

2016

## Busted Benefits—The Seventh Circuit Honors Explicit Contractual Terms of United’s Mileageplus Benefits Program

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### Recommended Citation

Abigail Storm, *Busted Benefits—The Seventh Circuit Honors Explicit Contractual Terms of United’s Mileageplus Benefits Program*, 81 J. Air L. & Com. 133 (2016)  
<https://scholar.smu.edu/jalc/vol81/iss1/9>

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**BUSTED BENEFITS—THE SEVENTH CIRCUIT HONORS  
EXPLICIT CONTRACTUAL TERMS OF UNITED’S  
MILEAGEPLUS BENEFITS PROGRAM**

ABIGAIL STORM\*

**I**N *LAGEN V. UNITED CONTINENTAL HOLDINGS, INC.*, the Seventh Circuit held that (1) United Airlines’ “Million-Mile Flyer” program did not create a separate contract from the MileagePlus Program (formerly known as “Mileage Plus”)<sup>1</sup>; and (2) the 1978 Airline Deregulation Act<sup>2</sup> (ADA) preempts common law claims for breach of the implied covenant of good faith and fair dealing arising from complaints about frequent-flyer rewards programs.<sup>3</sup> For these reasons, the Seventh Circuit affirmed the district court’s grant of United’s Cross Motion for Summary Judgment.<sup>4</sup> Though Circuit Judge Hamilton preferred that United “defend[ ] this lawsuit honorably” in a jury trial, his dissent relies on passionate sympathy rather than on well-established law.<sup>5</sup> And although United’s actions leading up to the plaintiff’s claim may not be agreeable, the Seventh Circuit’s holding in this case correctly applied basic principles of contract law, as well as honored the explicit language and purpose of the ADA.<sup>6</sup>

The named plaintiff, a member of United Airlines’ MileagePlus program, brought a putative class action against the defendants, United Continental Holdings, Inc. and its subsidiary, United Airlines, Inc., for breach of contract, breach of implied

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<sup>1</sup> For the purpose of this note, the author will refer to United’s frequent-flyer program as “MileagePlus.” United renamed the frequent flyer program in 2011 by deleting the space between “Mileage” and “Plus.” Amended Class Action Complaint at 5, *Lagen v. United Cont’l Holdings, Inc.*, 774 F.3d 1124 (7th Cir. 2014) (No. 12 C 4056).

<sup>2</sup> 49 U.S.C. § 41713 (2012).

<sup>3</sup> *Lagen*, 774 F.3d at 1127–28.

<sup>4</sup> *Id.* at 1128.

<sup>5</sup> *Id.* at 1129–32 (Hamilton, J., dissenting).

<sup>6</sup> *Id.* at 1127–28 (majority opinion).

covenant of good faith and fair dealing, and unjust enrichment.<sup>7</sup> For a breach of contract claim to survive a motion for summary judgment, the plaintiff must offer proof of “(1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff.”<sup>8</sup> In the present case, the plaintiff alleged that he and the defendant formed a contract separate from the original MileagePlus agreement.<sup>9</sup> He argued that United made a unilateral offer of lifetime benefits to program members who flew 1,000,000 miles on United flights, and he subsequently accepted that offer by actually flying 1,000,000 miles.<sup>10</sup> Additionally, the plaintiff maintains that United’s post-merger restructuring of the frequent flyer program, which either reduced or omitted so-called “lifetime benefits” to Million-Mile Flyer status members, resulted in a breach of a separate, unilateral contract formed between the class of Million-Mile Flyers and United Airlines.<sup>11</sup>

Since 1981, United Airlines has allowed customers to join its MileagePlus program if they “(1) acknowledge that they have read and understood the MileagePlus Program Rules, and (2) agree to be bound by those Rules.”<sup>12</sup> This program allows customers to take advantage of rewards such as upgrades of in-flight seating and free flights in exchange for frequently flying with United.<sup>13</sup> Most importantly, the MileagePlus Program rules governing the benefits have always permitted United to unilaterally refashion the terms of the program, even without notice.<sup>14</sup> These rules were in place in 1993 when plaintiff joined the MileagePlus Program, in 1997 when United announced the new Million-Mile Flyer status, and in 2006 when plaintiff became a Million-Mile Flyer.<sup>15</sup>

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<sup>7</sup> *Id.* at 1125, 1128; Amended Class Action Complaint at 9–12, *Lagen v. United Cont’l Holdings, Inc.*, 774 F.3d 1124 (7th Cir. 2014) (No. 12 C 4056).

<sup>8</sup> *Zirp-Burnham, LLC v. E. Terrell Assocs., Inc.*, 826 N.E.2d 430, 439 (quoting *Henderson-Smith & Assocs., Inc. v. Nahamani Family Serv. Ctr., Inc.*, 752 N.E.2d 33, 43 (Ill. App. Ct. 2001)) (internal quotation marks omitted).

<sup>9</sup> *Lagen*, 774 F.3d at 1125.

<sup>10</sup> *Id.* at 1126.

<sup>11</sup> *Id.*

<sup>12</sup> Brief of the Defendant-Appellees at 3, *Lagen v. United Cont’l Holdings, Inc.*, 774 F.3d 1124 (7th Cir. 2014) (No. 14-1375).

<sup>13</sup> *Lagen*, 774 F.3d at 1125.

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

<sup>15</sup> *Id.* at 1126.

After United's 2011 merger with Continental, the airline reformed the program's annual status levels.<sup>16</sup> After the merger, a Million-Mile Flyer, previously classified under the mid-level Premier Executive status, became a Premier Gold level member—the third-highest tier in a four-tier system that requires 50,000 miles annually.<sup>17</sup> Under the pre-merger program, Premier Executives received credit “representing the miles they actually flew plus a 100% bonus on top of actual mileage,” superior priority for upgrades, and “two annual regional upgrades and three one-time, system-wide upgrades.”<sup>18</sup> Post-merger, Premier Gold level members receive a 50% bonus on miles actually flown and do not have access to regional or system-wide upgrades.<sup>19</sup>

In this suit, plaintiff George Lagen filed a complaint on behalf of himself and the class of Million-Mile Flyers against the defendant airline alleging breach of contract, breach of the implied covenant of good faith and fair dealing and unjust enrichment.<sup>20</sup> The defendant filed a motion to dismiss that was denied as to the breach of contract claim but granted as to the covenant of good faith and fair dealing and unjust enrichment claims.<sup>21</sup> The district court granted the defendant's Cross-Motion for Summary Judgment under Rule 56(a).<sup>22</sup> That court held that the plaintiff did not produce any evidence that United Airlines made him or other class members an offer to partake in a separate frequent flyer program.<sup>23</sup> To conclude, the district court provided that the plaintiff's evidence was insufficiently vague and he failed to prove that the programs were “separate and distinct.”<sup>24</sup> On appeal, the Seventh Circuit affirmed the district court's grant of United's Cross-Motion for Summary Judgment.<sup>25</sup>

The Seventh Circuit reviewed the holding of the district court *de novo*<sup>26</sup> and, as is required for a summary judgment analysis,

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

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

<sup>18</sup> *Id.*

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

<sup>20</sup> *Id.* at 1125.

<sup>21</sup> *Lagen v. United Cont'l Holdings, Inc.*, 920 F. Supp. 2d 912, 913, 919 (N.D. Ill. 2013).

<sup>22</sup> *Lagen v. United Cont'l Holdings, Inc.*, No. 12 C 4056, 2014 WL 258756, at \*1 (N.D. Ill. Jan. 23, 2014).

<sup>23</sup> *Id.* at \*3.

<sup>24</sup> *Id.* at \*2.

<sup>25</sup> *Lagen*, 774 F.3d at 1125.

<sup>26</sup> *Id.* at 1127.

considered whether the plaintiff presented “specific facts showing that there is a genuine issue for trial.”<sup>27</sup> However, the court found that the plaintiff could not even produce sufficient evidence to prove the first element of a breach of contract claim.<sup>28</sup> Specifically, the court found that the plaintiff did not have a separate contract as a Million-Mile Flyer that was different from the contract between MileagePlus members and United Airlines.<sup>29</sup> Though the rules of the MileagePlus program do not expressly mention the Million-Mile Flyer program, the court expressed that this only shows that these rules do not address every minute detail of each level within the program, not that each level falls outside the governing hands of the rules.<sup>30</sup> The court notes that additional evidence existed that weighed in favor of United’s argument that only one contract existed, which is governed by the MileagePlus guidelines.<sup>31</sup> Such evidence includes: (1) advertisements by United that specify only MileagePlus members are qualified to become Million-Mile Flyers; (2) the 1997 *Friendly Skies Newsletter* announcing the Million-Mile Flyer program stated that the new reward program was for “Mileage Plus members;” (3) congratulatory emails to new Million-Mile Flyers that list “United Mileage Plus” as the sender; (4) those same emails references MileagePlus terms and conditions; (5) United’s website contains information about Million-Mile Flyer rewards under the title of MileagePlus; and (6) a member’s Million-Mile Flyer status is recorded on the MileagePlus member’s card.<sup>32</sup>

Additionally, the Seventh Circuit found that the plaintiff’s argument that United’s advertising practice may be misleading or fraudulent is preempted by the ADA.<sup>33</sup> This Act preempts claims for the breach of a state-enforced covenant of good faith and fair dealing.<sup>34</sup> Most importantly, the Seventh Circuit followed the Supreme Court’s ruling that the ADA “pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection stat-

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<sup>27</sup> *Seng-Tiong Ho v. Taflove*, 648 F.3d 489, 496 (7th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986)).

<sup>28</sup> *Lagen*, 774 F.3d at 1127.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 1128; *see* 49 U.S.C. § 41713 (2012).

<sup>34</sup> *See Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1432 (2014).

utes.”<sup>35</sup> The ADA does not grant airlines blanket permission to lie or mislead customers; it redirects such complaints to the Department of Transportation, which is the agency that regulates these activities.<sup>36</sup> The Seventh Circuit simply followed well-established law and honored the existent statutory scheme by ruling that the remainder of the plaintiff’s claims were preempted.<sup>37</sup>

Contrary to the majority opinion, Judge Hamilton’s dissent calls for a reversal of summary judgment to allow the plaintiff to present his claims to a jury.<sup>38</sup> The dissent believes that a second, distinct contract was formed either by option or unilateral contract because United offered benefits “invit[ing] acceptance by conduct, and acceptance by conduct is sufficient to form a binding contract.”<sup>39</sup> Further, the dissent avers that the introduction of the Million-Mile Flyer status “trumps” United’s reservation of its right to modify the structure of the MileagePlus program, including the right to change benefits.<sup>40</sup> The dissent opines that there is at least a factual question as to whether a reasonable United customer would have believed his lifetime benefits were subject to the rules and guidelines of the MileagePlus program.<sup>41</sup> Lastly, the dissent contends that because the ADA preempts “claims under state consumer protection laws,” the plaintiff should be allowed to sue United for breach of contract to “enforce commitments” that United willingly undertook.<sup>42</sup>

Additionally, the dissent disagreed with the majority’s balancing of evidence in deciding whether a reasonable customer would have known that the Million-Mile Flyer status was part of the MileagePlus program and the majority’s apprehensiveness about creating a “slippery slope” effect by allowing similar lawsuits to proceed.<sup>43</sup> Judge Hamilton discredits the evidence that customers should have known the Million-Mile Flyer was not

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<sup>35</sup> *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

<sup>36</sup> *Id.* at 379.

<sup>37</sup> See *Ginsberg*, 134 S. Ct. at 1430–33 (holding that a claim for breach of covenant of good faith and fair dealing is preempted by the ADA); see also *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 222 (1995); *Morales*, 504 U.S. at 378 (holding that the ADA “pre-empts the States from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes”); *Lagen*, 774 F.3d at 1128.

<sup>38</sup> *Lagen*, 774 F.3d at 1132 (Hamilton, J., dissenting).

<sup>39</sup> *Id.* at 1129.

<sup>40</sup> *Id.* at 1129–30.

<sup>41</sup> *Id.* at 1130–31.

<sup>42</sup> *Id.* at 1132.

<sup>43</sup> *Id.* at 1130.

separate from the MileagePlus program.<sup>44</sup> He insists that only a “legally sophisticated or hyper-vigilant customer” would notice that the lifetime benefits were subject to the rules and guidelines of the MileagePlus program.<sup>45</sup> Further, the dissent is convinced that the facts of this case distinguish it from cases involving “vague advertising promises,” and the majority’s concern of opening up the courtroom doors to excessive litigation is unwarranted.<sup>46</sup>

The problem with the dissent’s argument is that its leading points are not backed by sufficient evidence or law. While the dissent correctly determines that the applicable legal test is whether a reasonable customer would have interpreted the Million-Mile Flyer status to fall under the MileagePlus program guidelines, Judge Hamilton presents little support to counter the majority’s finding that a reasonable person could not have assumed the creation of two separate programs or contracts.<sup>47</sup> The majority provides a long list of facts that would have led a reasonable customer to conclude that the benefits offered to Million-Mile Flyers were subject to the rules and guidelines of the MileagePlus program.<sup>48</sup> The dissent refers to these facts as “sparse” and seeks to dismiss them with the plain meaning of the word “lifetime.”<sup>49</sup> However, simply using the word “lifetime” does not outweigh the multitude of clear facts to support that two separate programs or contracts failed to exist.<sup>50</sup> Additionally, it was unreasonable for the plaintiff to assume that his mid-level benefit status formed a separate contract with United.<sup>51</sup> The plaintiff should have questioned why United would unilaterally offer a separate contract to mid-status members but not to members who had achieved the highest level of MileagePlus membership.<sup>52</sup> With reference to the dissent’s preferred case law citation, in considering all of the circumstances, it is clear that United did not make a separate unilateral offer, but rather

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 1131.

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

<sup>47</sup> *Id.* at 1130–31.

<sup>48</sup> *Id.* at 1127 (majority opinion).

<sup>49</sup> *Id.* at 1131 (Hamilton, J., dissenting).

<sup>50</sup> *See id.* at 1127 (majority opinion).

<sup>51</sup> *Id.* at 1126.

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

offered an additional status title for certain members of the MileagePlus program.<sup>53</sup>

Further, the dissent asserts that “all of these facts” distinguish this case from others in the category that the majority worries will invite excessive litigation.<sup>54</sup> However, the dissent only presents three facts: (1) that plaintiff achieved Million-Mile Flyer status; (2) that benefits for Million-Mile Flyers were labeled “lifetime benefits”; and (3) that there was no asterisk or fine print alerting customers that the lifetime terms were still subject to the MileagePlus rules and guidelines.<sup>55</sup> But, these three small facts do not indicate that there is a factual issue to be decided by a jury. Indeed, the plaintiff achieved Million-Mile Flyer status, but the plaintiff also received rewards promised to him under the rules and guidelines applicable to that MileagePlus membership level.<sup>56</sup> As the majority established, labeling the rewards as “lifetime benefits” does not refute the fact that the MileagePlus rules and guidelines govern these rewards.<sup>57</sup> Finally, the lack of asterisks or fine print only shows that United did not recognize the need to alert its customers to the rational inference that a status, strictly available to MileagePlus members only, is still part of the MileagePlus program.<sup>58</sup>

Recently, there have been a number of attempted suits against airlines over airline rewards programs.<sup>59</sup> In fact, a similar breach of contract case against United was filed in the Federal District Court for the Northern District of Illinois.<sup>60</sup> Based on the Seventh Circuit’s recent decision in *Lagen*, the Illinois District Court granted United’s Motion for Summary Judgment.<sup>61</sup> The majority ruling in *Lagen* should be a warning to airline customers to read the rules and guidelines governing their frequent flyer programs and to realize that these rules govern all status

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<sup>53</sup> *Id.* at 1130 (Hamilton, J., dissenting); see *Kolodziej v. Mason*, 774 F.3d 736, 741–44 (11th Cir. 2014).

<sup>54</sup> *Lagen*, 774 F.3d at 1131 (Hamilton, J., dissenting).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 1126–27 (majority opinion).

<sup>57</sup> See *id.* at 1127.

<sup>58</sup> See *id.*

<sup>59</sup> See, e.g., *Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422 (2014); see also *Kwok v. Delta Air Lines Inc.*, 578 Fed. Appx. 898 (11th Cir. 2014); *Hangbo Han v. United Cont’l Holdings, Inc.*, 762 F.3d 598 (7th Cir. 2014); *Gordon v. United Cont’l Holdings, Inc.*, No. 12 C 6244, 2014 WL 4354067 (D. N.J. Sept. 3, 2014).

<sup>60</sup> See *Banakus v. United Cont’l Holdings, Inc.*, No. 12 C 6244, 2015 U.S. Dist. LEXIS 35205, at \*2 (N.D. Ill. Mar. 20, 2015), *aff’d*, 809 F.3d 946 (11th Cir. 2016).

<sup>61</sup> *Banakus*, 2015 U.S. Dist. LEXIS 35205, at \*7–10.



levels within the program.<sup>62</sup> Further, airlines should be cognizant of the language they use in describing benefits and rewards programs to avoid potentially misleading their patrons.<sup>63</sup> Both of these precautions will help to avoid unwanted litigation.

“A person could be forgiven for thinking that a ‘lifetime’ benefit that can vanish in an instant is an oxymoron.”<sup>64</sup> Plaintiff’s confusion and anger over his reduced benefits, post-merger, is understandable. However, it is clear that there was no breach of contract in this case.<sup>65</sup> That being true, the ADA requires the plaintiff to present his grievance to the Department of Transportation.<sup>66</sup> It may not be the solution the plaintiff expected, but Congress passed the ADA to guarantee that the states would not negate federal deregulation with state regulation.<sup>67</sup> In 1978, Congress determined that “maximum reliance on competitive market forces” would best further “efficiency, innovation, and low prices” in addition to variety and quality amongst air transportation services.<sup>68</sup> Because the states are prohibited from enforcing any law “relating to rates, routes[,] or services” of any airline, complaints regarding an airline’s advertising practices must be addressed with the Department of Transportation.<sup>69</sup>

In conclusion, the Seventh Circuit correctly applied well-established contract law and the ADA to the plaintiff’s claims when it affirmed the district court’s grant of United’s Cross-Motion for Summary Judgment.<sup>70</sup> In contrast, the dissenter, who is understandably sympathetic toward the plaintiff’s position, fails to support his argument with substantial facts or case law.<sup>71</sup> Ultimately, the plaintiff will have to take his complaint to the proper regulatory agency and will hopefully forewarn others to read and understand the rules and guidelines governing their frequent flyer rewards programs.

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<sup>62</sup> See *Lagen*, 774 F.3d at 1128.

<sup>63</sup> See *id.*

<sup>64</sup> *Id.* at 1125.

<sup>65</sup> See *id.* at 1128.

<sup>66</sup> See 49 U.S.C. § 41713(b)(1) (2012).

<sup>67</sup> See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992).

<sup>68</sup> 49 U.S.C. § 40101(a)(6), (a)(12)(A) (2012).

<sup>69</sup> See 49 U.S.C. § 41713 (2012).

<sup>70</sup> See *Lagen*, 774 F.3d at 1128.

<sup>71</sup> See *id.* at 1128–32 (Hamilton, J., dissenting).