to their pre-contractual positions.⁵²⁷ It is a remedy granted at a court's discretion for the purpose of annulling a contract and rendering it as though it did not exist.⁵²⁸ Rescission has been found available where there is lack of consideration, a party has repudiated the agreement, there is a material breach, fraud, mistake, or other gross inequity.⁵²⁹

the essence of the contract, defeating the parties' purpose in entering the contract."); *Marion Fam. YMCA v. Hensel*, 897 N.E.2d 184, 186 (Ohio Ct. App. 2008) (defining a material breach as "a failure to do something that is so fundamental to a contract that the failure to perform defeats the essential purpose of the contract"); *Stansbury v. Fed. Home Loan Mortg. Corp.*, No. 7:16-cv-00516, 2017 WL 3821669, at *3 (W.D. Va. Aug. 31, 2017) ("The Supreme Court of Virginia has defined a 'material breach of contract' as 'a failure to do something that is so fundamental to the contract that the failure to perform the obligation defeats an essential purpose of the contract.'").

⁵²⁴ RESTATEMENT (SECOND) OF CONTRACTS § 241.

⁵²⁵ *Coughlin v. Trans World Airlines, Inc.*, 847 F.2d 1432, 1434 (9th Cir. 1988) (holding "that a material breach of an agreement warrants rescission").

⁵²⁶ *Horton v. Horton*, 487 S.E.2d 200, 203 (Va. 1997).

⁵²⁷ *Rescission*, BLACK'S LAW DICTIONARY 1499 (10th ed. 2014).

⁵²⁸ *Astra USA, Inc. v. Bildman*, 914 N.E.2d 36, 45 (Mass. 2009).

⁵²⁹ *See, e.g., Kennard v. Indianapolis Life Ins. Co.*, 420 F. Supp. 2d 601, 611 (Tex. 2006).

As to preemption, state law regarding material breach would not trigger preemption because it centers on the terms of the contract and whether the parties have honored the terms of their self-imposed undertaking. Nonetheless, whether a breach is deemed to be material may involve state policy. For instance, the distinction between a breach and material breach requires a judgment as to whether it is substantial and goes to the root of the undertaking.⁵³⁰ The factors for determining what is material include the extent of deprivation of the “reasonably expected” benefit and “forfeiture”; the likelihood of cure; and the “extent” the breach and behavior “comports with standards of good faith and fair dealing.”⁵³¹ These can be deemed state policy determinations which are only accentuated when the remedy for material breach allows for rescission and cancellation.

Given the equitable nature of rescission, it could be susceptible to being preempted because it is premised on state policies external to the agreement. Courts have not been uniform, but the determination appears to turn on the specific facts of each case.

In *Bugarin v. All Nippon Airways Co.*, the Northern District of California held that an affirmative claim for rescission of a COC was preempted based on the assertion that there was a failure of consideration on behalf of defendant airline which cancelled flights due to the COVID-19 pandemic.⁵³² Since the COC set forth the recourse for a cancelled flight and identified the circumstance for obtaining a refund, application of rescission principles would constitute the enforcement of a state-imposed obligation.⁵³³

Other courts have come to different conclusions. For instance, in *Madorsky v. Spirit Airlines*, a proposed class-action claim was brought, asserting that the airline’s conditions of membership in its “\$9 Fare Club,” which included an automatic fee increase policy and a policy for canceling membership, was unlawful as it deprived the passenger members of the benefits of

⁵³⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. L. INST. 1981).

⁵³¹ *Id.*

⁵³² *Bugarin v. All Nippon Airways Co.*, No. 20-cv-03341, 2021 WL 175940, at *10 (N.D. Cal. Jan. 19, 2021).

⁵³³ *Id.*; see also *Subramanyam v. KLM Royal Dutch Airlines*, No. 20-11296, 2021 WL 1592664 (E.D. Mich. Apr. 23, 2021) (noting under Michigan state law that rescission is an equitable doctrine and not an independent cause of action and would otherwise likely be preempted by ADA).

the Club—i.e., the ability to purchase tickets at a discount.⁵³⁴ Plaintiffs pursued a claim for rescission and an action under a state consumer fraud statute.⁵³⁵ While the court held that the fraud claim was preempted, it agreed the claim for rescission was not, but no discussion was provided.⁵³⁶ The court went on to reject the claim as a matter of law, finding that it was premised on an asserted false representation and that the plaintiffs had failed to identify any provision in the contract that was false.⁵³⁷ The allegations amounted to a failure to disclose that was deemed insufficient to constitute a false statement triggering the right to rescind the contract.⁵³⁸

Similarly, courts have found rescission to be available in the airline–passenger context where the airline was found to have materially breached its contractual obligations. For example, an airline precluded a passenger from carrying a package containing the remains of her husband despite the package being within the size limitation and within the terms of the tariff providing that valuables “should be carried personally by the passenger.”⁵³⁹ Another airline refused to allow a passenger to carry on certain jewelry despite a tariff providing that the airline was “not responsible for jewelry” and directing that jewelry “should be carried by the passenger.”⁵⁴⁰ In both instances, the material

⁵³⁴ *Madorsky v. Spirit Airlines*, No. 11-12662, 2012 WL 6049095, at *1 (E.D. Mich. Dec. 5, 2012).

⁵³⁵ *Id.*

⁵³⁶ *Id.* at *10. The court identified that a rescission claim under Florida law consisted of the following elements:

- (1) The character or relationship of the parties;
- (2) The making of the contract;
- (3) The existence of fraud, mutual mistake, false representations, impossibility of performance, or other ground for rescission or cancellation;
- (4) That the party seeking rescission has rescinded the contract and notified the other party to the contract of such rescission;
- (5) If the moving party has received benefits from the contract, he should further allege an offer to restore these benefits to the party furnishing them, if restoration is possible;
- (6) Lastly, the moving party has no adequate remedy at law.

Id. at *10 (citing *Laws. Title & Escrow, Inc. v. S. States Inv. Corp.*, No. 98-5472, 1999 WL 993932, at *3 (6th Cir. Oct. 20, 1999) (unpublished table decision)).

⁵³⁷ *See id.* at *10–11.

⁵³⁸ *See id.* at *11.

⁵³⁹ *Coughlin v. Trans World Airlines, Inc.*, 847 F.2d 1432, 1433 (9th Cir. 1988).

⁵⁴⁰ *Bary v. Delta Air Lines, Inc.*, No. CV-02-5202, 2009 WL 3260499, at *4 (E.D.N.Y. Oct. 9, 2009) (emphasis omitted).

breach entitled the claimant to rescission and precluded the airline from enforcing the limitations provisions.⁵⁴¹

Rescission works both ways and is an available remedy for a carrier. In *Brualdi v. IBERIA, Lineas Aereas de España, S.A.*, for instance, the court granted a carrier relief through rescission where a potential customer of the airline brought a breach of contract action regarding the attempted purchase of airline tickets.⁵⁴² The court found that even assuming a valid contract was formed, the customer had failed to substantially perform his obligation, leaving the airline with the right to rescind the contract.⁵⁴³

Notably, rescission has been found to require being able to return the parties to the status quo, and if this is not available, the claim fails. For instance, in *Unishippers Global Logistics, LLC v. DHL Express, Inc.*, the plaintiff shipping company claimed it had been wrongly induced to amend a national shipping contract while the defendant purportedly was secretly planning to discontinue its service.⁵⁴⁴ The rescission claim was dismissed because even if the court were to rescind the agreement, the plaintiff shipper would have already received the benefit under the agreement, which could not be returned.⁵⁴⁵

6. *Tortious Interference with Contractual Relations*

Tortious interference with a contract can also pose a dispute between self and state-imposed duties. There is considerable authority that an interference is preempted because it exceeds the terms of any self-imposed obligation, as it is a cause of action premised in tort. In *Brown v. United Airlines, Inc.*, for instance, the First Circuit addressed an action brought by skycaps against

⁵⁴¹ *Coughlin*, 847 F.2d at 1434; *Bary*, 2009 WL 3260499, at *17; *see also* *Harger v. Spirit Airlines, Inc.*, No. 01 C 8606, 2003 WL 21218968, at *8 (N.D. Ill. May 22, 2003) (denying summary judgment on plaintiff's breach of COC claim where there was an issue of fact concerning whether the airline refused to permit the plaintiff to check in her baggage because it did not meet the carry on size requirement and finding that if the plaintiff's "bag met the specific size requirements under the contract of carriage but Spirit refused to allow [the plaintiff] to carry it on, then Spirit materially breached its contract of carriage and it cannot enforce the liability limitation against [the plaintiff].").

⁵⁴² *Brualdi v. IBERIA, Lineas Aereas de Espana, S.A.*, 913 N.Y.S.2d 753, 754 (N.Y. App. Div. 2010).

⁵⁴³ *See id.* at 755.

⁵⁴⁴ *Unishippers Glob. Logistics, LLC v. DHL Express (USA), Inc.*, No. 2:08CV894, 2009 WL 3459459, at *1 (D. Utah Oct. 27, 2009).

⁵⁴⁵ *Id.* at *2.

certain airlines for unjust enrichment and tortious interference arising out of the airlines' imposition of \$2 baggage fees for curbside service.⁵⁴⁶ It held that the tortious interference claim was preempted and fell outside the *Wolens* exception because it "sound[ed] in tort, not contract," and "[t]ort law is not a privately ordered obligation," but rather is imposed by the state.⁵⁴⁷

It has also been argued that invoking a tortious interference claim is a means of protecting and enforcing the underlying contract and should not be preempted. In *Sabre Travel International, Ltd. v. Deutsche Lufthansa AG*, the Supreme Court of Texas held that the interference claim was not preempted.⁵⁴⁸ There, a declaratory judgment was sought to establish that the airline's surcharge on certain tickets did not violate the parties' contract.⁵⁴⁹ The airline argued against preemption, contending that the tortious interference claim was a means to enforce its contracts with the travel agents.⁵⁵⁰ The argument was countered with the assertion that such a claim imposed a state duty beyond the contract, essentially to refrain from interference with a contract.⁵⁵¹ The court proceeded to hold that the claim was not preempted.⁵⁵² Although the airline did contract with the travel agents and had a contract with the plaintiff, who did not contract with the travel agents, the airline was not attempting to enlarge any contractual obligation with its respective travel agents or with the plaintiff.⁵⁵³

E. QUASI-CONTRACT

1. *Unjust Enrichment*

Despite its kinship to contract, unjust enrichment claims have generally been found to be preempted when they relate to

⁵⁴⁶ *Brown v. United Airlines, Inc.*, 720 F.3d 60, 62 (1st Cir. 2013).

⁵⁴⁷ *Id.* at 71.

⁵⁴⁸ *Sabre Travel Int'l, Ltd. v. Deutsche Lufthansa AG*, 567 S.W.3d 725, 728 (Tex. 2019).

⁵⁴⁹ *Id.*

⁵⁵⁰ *Id.* at 740.

⁵⁵¹ *Id.*

⁵⁵² *Id.* at 741.

⁵⁵³ *Id.* at 740; *see also* *Frequent Flyer Depot, Inc. v. Am. Airlines, Inc.*, 281 S.W.3d 215, 221 (Tex. App.—Fort Worth 2009, pet. denied) (finding that although the airline brought tort claims including tortious interference, the claims were an "attempt to protect the vitality of [the airline's] self-imposed obligations" under the frequent flyer program, and an airline invoking state law to protect its own agreements does not have the impermissible regulatory effect necessary for preemption).

prices, routes, or services.⁵⁵⁴ The doctrine “exists in the hazy realm of quasi-contract and restitution”⁵⁵⁵ and otherwise serves as a limited “equitable stopgap for occasional inadequacies in contractual remedies at law.”⁵⁵⁶

As recently noted by the Central District of California, unjust enrichment is a quasi-contract claim based in equity and restitution.⁵⁵⁷ As it is not based on the intention of the parties, it imposes state-related obligations outside the governing COC.⁵⁵⁸ According to one court, the doctrine is the “antithesis of enforcing ‘a term the airline itself stipulated,’ and rather [is] an example of a state ‘imposing [its] own substantive standards.’”⁵⁵⁹ Further, it has been held that while unjust enrichment can be pled in the alternative, even if duplicative of other claims, it does not apply when there is a valid, enforceable contract.⁵⁶⁰ Also, it is otherwise premised on considerations of equity and morality.⁵⁶¹

⁵⁵⁴ See, e.g., *McGarry v. Delta Air Lines, Inc.*, No. CV 18-9827, 2019 WL 2558199, at *7 (C.D. Cal. June 18, 2019); *Rojas v. Delta Air Lines, Inc.*, 425 F. Supp. 3d 524, 545 (D. Md. 2019); *Schneberger v. Air Evac EMS, Inc.*, 749 F. App'x 670, 678 (10th Cir. 2018); *Scarlett v. Air Methods Corp.*, No. 16-cv-02723, 2018 WL 2322075, at *8 (D. Colo. May 22, 2018); *Hakimi v. Societe Air France, S.A.*, No. 18-cv-01387, 2018 WL 4826487, at *5 (N.D. Cal. Oct. 4, 2018); *Worldwide Aircraft Servs., Inc. v. United Healthcare Ins. Co.*, No. 8:18-cv-2549-T-24, 2018 WL 6589838, at *3 (M.D. Fla. Dec. 14, 2018); *Martin v. United Airlines, Inc.*, No. CIV-16-1042, 2017 WL 3687347, at *5 (W.D. Okla. Apr. 18, 2017); *Cox v. Spirit Airlines, Inc.*, 340 F. Supp. 3d 154, 159 (E.D.N.Y. 2018); *Reva, Inc. v. Humana Health Benefit Plan of La., Inc.*, No. 18-20136-CIV, 2018 WL 1701969, at *7 (S.D. Fla. Mar. 19, 2018); *Stout v. Med-Trans Corp.*, 313 F. Supp. 3d 1289, 1296 (N.D. Fla. 2018); *Brown v. United Airlines, Inc.*, 720 F.3d 60, 71 (1st Cir. 2013).

⁵⁵⁵ *Brown*, 720 F.3d at 70; see also *Metro. Life Ins. Co. v. Cotter*, 984 N.E.2d 835, 850 (Mass. 2013); *Salamon v. Terra*, 477 N.E.2d 1029, 1031 (Mass. 1985); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (AM. L. INST. 2011).

⁵⁵⁶ *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 412 F.3d 215, 234 (1st Cir. 2005).

⁵⁵⁷ *McGarry*, 2019 WL 2558199, at *6.

⁵⁵⁸ *Id.*

⁵⁵⁹ *Cox*, 340 F.Supp.3d at 160 (quoting *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232–33 (1995)).

⁵⁶⁰ See, e.g., *Restivo v. Cont'l Airlines, Inc.*, 947 N.E.2d 1287, 1290–91 (Ohio Ct. App. 2011) (holding existence of contract precluded state law unjust enrichment claim based on a challenge to expiration date on airline gift card).

⁵⁶¹ See *Am. Biomedical Grp., Inc. v. Techtrol, Inc.*, 374 P.3d 820, 828 (Okla. 2016) (quoting *Harvell v. Goodyear Tire & Rubber Co.*, 164 P.3d 1028, 1035 (Okla. 2006)) (“Unjust enrichment arises ‘from the failure of a party to make restitution in circumstances where it is inequitable,’ or one party holds property ‘that, in equity and good conscience, it should not be allowed to retain.’”). For a

Despite the majority of authority, there remains a smattering of cases permitting unjust enrichment claims where the claim is deemed not to relate to services, rates, or routes.⁵⁶² In *Solo v. United Parcel Service, Co.*, shippers brought a putative class action suit against a private courier service that allegedly overcharged customers for liability coverage against loss or damage for packages with a declared value of \$300 or more.⁵⁶³ In addressing the issue of preemption under the Federal Aviation Administration Authorization Act of 1994, the court noted, “The doctrine of unjust enrichment does not synonymously apply to all contracts as a matter of state policy.”⁵⁶⁴ “Instead, unjust enrichment serves to ‘effectuate the intentions of parties or to protect their reasonable expectations,’ and thus looks to the particular parties to a transaction rather than a universal, state-imposed obligation.”⁵⁶⁵

case finding a viable claim as to unjust enrichment, see *Stout v. Med-Trans Corp.*, 313 F. Supp. 3d 1289, 1296 (N.D. Fla. 2018) (internal citations omitted). As noted by the court in *Stout*:

[A] claim for unjust enrichment is not based on the parties’ agreement but rather [is] an agreement created by law. An unjust enrichment claim provides a mechanism for recovery when the court deems it unjust for one party to have received a benefit without paying compensation for the value thereof. Since a claim for unjust enrichment is not based on the parties’ ‘self-imposed obligations,’ it constitutes a state-imposed obligation and is therefore preempted.

⁵⁶² *Jones v. Am. Airlines, Inc.*, No. 5:08-CV-236-BR, 2008 WL 9411160, at *6 (E.D.N.C. Oct. 16, 2008) (finding that plaintiffs had sufficiently pled *quantum meruit* and unjust enrichment claims where they “allege[d] that they ‘have rendered baggage handling services to [American], the baggage handling services were knowingly and voluntarily accepted by American, and . . . the services were not given gratuitously to American’ . . . [and] that ‘American’s failure to clearly communicate the nature and effect of the baggage handling fee is unjust[.]’”); see also *Dolan v. JetBlue Airways Corp.*, 385 F. Supp. 3d 1338, 1345–46 (S.D. Fla. 2019) (finding unjust enrichment claim arising out of the undisclosed receipt of a portion of a fee changing trip insurance was not preempted because not related to service); *Catullo v. Air France*, No. CV065007671, 2009 WL 1054150, at *1–2 (Conn. Super. Ct. Mar. 19, 2009) (holding an airline unjustly enriched when it applied a two-hour check in rule but had sold tickets to passenger forty minutes before paid flight); *In re Air Transp. Excise Tax Litig.*, 37 F. Supp. 2d 1133, 1140 (D. Minn. 1999) (finding no preemption under the ADA for unjust enrichment, money had and received, and conversion claims because they did not frustrate the purpose of the ADA).

⁵⁶³ *Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 791 (6th Cir. 2016).

⁵⁶⁴ *Id.* at 798.

⁵⁶⁵ *Id.*

2. *Promissory Estoppel*

Promissory estoppel first appeared in Williston's well-known Treatise, *The Law of Contracts*, first published in 1920,⁵⁶⁶ and was then adopted in both the First and Second Restatements of Contracts.⁵⁶⁷ Williston intended "to differentiate between reliance on a factual misrepresentation as a means of negating the denial of the truth of the representation from reliance on a gratuitous promise, which could be used offensively to create a binding promise."⁵⁶⁸ "The notion evolved as a means to avoid results that were deemed unjust and harsh in certain cases lying on the outskirts of contract, such as gratuitous promises, charitable subscriptions, and intra-family gifts and other similar promises."⁵⁶⁹ Virtually every state has adopted some form of promissory estoppel.⁵⁷⁰

Under the R2d Contract's formulation, a promise otherwise lacking consideration is enforceable to the same extent as a contract where the promisor should have reasonably expected action or forbearance, such action or forbearance does occur, and enforcement is necessary to avoid injustice.⁵⁷¹ It is applied only when there is no binding contract and uses the concept of reliance to protect and serve the underlying promise.

Since its emergence in the Restatement in 1932, and again in 1981, promissory estoppel is considered by some to be the Restatement's "most notable and influential rule,"⁵⁷² having a "profound influence on the law of contracts."⁵⁷³ However, it is not without debate because the notion of reliance as consideration is deemed by some to run "counter to the bargained for mutuality of obligation conception of consideration."⁵⁷⁴ While its proponents see it as a vital doctrine that fills necessary gaps left by the limits of bargaining and invokes equitable notions of

⁵⁶⁶ Tory A. Weigand, *Promissory Estoppel's Avoidance of Injustice and Measure of Damages: The Final Frontier*, 23 SUFF. J. TRIAL & APP. ADVOC. 1, 3 (2017) (citing 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* 308 (1st ed. 1920)).

⁵⁶⁷ *Id.* at 6–8 (citing RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. a (AM. L. INST. 1981)).

⁵⁶⁸ *Id.* at 3–4.

⁵⁶⁹ *Id.* at 4 (citing Eric Alden, *Rethinking Promissory Estoppel*, 16 NEV. L.J. 659, 683–704 (2016) (explaining evolution of promissory estoppel)).

⁵⁷⁰ *Id.* at 59–70 (containing fifty-state survey regarding promissory estoppel).

⁵⁷¹ RESTATEMENT (SECOND) OF CONTRACTS § 90.

⁵⁷² Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 111 (1991).

⁵⁷³ *Id.*

⁵⁷⁴ Weigand, *supra* note 566, at 5.

fairness and good faith,⁵⁷⁵ its critics see it as an erosion of bed-rock contract principles “into tort-type notions of unfairness and injustice.”⁵⁷⁶

Somewhat surprisingly, promissory estoppel has not received much attention in the passenger-airline context. It may be that such claims are simply not viable given the likely determination that there is a binding, existing contract in the form of the ticket, tariffs, and COC. Nonetheless, it represents a contract-related doctrine that once again makes it difficult to distinguish between state and self-imposed obligations underlying the ADA preemption inquiry.

In *Johnson v. United Airlines, Inc.*, the Southern District of Texas did not address the issue of preemption of a promissory estoppel claim other than finding that it failed as a matter of law.⁵⁷⁷ It was alleged there was a valid claim for promissory estoppel since the claimant had relied on the airline’s purported promise of “lifetime top tier frequent flyer status” that was allegedly not provided.⁵⁷⁸ The court summarily rejected the claim, finding that promissory estoppel still required not only reliance but also a promise and that the record did not support any such promise from the airline.⁵⁷⁹

In *Osband v. United Airlines, Inc.*, a Colorado appellate court addressed a promissory estoppel claim in the context of an action brought by an airline employee against the airline for travel benefits.⁵⁸⁰ It proceeded to find that the promissory estoppel claim was preempted by the ADA, as it was deemed not to be a contract-related doctrine seeking to enforce a self-imposed obligation.⁵⁸¹ Rather, it deemed promissory estoppel an equitable doctrine “enforced by the state to prevent the lack of a written contract from defeating a plaintiff’s claim.”⁵⁸² According to the court, a promise that is enforceable through promissory estoppel is enforceable due to state policy as to equitable relief and

⁵⁷⁵ See Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1292–1330 (1998).

⁵⁷⁶ Susan Lorde Martin, *Kill the Monster: Promissory Estoppel as an Independent Cause of Action*, 7 WM. & MARY BUS. L. REV. 1, 3 (2016).

⁵⁷⁷ *Johnson v. United Airlines, Inc.*, No. 4:14-cv-00646, 2016 WL 3030158, at *10 (S.D. Tex. Apr. 20, 2016).

⁵⁷⁸ *Id.* at *9.

⁵⁷⁹ *Id.* at *10.

⁵⁸⁰ *Osband v. United Airlines, Inc.*, 981 P.2d 616, 618 (Colo. App. 1999).

⁵⁸¹ *Id.* at 623.

⁵⁸² *Id.* at 622.

public policy, not due to agreement.⁵⁸³ Since the doctrine does not depend on a contract, it “necessarily is an extra-contractual enhancement of an agreement” subject to preemption.⁵⁸⁴

A contrary holding was reached by the Seventh Circuit in *ATA Airlines Inc. v. Federal Express Corp.*, where an airline brought an action against a shipping company based on a purported agreement to share in the business generated by military transportation.⁵⁸⁵ The court found that there was no binding contract due to lack of definitiveness in the letter agreement, but that there was evidence of a promise and sufficient reliance to be enforceable under a promissory estoppel theory.⁵⁸⁶ In doing so, the court viewed the doctrine as having no meaningful difference with contract and thus not preempted under the ADA.⁵⁸⁷

The difficulty with the *ATA Airlines* decision is it that fails to recognize the equitable origin, nature, and component of promissory estoppel. Under R2d Contracts’s own definition, a reliance-based promise is enforceable only to the extent “injustice can be avoided.”⁵⁸⁸ No matter how injustice is defined, it remains a question of state policy.⁵⁸⁹ Furthermore, a promise that is enforced based on reliance remains separate and distinct from an actual agreement.⁵⁹⁰

⁵⁸³ *Id.* at 622–23.

⁵⁸⁴ *Id.* at 623.

⁵⁸⁵ *ATA Airlines, Inc. v. Fed. Express Corp.*, 665 F.3d 882, 883–85 (7th Cir. 2011).

⁵⁸⁶ *Id.* at 887–88.

⁵⁸⁷ According to the court in *ATA Airlines*:

Promissory estoppel, as the word “promissory” implies, furnishes a ground for enforcing a promise made by a private party, rather than for implementing a state’s regulatory policies. A garden-variety claim of promissory estoppel—one that differs from a conventional breach of contract claim only in basing the enforceability of the defendant’s promise on reliance rather than on consideration—is therefore not preempted.

Id. at 884 (internal citations omitted).

⁵⁸⁸ RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981); *see also* *Peters v. Gilead Scis., Inc.*, 533 F.3d 594, 599 (7th Cir. 2008) (characterizing promissory estoppel as a “species of contract claim [that] sounds in equity”).

⁵⁸⁹ *See, e.g., Breitling U.S.A. Inc., v. Fed. Express Corp.*, 45 F. Supp. 2d 179, 184 (D. Conn. 1999) (preempting a breach of contract claim because it was based on doctrines of estoppel and waiver to invalidate an express term in the contract) (“[B]ecause *Breitling* seeks to impose common law principles and policies on the agreement between the two parties, *Breitling*’s claims are preempted by the ADA.”).

⁵⁹⁰ For cases in related contexts supporting the position that promissory estoppel claims, assuming relation to prices, routes, or services, are preempted, *see A.J.’s Wrecker Serv. of Dall., Inc. v. Salazar*, 165 S.W.3d 444, 449 (Tex. App.—

3. *Unclean Hands, Waiver, and Estoppel*

Similar to the majority of authority addressing promissory estoppel claims, courts have generally held that “[e]quitable doctrines typically have no place in breach-of-contract actions against air carriers.”⁵⁹¹ This is because equitable doctrines, in most instances, represent state policies and are thus being relied upon to enlarge or alter contractual obligations.⁵⁹²

Although the definition of unclean hands differs somewhat between the states, it is generally understood that “[h]e who comes into equity must come with clean hands.”⁵⁹³ Courts have defined it either as requiring (1) misconduct; (2) committed in connected events; and (3) of the same gravity,⁵⁹⁴ or otherwise as a doctrine precluding a party from recovery where they engaged, as to the matter in dispute, in conduct that was “unconscientious, unjust, marked by a want of good faith or violates the principles of equity and righteous dealing.”⁵⁹⁵

Dallas 2005, pet. denied) (finding state law claims including equitable estoppel and promissory estoppel preempted by federal law where plaintiff sued towing company for wrongfully towing her car); *Cerdant, Inc. v. DHL Express (USA), Inc.*, No. 2:08-cv-186, 2009 WL 723149, at *2, *4–5 (S.D. Ohio Mar. 16, 2009) (dismissing plaintiff’s non-contract claims, including promissory estoppel, for allegations of improper shipping charges as preempted by the FAAAA because they “would constitute an enlargement or enhancement of the parties’ bargain”); *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am., Inc.*, 972 F. Supp. 665, 676 (N.D. Ga. 1997) (finding that the ADA preempts equitable relief); *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 567 F. Supp. 2d 1213, 1220–21 (C.D. Cal. 2008) (finding state law claims including fraudulent concealment preempted in a case alleging violations of antitrust and consumer protection laws as a result of an alleged price-fixing conspiracy); *Wagman v. Fed. Express Corp.*, No. 94-1422, 1995 WL 81686, at *2 (4th Cir. Feb. 17, 1995) (affirming dismissal on preemption grounds of constructive fraud and other claims based on allegations of misleading advertising arising from the late delivery of plaintiff’s package).

⁵⁹¹ *Schneberger v. Air Evac EMS, Inc.*, No. CIV-16-843, 2017 WL 1026012, at *5 (W.D. Okla. Mar. 15, 2017).

⁵⁹² *See, e.g., Williams v. Fed. Express Corp.*, No. CV 99-06252, 1999 WL 1276558, at *5 (C.D. Cal. Oct. 6, 1999) (finding that the doctrine of unclean hands was inapplicable because “the ADA ‘confines courts, in breach-of-contract actions, to the parties’ bargain, with no enlargement or enhancement based on state laws or policies external to the agreement’”); *ATA Airlines, Inc. v. Fed. Express Corp.*, No. 1:08-cv-00785, 2010 WL 1754164, at *4 (S.D. Ind. Apr. 21, 2010) (finding that claims for equitable and promissory estoppel “are preempted because they seek relief outside the scope of the parties’ agreements”).

⁵⁹³ *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 241 (1933).

⁵⁹⁴ *See Pierce v. Heritage Props., Inc.*, 688 So. 2d 1385, 1391 (Miss. 1997).

⁵⁹⁵ *Bank of Saipan v. CNG Fin. Corp.*, 380 F.3d 836, 840 (5th Cir. 2004) (quoting *City of Fredericksburg v. Bopp*, 126 S.W.3d 218, 221 (Tex. App.—San Antonio 2003)).

As to preemption, the Eighth Circuit found the assertion of unclean hands to be preempted. In *Ferrell v. Air Evac EMS, Inc.*, a patient brought a putative class action in state court against an air-ambulance provider, seeking declaratory judgment that any contract between class members and the provider was unenforceable.⁵⁹⁶ The patient asserted that the air-ambulance provider did “not have the good faith, clean hands, and reasonable terms necessary to be eligible for relief under implied contract, unjust enrichment, *quantum meruit*, or other restitutionary remedy.”⁵⁹⁷ The court proceeded to hold that the claim was preempted:

Determining whether Air EVAC lacks the “clean hands” necessary to obtain equitable relief such as restitution under Arkansas law because it “attempts to gouge patients with its exorbitant charges” would require determining whether Air EVAC’s pricing practices are “unconscientious or unjust.” It is hard to imagine a state law claim more at odds with the congressional intent “[t]o ensure that the States would not undo federal deregulation with regulation of their own.”⁵⁹⁸

While unclean hands can be invoked against a party asserting an equitable defense, it is inapplicable to defenses regarding the scope, meaning, or breach or non-breach of a contract. In *Williams v. Federal Express Corp.*, for example, the claimant brought an action against Federal Express (FedEx), contending that it had intentionally misdelivered a package, while FedEx asserted that the claimant failed to abide by the contractual notice provision.⁵⁹⁹ The claimant’s reliance on unclean hands, based on the assertion that FedEx breached the contract, was rejected because the assertion was legal rather than equitable in nature, and that reliance on the doctrine would impose an obligation or duty beyond the terms of the undertaking.⁶⁰⁰

The equitable doctrine of waiver has likewise faced similar hostility in the airline–passenger context. “Waiver is defined as the intentional relinquishment of a known right.”⁶⁰¹ Like material breach, waiver also sounds in generally applicable principles

⁵⁹⁶ *Ferrell v. Air Evac EMS, Inc.*, 900 F.3d 602, 603 (8th Cir. 2018).

⁵⁹⁷ *Id.* at 607.

⁵⁹⁸ *Id.* (internal citations omitted).

⁵⁹⁹ *Williams v. Fed. Express Corp.*, No. CV 99-06252, 1999 WL 1276558, at *1 (C.D. Cal. Oct. 6, 1999).

⁶⁰⁰ *Id.*

⁶⁰¹ *Ryder v. Bank of Hickory Hills*, 585 N.E.2d 46, 49 (Ill. 1991).

of contract law.⁶⁰² A party “may lose the right to assert a term of the contract, or to require performance of a part of the contract, by waiver or estoppel.”⁶⁰³ Waiver or estoppel can be evidenced by express words or conduct with it noted that “it involves the act or conduct of one party to the contract only, and involves both knowledge and intent on the part of the waiving party.”⁶⁰⁴ Courts have otherwise noted that “[b]ecause waiver of a contract right must be proved to be intentional . . . ‘mere silence, oversight or thoughtlessness in failing to object’ to a breach of the contract will not support a finding of waiver.”⁶⁰⁵

In *Breitling U.S.A. Inc. v. Federal Express Corp.*, the District of Connecticut addressed a breach of contract claim against FedEx where it was asserted that FedEx waived a condition of its contract.⁶⁰⁶ The court found that the claim was preempted, reasoning that the claimant was seeking to have the court “use common law principles and policies to disregard the language of the Service Guide and remove the limitations on FedEx’s liability,”⁶⁰⁷ and that “[u]nder *Wolens*, common law equitable principles may not be used to adjudicate contract claims relating to rates, routes, or services of an air carrier.”⁶⁰⁸ Similar cases have also held that a claimant’s reliance on the equitable doctrine of waiver to void an express condition of the contract was preempted.⁶⁰⁹

F. REMEDIES

Fundamental to contract doctrine is remedy. It is a necessary element for a breach of contract claim.⁶¹⁰ Particularly important

⁶⁰² See *Newirth v. Aegis Senior Cmtys., LLC*, 931 F.3d 935, 940 (9th Cir. 2019).

⁶⁰³ *Greenmoss Builders, Inc. v. King*, 580 A.2d 971, 974 (Vt. 1990).

⁶⁰⁴ *Toys, Inc. v. F.M. Burlington Co.*, 582 A.2d 123, 127 (Vt. 1990) (quoting *Lynda Lee Fashions, Inc. v. Sharp Offset Printing, Inc.*, 352 A.2d 676, 677 (Vt. 1976)).

⁶⁰⁵ *Beth Isr. Med. Ctr. v. Horizon Blue Cross & Blue Shield of N.J., Inc.*, 448 F.3d 573, 585 (2d Cir. 2006); *Martin v. Yasuda*, 829 F.3d 1118, 1124 (9th Cir. 2016) (listing the elements of waiver: knowledge of the right in question; acts inconsistent with that right; and prejudice).

⁶⁰⁶ *Breitling U.S.A. Inc. v. Fed. Express Corp.*, 45 F. Supp. 2d 179, 186 (D. Conn. 1999).

⁶⁰⁷ *Id.*

⁶⁰⁸ *Id.*

⁶⁰⁹ *Id.* (citing *SVT Corp. v. Fed. Express Corp.*, No. C-943057, 1997 WL 285051 (N.D. Cal. May 19, 1997)).

⁶¹⁰ See, e.g., *Valley Nat’l Bank v. Marcano*, 166 A.3d 80, 87 (Conn. App. Ct. 2017).

is the need to protect “the expectation interest,” which is said to give the injured party the benefit of the bargain.⁶¹¹ This remedy is intended to place the non-breaching party in as good a position as that party would have been in had the contract been properly performed.⁶¹²

The scope of the benefit of the bargain has been held to include those “damages that ‘arise naturally’ from the breach,” those that “may reasonably be supposed to have been within the contemplation of the parties as a probable result” of the breach, or those that were “reasonably foreseeable and within contemplation of the parties when they entered into the contract.”⁶¹³ “[R]emote, contingent and uncertain consequences” or speculative claims for damages are not recoverable.⁶¹⁴

Other available remedies include reliance and restitution. Reliance provides a remedy based on the expenses or losses incurred by the non-breaching party acting in reliance on the contract.⁶¹⁵ Restitution, in turn, seeks to prevent unjust enrichment.⁶¹⁶ The focus is on the breaching party rather than the non-breaching party and aims to put the breaching party back into the position in which that party would have been had the contract never been made.⁶¹⁷

Courts have rejected the assertion that the damages sought should be assessed for purposes of whether relating to prices, routes, or services with the *Wolens* exception otherwise generally encompass contractual remedies.⁶¹⁸ The *Wolens* Court expressly

⁶¹¹ *NASDAQ, Inc. v. Exch. Traded Managers Grp., LLC*, 431 F. Supp. 3d 176, 269 (S.D.N.Y. 2019) (quoting *Genecor Int’l, Inc. v. Novo Nordisk A/S*, 766 A.2d 8, 11 (Del. 2000)) (“It is a basic principle of contract law that remedy for a breach should seek to give the non-breaching party the benefit of its bargain by putting that party in the position it would have been but for the breach.”).

⁶¹² RESTATEMENT (SECOND) OF CONTRACTS § 344 (AM. L. INST. 1981).

⁶¹³ *Glass v. Nw. Airlines, Inc.*, 798 F. Supp. 2d 902, 908 (W.D. Tenn. 2011) (quoting *Heim v. Town of Camden*, No. 02A01-9109CH00204, 1992 WL 1391, at *4 (Tenn. Ct. App. Jan. 8, 1992)).

⁶¹⁴ *Id.*

⁶¹⁵ RESTATEMENT (SECOND) OF CONTRACTS § 349.

⁶¹⁶ *See Hickcox-Huffman v. U.S. Airways, Inc.*, 855 F.3d 1057, 1065 (9th Cir. 2017) (noting the availability of restitution of a checked baggage fee in a breach of contract action).

⁶¹⁷ *See, e.g., Brown v. K&L Tank Truck Serv., Inc.*, No. 15-9587, 2017 WL 3839414, at *6 (D. Kan. Sept. 1, 2017) (explaining that the “proper measure of damages” for unjust enrichment “is not the damages incurred by the [plaintiffs] from the corporation not performing under the alleged contract (in other words, the benefit of the bargain) but the value of the benefit . . . conferred”).

⁶¹⁸ *See, e.g., Kleiner v. Sw. Airlines Co.*, No. 3:08-CV-1975, 2009 WL 10674260, at *3–4 (N.D. Tex. Aug. 8, 2009).

stated that ADA preemption did not protect airlines from “[a] remedy confined to a contract’s terms [as it] simply holds parties to their agreements—in this instance, to business judgments an airline made public about its rates and services.”⁶¹⁹ Nonetheless, as with other contractual principles, determining whether certain damages sought constitute enforcement of the terms of the agreement or the imposition of state-based policy can be a close call.

In *Klutho v. Southwest Airlines Co.*, the Eastern District of Missouri addressed a class action asserting breach of contract as to the purchase of “Early Bird Check-In.”⁶²⁰ The putative class plaintiffs would be the passengers who had purchased the “Early Bird Check-In” service but had their flight canceled, rebooked, or changed, and who were required to repurchase the same service or denied a credit or refund.⁶²¹ The airline argued the claim was preempted as it involved a dispute over the price charged for a service, while the passengers claimed that a unilateral contract arose by virtue of the airline offering the service and the passengers’ acceptance of the service, thus fitting the *Wolens* exception.⁶²² The court found that the *Wolens* exception applied and the fact that the COC did not expressly provide for a refund did not preclude the claim, as “[r]efunds are among the remedies traditionally recognized.”⁶²³

Preemption remains applicable anytime the invocation of state law enlarges or enhances remedies for breach beyond those provided in the contract.⁶²⁴ Not surprisingly, courts have readily found that contract actions seeking invalidation of express contract terms, enforcement of equitable remedies, or punitive damages⁶²⁵ are preempted because they “impermissibly enlarged the scope of the proceedings beyond the parties’

⁶¹⁹ *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 229 (1995).

⁶²⁰ *Klutho v. Sw. Airlines Co.*, No. 4:20-CV-00672, 2020 WL 6703283, at *1 (E.D. Mo. Nov. 13, 2020).

⁶²¹ *Id.*

⁶²² *Id.* at *2.

⁶²³ *Id.* at *3 (quoting *Hickcox-Huffman v. U.S. Airways, Inc.*, 855 F.3d 1057, 1064 (9th Cir. 2017)).

⁶²⁴ *Power Standards Lab, Inc. v. Fed. Express Corp.*, 26 Cal. Rptr. 3d 202, 207–08 (Cal. Ct. App. 2005) (concluding that the ADA preempted the plaintiff’s claims because the plaintiff sought relief and damages that were external to, or not contemplated by, the agreement).

⁶²⁵ *Starker v. Spirit Airlines, Inc.*, No. 17 Civ. 6812, 2019 WL 4194572, at *18–19 (S.D.N.Y. Sept. 3, 2019).

agreement.”⁶²⁶ For instance, in *Travel All Over the World v. Kingdom of Saudi Arabia*, the Seventh Circuit held that a claim for failure to honor reservations was not preempted because it was based on the defendant’s self-imposed commitments to the plaintiffs, but held that a claim for punitive damages was preempted because it impermissibly enlarged the scope of the proceedings beyond the parties’ agreement.⁶²⁷

More recently, the Northern District of Illinois, in *Neft v. United Continental Holdings, Inc.*, addressed a class action asserting breach of contract for the alleged failure to provide members of a travel program with certain benefits, including discounted airfare, for travelers aged fifty-five and over.⁶²⁸ The court found the claim failed on the merits and that the damage demand was otherwise preempted.⁶²⁹ The only damage sought was restitution in the form of a refund for the \$225 member’s fee.⁶³⁰ The court held that this restitution-based damage was outside the terms of the airline’s contract, as the governing terms and conditions of the program limited refunds to the first ninety days of membership, and the plaintiff did not seek a refund during that time.⁶³¹ The court went on to reject the argument that the damage was allowable because the airline had failed to honor its own terms of the program, specifically the obligation to continue making zoned airfares available to lifetime Silver Wings members (over age fifty-five).⁶³² It reaffirmed that the remedy was specifically foreclosed by the plain language of the terms and conditions of the program.⁶³³

Similarly, it has been held that preemption applies to equitable or injunctive relief, particularly where there is no contract, as the remedy reflects the court’s judgment as to policy and not the parties’ mutual agreement.⁶³⁴ The District of Colorado recently found ADA preemption as to the request for equitable and injunctive relief related to conduct in the aftermath of an

⁶²⁶ *Waul v. Am. Airlines, Inc.*, No. A101212, 2003 WL 22719273, at *3 (Cal. Ct. App. Nov. 17, 2003).

⁶²⁷ *Travel All Over the World v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996).

⁶²⁸ *Neft v. United Cont’l Holdings, Inc.*, 299 F. Supp. 3d 965, 967–68 (N.D. Ill. 2018).

⁶²⁹ *Id.* at 974–75.

⁶³⁰ *Id.* at 975.

⁶³¹ *Id.*

⁶³² *Id.*

⁶³³ *Id.*

⁶³⁴ *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1068–69 (10th Cir. 2019).

alleged in-flight sexual assault.⁶³⁵ According to the court, “[a]t least with respect to the injunctive relief claims, Plaintiffs would have the Court play the role of a regulatory agency, assessing the propriety of certain policies, procedures, and training protocols and imposing such requirements on [the airline], all as a matter of Colorado state common law” which otherwise constitutes “an explicit invitation for the Court to engage in policy determinations in the aviation safety area that the ADA has explicitly reserved to federal regulatory authorities.”⁶³⁶

Other courts have been more reserved on the damage versus preemption demarcation. For instance, in *Ron v. Air Tran Airways, Inc.*, a Texas state appeals court stated that “[a] breach-of-contract claim that relates to an airline’s services is not preempted simply because the remedy of a common-law claim for monetary damages is not specifically described in the contract or in a federal regulation.”⁶³⁷ The court noted that this was supported by *Wolens* “in which the Court held that the claims of the plaintiffs—who did not ask the Court to force the airline to adhere to the terms of the parties’ bargain, but instead sought monetary damages for the contract’s breach—were not preempted.”⁶³⁸

Injunctive relief, even if premised on a breach of contract claim, has been found to trigger preemption. In *Deerskin Trading Post, Inc. v. United Parcel Service of America, Inc.*, the court stated that injunctive relief requires regulation by the court, and while the equitable relief sought may seek to enforce the terms of the private agreement, “the means of enforcement is far more intrusive than is normal in breach of contract actions,” and “[o]nce a court issues an injunction, a breach is no longer just a breach, but is also a violation of a court order.”⁶³⁹

As to the merits, many reported disputes concern the damage limitation provisions contained in COCs. Courts have made clear that there are no viable breach of contract claims where the damages sought are precluded by the terms of the con-

⁶³⁵ *Ramsay v. Frontier, Inc.*, No. 19-cv-03544, 2020 WL 4557545, at *20 (D. Colo. July 30, 2020).

⁶³⁶ *Id.*

⁶³⁷ *Ron v. AirTran Airways, Inc.*, 397 S.W.3d 785, 794 (Tex. App.—Houston [14th Dist.] 2013, no pet.).

⁶³⁸ *Id.*; *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 225 (1995) (“Plaintiffs currently seek only monetary relief.”).

⁶³⁹ *Deerskin Trading Post, Inc. v. United Parcel Serv. of Am.*, 972 F. Supp. 665, 675 (N.D. Ga. 1997).

tract.⁶⁴⁰ For instance, in disputes over refunds or the failure to use nonrefundable tickets, courts have enforced the express limitations set forth in the COC. In *Dennis v. Delta Air Lines, Inc.*, for example, the Eastern District of New York ruled that a breach of contract claim failed as a matter of law as there were no damages within the terms of the governing COC.⁶⁴¹ The only remedy provided was for the value of any unused portion of the ticket which the plaintiff had already received.⁶⁴²

The Ninth Circuit recently affirmed the right to seek restitution even where the COC contain damage limitation provisions.⁶⁴³ There, a passenger claimed the airline breached its contract by failing to deliver her checked bag.⁶⁴⁴ The court held that although the COC contained a limitation of liability provision pertaining to the loss, delay, or damage to baggage, up to a limit of \$3,300 per person, this provision did not preclude recovery through restitution of the \$15 baggage fee that was charged and collected.⁶⁴⁵ The court first stated, “Though restitution may be sought as an equitable remedy where there is no enforceable contract, it is also an available remedy where there is an enforceable contract that has been breached by non-performance.”⁶⁴⁶ It also went on to hold that the language in the limitation clause did not “imply[] a negative pregnant so that only consequential damages may be sought,” but instead placed “a limit on a specific type of damages that can become very large.”⁶⁴⁷ Indeed, the court made clear that “the implication of the limit on conse-

⁶⁴⁰ *Norman v. Trans World Airlines, Inc.*, No. 98 Civ. 7419, 2000 WL 1480367, at *6 (S.D.N.Y. Oct. 6, 2000) (“[R]emedy for any breach of the contract of carriage between the parties is limited to the remedies set forth in that contract.”).

⁶⁴¹ *Dennis v. Delta Air Lines, Inc.*, No.10-CV-973, 2011 WL 4543487, at *3 (E.D.N.Y. Sept. 29, 2011).

⁶⁴² *Id.*; see also *Ruta v. Delta Air Lines, Inc.*, 322 F. Supp. 2d 391, 399 (S.D.N.Y. 2004) (granting summary judgment for an airline as to a passenger claim as there was no unused portion of the ticket, and the airline’s liability was limited under the terms of the COC which also provided for the passenger’s removal from the flight); *Schultz v. United Airlines, Inc.*, 797 F. Supp. 2d 1103, 1106 (W.D. Wash. 2011) (“Plaintiff’s claims for a refund of the baggage fee as a result of the alleged breach of contract employ external state law to enlarge an existing agreement regarding baggage transport.”).

⁶⁴³ See *Hickcox-Huffman v. U.S. Airways, Inc.*, 855 F.3d 1057, 1064–66 (9th Cir. 2017).

⁶⁴⁴ *Id.* at 1059.

⁶⁴⁵ *Id.* at 1064–65.

⁶⁴⁶ *Id.* at 1065.

⁶⁴⁷ *Id.*

quential damages for ‘delay’ of baggage implies that delayed baggage is subject to a contractual remedy.”⁶⁴⁸

In *Hughes v. Southwest Airlines, Co.*, the Northern District of Illinois addressed the damage limitation provision in the COC, which provided that the “sole recourse” for any refusal to transport was recovery of the refund value of the unused portion of the passenger’s ticket.⁶⁴⁹ Although the limitation provision did not specifically refer to flight cancellations, the court found that the context of the disclaimer applied without limitation where the airline refused to transport a customer.⁶⁵⁰ As such, the provision was held to bar the passenger’s claim to consequential damages where his flight was cancelled because the airline ran out of deicer.⁶⁵¹

IV. CONCLUSION

Contractual disputes between airlines and passengers remain a common subject of litigation. The breadth and scope of the types of programs and services provided by airlines and their contractors in modern aviation, as well as emerging technology, continue to provide fertile ground for contractual disputes. While contractual claims have been excluded from the scope of ADA preemption, the line between what is a state-imposed obligation and enhancement and what is a self-imposed undertaking is often unclear. Indeed, Justice O’Connor’s observation in *Wolens*, that judicial enforcement of the parties’ agreement is difficult to divorce from state policy, rings loudly, as does her observation that even contractual interpretative rules stem from “a complex of moral, political, and social judgments.”⁶⁵² Further, the application of state contractual doctrine is an uneasy one given the unilateral nature of COCs, programs, and services offered by airlines. Nonetheless, both rights and remedies will continue to be determined by application of these principles to the circumstances.

⁶⁴⁸ *Id.*

⁶⁴⁹ *Hughes v. Sw. Airlines, Co.*, 409 F. Supp. 3d 653, 659 (N.D. Ill. 2019).

⁶⁵⁰ *Id.*

⁶⁵¹ *Id.*

⁶⁵² *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 249 (1995) (O’Connor, J., concurring in judgment in part and dissenting in part).