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I. INTRODUCTION

THIS COMMENT will examine the current treatment of the Airline Deregulation Act of 1978 (ADA) in U.S. courts. The ADA is of the utmost importance to the airline industry because it provides for the preemption of many state law claims against air carriers. The goal of this Comment is to compile the most important recent cases construing the ADA and to provide a thoughtful analysis of the implications of those cases.

II. THE ADA AND THE COURTS

The United States Supreme Court has had occasion to rule on the ADA two times since 1992. The Court’s opinions in these cases have unleashed much controversy and have not settled many issues. Indeed, these opinions have served only to increase the clamor about the ADA and have led lower courts to issue conflicting rulings.

A. THE ADA PREEMPTION PROVISION AND THE SAVINGS CLAUSE

The ADA specifically states that certain state statutory and common-law claims may not be brought against air carriers:

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.

This provision of the ADA has generated a tremendous amount of litigation.

Courts have often construed this subsection with another section of the ADA (termed the "savings clause"), which states that "[a] remedy under this part is in addition to any other remedies provided by law." The interplay between these two sections of the ADA has been at the core of many disputes that have found their way into state and federal courts.

B. THE ADA IN THE UNITED STATES SUPREME COURT

Since 1992, the United States Supreme Court has issued two rulings construing the ADA and, in particular, these two sections. The first, Morales v. Trans World Airlines, Inc., was a landmark decision in which the Court attempted to explain, among other items, if the preemption provision now found in section 41713(b) preempted claims arising under a state deceptive trade practices act. The second, American Airlines, Inc. v. Wolens, presented the Court with the question of whether the ADA preempted breach of contract claims against air carriers. These two rulings have led to much litigation in lower courts, both state and federal, concerning the preemption issue. Judges have struggled to develop a consistent methodology of applying Morales and Wolens.

The remainder of this Comment will be devoted to an examination of the application of the preemption provision, the savings clause, and the Morales and Wolens opinions over the past few years. Additionally, holdings of various lower courts will be examined in order to ascertain whether they answer any of the questions that have surfaced since the advent of Morales and Wolens. Before turning to an in-depth examination of those two cases, it will be useful for the reader to briefly review the pre-Morales state of preemption litigation.

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2 49 U.S.C. § 40120(c) (1994). Again, in 1994 Congress changed this section with Pub. L. No. 103-272. The previous section provided that "[n]othing . . . in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506 (1994). Similarly, the legislative history indicates that Congress did not intend to affect any change of the statute's interpretation by the courts, as the section was changed in order "to eliminate unnecessary words and for clarity and consistency in the revised title and with other titles of the United States Code." H.R. Rep. No. 103-180 at 276 (1994), reprinted in 1994 U.S.C.C.A.N. 818, 1093.


III. PREEMPTION LAW BEFORE MORALES AND WOLENS

Before the U.S. Supreme Court handed down its Morales decision in 1992, cases involving the preemption provision of the ADA generally fell into two categories: (1) those involving economic and regulatory issues; and (2) those involving some type of personal injury claim, including state law tort claims. Courts often held that the preemption provision barred claims in the first category. Under this rubric, for example, courts ruled that the ADA preemption provision barred claims involving seating for the physically challenged, proscribed conduct (such as smoking), related to unruly passengers.

In contrast, courts generally held that claims which arose from "traditional" tort claims under state law were not preempted. Courts have stated that the reason for sustaining such claims was "that the scope of the [ADA] should not be so broad that it is used as a justification for the preemption of all conceivable state law claims having a remote connection to 'rates, routes, or services.'" Such was the delineation faced by the Supreme Court when it heard Morales in 1992. While the Morales opinion did not expressly strike down the two category system just described, it did unleash a maelstrom of confusion, causing lower courts to adjudicate preemption cases in a nonuniform manner.

IV. THE MORALES DECISION

The Morales case began when Texas Attorney General Jim Mattox, relying on Air Travel Enforcement Guidelines developed by the National Association of Attorneys General (NAAG), sent a memorandum to several airlines complaining of a lack of

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6 Id. See, e.g., Illinois Corporate Travel, Inc. v. American Airlines, Inc., 889 F.2d 751 (7th Cir. 1989) (claims against air carrier brought under state consumer fraud statute barred by ADA preemption provision); see also Daniel Petroski, Airlines' Response to the DTPA Section 1305 Preemption, 56 J. AIR L. & COM. 125 (1990).
7 Kahn, 639 N.E.2d at 212. See, e.g., O'Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir. 1989) (claims arising from the "wrongful exclusion" of noisy passengers preempted); Anderson v. USAir, Inc., 818 F.2d 49 (D.C. Cir. 1987) (case based on seating of physically challenged passenger preempted); Diefenthal v. Civil Aeronautics Bd., 681 F.2d 1039 (5th Cir. 1982) (challenges to rules prohibiting smoking preempted).
8 Kahn, 639 N.E.2d at 212. See, e.g., In re Air Crash Disaster at Stapleton Int'l Airport, 721 F. Supp. 1185 (D. Colo. 1988) (tort claims arising from airplane crash not preempted).
adequate disclosure in airline advertising.\textsuperscript{10} Mattox sent the memorandum despite notification from both the Department of Transportation and the Federal Trade Commission that the NAAG guidelines were violative of the ADA preemption provision and contrary to public policy.\textsuperscript{11}

The airlines initiated the litigation by seeking a preliminary injunction in federal court against Mattox, which would have prevented him from bringing enforcement actions against the airlines under the Texas Deceptive Trade Practices-Consumer Protection Act (DTPA).\textsuperscript{12} The district court granted the airlines' motion, stating that any enforcement action brought against the airlines under any state law regarding the airlines' advertising was preempted by federal law.\textsuperscript{13}

In 1990, the Fifth Circuit affirmed the ruling of the district court.\textsuperscript{14} The court stated that "it [was] clear that by enacting \S 1305 Congress intended to retain in the federal government[ ] exclusive authority over airline advertising of fares."\textsuperscript{15} The court also noted that the Department of Transportation had the power to bring actions against airlines resulting from unfair and deceptive trade practices, and, therefore, the court did not feel that it was leaving the airlines in an unregulated "vacuum which the states needed to fill in order to protect their citizens."\textsuperscript{16}

\begin{flushright}
\textsuperscript{10} Morales, 504 U.S. at 379. An excerpt from the NAAG guidelines can be found in the appendix to the Morales opinion. \textit{Id.} at 391. They include detailed rules concerning fare advertisements (print, commercials, and billboards), fare availability, surcharges, frequent flyer programs, and other topics.

\textsuperscript{11} \textit{Id.} at 379.


\textsuperscript{13} Mattox, 712 F. Supp. at 101. The court did not, however, specifically mention the ADA preemption provision. Rather, it relied on the "Commerce Clause \ldots the Constitutional prohibition against interstate compacts that intrude into the federal domain \ldots [and the] Plaintiffs' First Amendment rights." \textit{Id.}

\textsuperscript{14} Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990).

\textsuperscript{15} \textit{Id.} at 783.

\textsuperscript{16} \textit{Id.} The statute giving the Department of Transportation such authority now provides:

On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, or ticket agent, and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition in air transportation or the sale of air transportation. If the Secretary, after notice and an op-
The U.S. Supreme Court defined the issue before it in *Morales* as “at bottom . . . one of statutory intent.” The Court had to determine just how broad the phrase “relating to” in the ADA preemption provision swept.

Writing for the Court, Justice Scalia referred to the definition of the word “relate”: “to stand in some relation; to have bearing or concern; to pertain; refer.” The Justice went on to note that the phrase “express[ed] a broad pre-emptive purpose” and that a similarly worded clause in the Employment Retirement Income Security Act of 1974 (ERISA) had been given “a broad scope” and “an expansive sweep.”

Justice Scalia then explained the Court’s rejection of the states’ arguments. To begin with, the Justice rejected the notion that comparison of the ADA to ERISA was improper. Additionally, the Justice stated that the states’ reading of the preemption clause as only prohibiting states “from actually prescribing rates, routes, or services . . . . simply [read] the words ‘relating to’ out of the statute.” Justice Scalia also rejected the notion that preemption only applies to “state laws specifically addressed to the airline industry.” Finally, the Justice stated that the “preemption provision . . . displace[s] all state laws that fall within its sphere, even including state laws that are consistent . . . ” with the Department of Transportation’s ability to regulate advertising.

The Justice closed with a few remarks that are also worthy of note. He argued that if such state law claims were not pre-

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17 *Morales*, 504 U.S. at 383.
18 Id. (quoting BLACK’S LAW DICTIONARY 1158 (5th ed. 1979)).
19 Id. at 383-84.
20 Id. at 384.
21 Id. at 385.
22 Id. at 386.
23 Id. at 387. For example, the Texas DTPA forbids:

the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed.

emptied, it "would give consumers a cause of action . . . for an airline's failure to provide a particular advertised fare—effectively creating an enforceable right to that fare when the advertisement fails to include the [NAAG]-mandated explanations and disclaimers."24 Next, Justice Scalia argued that airlines must be free of state regulation of advertising in order to remain profitable. "The [NAAG] guidelines severely burden . . ." the airlines' ability to fill their flights in a profitable manner.25 The Justice then quoted from a Federal Trade Commission letter to the deputy attorney general of California, pointing out another adverse effect of the NAAG guidelines, namely that "requiring too much information in advertisements can have the paradoxical effect of stifling the information that consumers receive."26

Finally, Justice Scalia explained that the ADA does not preempt all state law claims against airlines. In particular, state regulation of the nonprice aspects of advertising could be permissible, as could state laws prohibiting gambling and prostitution as applied to airlines.27 The Justice closed by stating that "[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner to have preemptive effect."28

V. THE WOLENS DECISION

The United States Supreme Court most recently ruled on a case dealing with the scope of the ADA preemption provision in American Airlines, Inc. v. Wolens,29 issued in January of 1995. In Wolens, the Court considered two consolidated state class actions brought against American Airlines under Illinois law.

A. THE COURT AGAIN RULES THAT THE ADA PREEMPTS STATE CONSUMER PROTECTION CLAIMS

The plaintiffs in both cases were participants in American's frequent flyer program, AAdvantage.30 The complaints concerned American's imposition of retroactive cutbacks on the use of previously received credits that could be exchanged for free air tickets.31 The plaintiffs maintained that the retroactive

24 Morales, 504 U.S. at 388.
25 Id.
26 Id. at 390.
27 Id.
28 Id.
30 Id. at 822.
31 Id.
changes in the AAdvantage program violated the Illinois Consumer Fraud and Deceptive Business Practices Act (IDBPA)\textsuperscript{32} and constituted a breach of contract.\textsuperscript{33}

The Supreme Court stated that the state statutory claims related to "rates" because the claims arose out of "American's charges in the form of mileage credits for free tickets . . . [and related to] 'services'" because the claims arose from "access to flights."\textsuperscript{34} The Court went on to say that the real issue in the case was the interpretation of the words "enact or enforce any law" in the ADA preemption clause, which at the time stated that "[n]o state . . . shall enact or enforce any law . . . relating to [air carrier] rates, routes, or services."\textsuperscript{35}

The Court ruled that the ADA preempted the claims arising under the IDBPA.\textsuperscript{36} As the Court pointed out, the IDBPA "is paradigmatic of the consumer protection legislation underpinning the NAAG guidelines."\textsuperscript{37} Because the IDBPA "serve[d] as a means to guide and police the marketing practices of airlines," the ADA preempted the application of the IDBPA to the actions of American.\textsuperscript{38} The Court noted, as it did in Morales, that the Department of Transportation retained the authority to regulate airlines in a manner similar to the IDBPA.\textsuperscript{39} In summary, the Court agreed with American's argument that "Congress could hardly have intended to allow the States to hobble [com-

\textsuperscript{32}The IDBPA is codified at 815 ILL. COMP. STAT. 505/1 - 505/12 (West 1992). The specific statute in question forbade:

[\textit{u}nfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact . . . in the conduct of any trade or commerce . . . whether any person has in fact been misled, deceived or damaged thereby.

815 ILL. COMP. STAT. 505/2 (West 1992). This language mirrors the language of the NAAG Guidelines discussed in Morales.

\textsuperscript{33}Wolens, 115 S. Ct. at 822.

\textsuperscript{34}Id. at 823.

\textsuperscript{35}Id.

\textsuperscript{36}Id. at 823-24.

\textsuperscript{37}Id. at 823.

\textsuperscript{38}Id.

\textsuperscript{39}Id. at 823 n.4. The Court revealed that the Department of Transportation issued 34 cease and desist orders pursuant to its regulatory authority and assessed more than $1.8 million in fines in aviation economic enforcement proceedings in 1993. Id.
petition for airline passengers] through the application of restrictive state laws.\textsuperscript{40}

B. THE ADA DOES NOT PREEMPT CLAIMS OF BREACH OF CONTRACT

The \textit{Wolens} Court did, however, uphold the plaintiffs' claims based on the theory of breach of contract. The Court reasoned that "terms and conditions airlines offer and passengers accept are privately ordered obligations 'and thus do not amount to a State's enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [the ADA preemption provision]."\textsuperscript{41} Additionally, the Court also pointed out that the ADA was crafted with the goal of "maxim[izing] reliance on competitive market forces."\textsuperscript{42} Allowing claims for breach of contract to be maintained would serve this goal.

Since the Supreme Court's opinions in \textit{Morales} and \textit{Wolens}, lower federal and state courts have returned rulings construing the ADA preemption clause that have often conflicted with each other. The following analysis supports this contention and demonstrates that \textit{Morales} and \textit{Wolens} have done little to settle the question of how far federal preemption of state law claims against air carriers reaches. The focus of the courts has now switched to the construction of the terms "rates" and "services"

\textsuperscript{40} Id. at 824 (quoting Brief of American Airlines at 27).

\textsuperscript{41} Id. (quoting Brief of the United States as amicus curiae). The Supreme Court long ago held that judicial enforcement of racially discriminatory restrictive covenants contained in deeds to private real property constituted "state action" that violated the Equal Protection Clause of the Fourteenth Amendment. \textit{Shelley v. Kraemer}, 334 U.S. 1, 20 (1947). The Court stated that "[s]tate action ... refers to exertions of state power in all forms." \textit{Id.} The Court also rejected the argument that "judicial enforcement of private agreements does not amount to state action . . . ." \textit{Id.} at 14.

Is \textit{Wolens} consistent with \textit{Shelley}? The plaintiffs in \textit{Wolens} attempted to enforce "privately ordered obligations" not unlike the plaintiffs in \textit{Shelley}. Nonetheless, the \textit{Wolens} Court held that the ADA did not preempt judicial enforcement of such obligations. Does not the judicial enforcement of "privately ordered obligations" constitute the "enact[ment] or enforce[ment] [of a] law . . . ." in light of the fact that "[s]tate action . . . refers to exertions of state power in all forms"?

and away from the construction of the phrase “relates to” as in *Morales.*

VI. CASES CONCERNING “RATES”

*Wolens* changed the way courts have approached rulings concerning what claims actually relate to “rates” for purposes of the ADA preemption clause. *Statland v. American Airlines, Inc.* provides an excellent example of a post-*Morales*, pre-*Wolens* case regarding “rates.” In *Statland*, the court dealt with a class action claim against American concerning penalties assessed to ticketed passengers resulting from the cancellation of their tickets. American’s policy was to keep ten percent of both the ticket price and the federal tax paid by the ticket purchaser whenever a passenger canceled a ticket. The plaintiffs claimed that American’s practice contravened Department of Transportation regulations in that the tickets purchased did not state that American had the right to retain ten percent of the purchase price in the event of cancellation.

The plaintiffs brought claims against American under section 411(b) of the Federal Aviation Act and under Illinois state law for breach of fiduciary duty, violation of the IDBPA, conversion, and breach of contract. The court held that the Federal Aviation Act did not create a private right of action and that the ADA preempted the state law claims.

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43 The construction of the term “routes” has not been a frequent subject of litigation and will not be considered in this Comment.

44 998 F.2d 539 (7th Cir. 1993).

45 Id.

46 Id.

47 Id.

48 This provision has been recodified at 49 U.S.C. § 41712 (1994). *See supra* note 16 and accompanying text.

49 *See supra* note 32 and accompanying text.

50 *Statland*, 998 F.2d at 539, 541-42.

51 *Id.* at 540. Concerning the private right of action under the Federal Aviation Act, the court stated “that a private cause of action is seldom implied for statutes framed as general commands to a federal agency or for statutes that do not create rights for a specific class of persons.” *Id.* (citing *Evanston v. Regional Transp. Auth.*, 825 F.2d 1121, 1123 (7th Cir. 1987)). The court went on to say that it was not Congress’s intent to give plaintiffs such as Statland a private cause of action under the Federal Aviation Act. *Id.* If not so, then “every law regulating a business would give its customers an implied private right to sue.” *Id.*

Many courts have ruled that the ADA preemption provision does not, by itself, create a private right of action. *See Air Transp. Ass’n of Am. v. Public Util. Comm’n*, 833 F.2d 200, 207 (9th Cir. 1987); *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 97 (2d Cir.), *cert. denied*, 479 U.S. 872 (1986). Moreover, the
The court gave a terse explanation of the operation of the ADA preemption provision in the case. It cited Morales’s view of the ADA as having a “broad pre-emptive purpose” and noted its own prior holding that the ADA preempted a state law claim against an airline regarding the airline’s ticket advertising policies. The court thus concluded in a succinct manner “that [it] is obvious that canceled ticket refunds relate to rates.”

The court’s holding in Vail v. Pan Am Corp. also comports with the logic of Statland. The plaintiffs in Vail alleged that from 1986 to 1989, Pan Am falsely advertised that it was instituting an enhanced security program and, thus, fraudulently charged five dollars per ticket in order to recoup the costs of the program. The plaintiffs stated that the ADA did not preempt their claims for “nothing more than traditional actions for fraud and breach of contract [because] they did not seek to regulate rates or to ‘usurp the industry’s authority to regulate security measures.’” Finally, the plaintiffs stated that the savings clause prevented preemption of their claims because the savings clause “contemplates that unless the common-law claim and the federal Act are ‘absolutely inconsistent,’ they may coexist.”

savings clause and applied the *Morales* reasoning that “[a] general ‘remedies’ saving clause cannot be allowed to supersede the specific substantive pre-emption provision [now found at 49 U.S.C. § 41713(b)].”

The court then added a policy-based argument:

If the airline’s conduct were fraudulent or deceptive, state courts could fashion remedies, applying state law, proscribing certain advertising and compelling the airline to repay customers surcharges and other ‘rates’ charged to air passengers. The result would be multiple and potentially conflicting standards controlling advertising, services, and rates. The conclusion is inescapable that Congress intended to reject the dual enforcement of state law claims relating to rates . . . .

Thus, the court held that the plaintiff’s claims were barred by the operation of the ADA.

Since the advent of *Wolens*, however, courts have been forced to rethink the approaches taken in *Vail* and *Statland* for cases concerning “rates.” *Johnson v. American Airlines, Inc.* provides an excellent example of this fact. The case involved two consolidated class action suits brought by ticket holders against air carriers concerning penalties assessed on canceled tickets. The plaintiffs claimed that the airlines had informed them that upon cancellation of their tickets they would be required to pay a penalty equal to twenty-five percent of the total fare. When they did cancel their tickets, however, the airlines assessed penalties based on twenty-five percent of the total price of the ticket, an amount which included federal transportation tax. The Illinois appellate court that heard the case originally affirmed the trial court’s orders granting the air carriers’ motions to dismiss based on *Morales*. The Supreme Court, however, vacated the appellate court’s ruling and remanded the case for reconsideration in light of *Wolens*, which it handed down after the original appeal.

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59 Id. at 526.
60 Id. at 526-27.
61 Id. at 528.
63 Id. at 55.
64 Id.
65 Id.
66 Id.
67 Id. at 56; see *Wolens*, 115 S. Ct. at 817.
On remand, the court pointed out that Wolens stands for the proposition that the ADA does not preempt breach of contract claims against air carriers stemming from their self-imposed duties and obligations. The court then clarified the required analysis:

If the obligation allegedly breached is solely a self-imposed undertaking that the airline itself undertook to perform, a breach of that undertaking is not preempted. But, if the source of the obligation that has allegedly been breached is a state law or policy, external to the airline's own self-imposed undertaking, a breach of that obligation is preempted.

The court concluded that the plaintiffs' claims were not preempted because they involved "an agreement between the airlines and the plaintiffs."

Wolens, therefore, would change the result of "rates" cases such as Statland and Vail. It would appear that many cases involving "rates" are now free from the threat of preemption to the extent that such cases involve the self-imposed duties of air carriers as reflected in the language of the tickets which they issue. A breach of the terms included in a ticket constituting the contract between an air carrier and its passenger is clearly actionable under Wolens.

VII. CASES CONCERNING "SERVICES"

Since Morales and Wolens, a far more contentious area of jurisprudence has developed concerning what exactly are "services" for purposes of the ADA. The next portion of this Comment will examine the many divergent cases that the courts have handed down since Morales and Wolens dealing with this question.

A. Hodges and Smith: The Fifth Circuit Approach

Hodges v. Delta Airlines, Inc. involved a passenger who was injured in flight when another passenger opened an overhead compartment and caused a case of rum to fall to the floor. Plaintiff Hodges suffered lacerations on her arm and wrist as a
result. The Fifth Circuit had to decide whether the ADA preempted the plaintiff’s state law tort claim stemming from the alleged negligent operation of an aircraft.

The court opened its opinion by reciting the goal of the ADA: the dismantling of federal economic regulation of the U.S. airline industry. It also pointed out that while Morales mandates that “whatever state laws ‘relate to rates, routes or services’ are broadly preempted,” Morales does not define “services.” The court adhered to the definition of “services” it had previously developed in the first hearing of Hodges, namely, that “‘services’ generally represent a bargained-for or anticipated provision of labor from one party to another.”

The court also pointed to statements of the Civil Aeronautics Board (CAB) to support its view of the solely economic nature

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73 Id.
74 Id.
75 Id. This opinion stems from the second hearing of the case before the Fifth Circuit. The case was first argued in 1993 and published as Hodges v. Delta Airlines, Inc., 4 F.3d 350 (5th Cir. 1993). The court felt bound by a previously unpublished decision (Baugh v. Trans World Airlines, Inc., 915 F.2d 693 (5th Cir. 1990)) that forced it to conclude that the ADA acted to preempt the plaintiff’s state law claims. Hodges, 4 F.3d at 355.

The court stated that “Morales inform[ed] but [did] not squarely resolve this case.” Id. at 353. The court argued that under “the definition of ‘services’ . . . most plausible in light of the ADA’s purpose and historical regulatory antecedents, it appear[ed] that ‘services’ [was] not coextensive with airline ‘safety’.” Id. at 354. As stated, the court felt bound by Baugh to rule as it did, although the court strongly urged an en banc review of its decision. Id. at 352, 356. The Hodges formulation discussed in the remainder of this Comment has as its source the en banc decision found at 44 F.3d 334.

76 Hodges, 44 F.3d at 335.
77 Id. at 336.
78 Id. The court went on to further explain its view of services:

If the element of bargain or agreement is incorporated in our understanding of services, it leads to a concern with the contractual arrangement between the airline and the user of the service. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and bagging handling, in addition to the transportation itself. These matters are all appurtenant and necessarily included with the contract of carriage between the passenger or shipper and the airline. It is these [contractual] features of air transportation that we believe Congress intended to de-regulate as “services” and broadly to protect from state regulation.

Id.
of the term "services."\textsuperscript{79} The court stressed that the CAB's characterization of "services" "strongly support[ed] the view that the ADA was concerned solely with economic deregulation, not with displacing state tort law."\textsuperscript{80}

The court also opined that Congress did not intend to shelter airlines from all state law claims for personal injuries.\textsuperscript{81} The court relied on a provision of the Federal Aviation Act that requires air carriers to carry insurance covering bodily injuries and death resulting from the operation of aircraft.\textsuperscript{82} The requirement to procure insurance could not "be understated, for it could only be understood to qualify the scope of 'services' removed from state regulation by [the ADA preemption provision]."\textsuperscript{83} The court concluded that complete preemption would have rendered the insurance requirement meaningless.\textsuperscript{84}

Thus, the court announced a new dichotomy concerning the term "services" for purposes of the ADA preemption provision. State law tort claims arising from the "operation and maintenance of aircraft" were not preempted by the ADA whereas state law tort claims arising from the "economic services" provided by an air carrier were preempted.\textsuperscript{85} Under the court's formulation,

\textsuperscript{79} Id. at 337.
\textsuperscript{80} Id. In a portion of the Statements of General Policy not quoted by the court, the CAB opines:

\[\text{[P]reemption extends to all of the economic factors that go into the provision of the quid pro quo for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing; and we hereby occupy these fields completely.}\]


\textsuperscript{81} Hodges, 44 F.3d at 338.
\textsuperscript{82} Id. The current version of this provision states:

\begin{quote}
\text{The Secretary of Transportation may issue a certificate to a citizen of the United States to provide air transportation as an air carrier \ldots only if the citizen complies with regulations and orders of the Secretary governing the filing of an insurance policy \ldots The policy \ldots must be sufficient to pay \ldots for bodily injury to, or death of, an individual for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft under the certificate.}
\end{quote}

\textsuperscript{83} Hodges, 44 F.3d at 338.
\textsuperscript{84} Id.
\textsuperscript{85} Id. at 338-39.
then, the “service” provided by an airline is distinct from “operation and maintenance” of an aircraft.

The court pointed out two examples of cases that would still be barred by the ADA under its new formulation. The first included “wrongful exclusion” cases—cases in which passengers are ejected from flights due to inappropriate behavior. The second included “bumping” cases—cases in which passengers are precluded from boarding planes due to overbooking.

Hodges’s companion case, Smith v. America West Airlines Inc., provided the Fifth Circuit with an immediate opportunity to apply its newfound dichotomy of “economic services” as opposed to the “operation and maintenance of aircraft.” In Smith, several passengers who had been on board a hijacked airplane filed suit against the air carrier claiming that the air carrier was negligent in permitting the alleged hijacker to board the airplane.

The air carrier’s preemption argument was based on the fact that if the state law claims were allowed to be maintained, it would “result in significant de facto regulation of the airlines’ boarding practices . . .” Additionally, the air carrier cited a previous case in which the Fifth Circuit held that a claim of wrongful eviction of a passenger was barred by the ADA. The air carrier appeared to argue that if the ADA barred suits based on the wrongful eviction of a passenger, then the ADA should bar a suit based on the wrongful boarding of a passenger as well. The Fifth Circuit did not agree with the logic of the air carrier’s argument.

The court stated that the analogy to O’Carroll was unpersuasive. O’Carroll “involved an alleged breach of the airline’s duty to transport the plaintiff,” while the plaintiffs’ claims in Smith had “nothing to do either with the airlines’ economic practices regarding boarding or with the boarding practices [of the air carrier].” Rather, Smith involved a claim related to the level of

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86 Id.
87 Id. at 340.
88 44 F.3d 344 (5th Cir. 1995) (en banc).
89 Id. at 345. The district court granted the air carrier’s motion for summary judgment on the basis that the plaintiffs’ claims were barred by the ADA. Id.
90 Id. at 346 (quoting Hodges, 44 F.3d at 339).
91 Id. (citing O’Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir.), cert. denied, 490 U.S. 1106 (1989)).
92 Id. at 347.
safety provided to passengers and the disregard for that safety by “permitting a visibly deranged man to board.”

The court closed by stating that the plaintiffs' claims were not barred by the ADA preemption provision. The possible recovery of damages by the plaintiffs would, in the eyes of the court, affect the airline’s ticket sales and security; however, such damages would neither affect nor “regulate the economic or contractual aspects of boarding.”

B. HARRIS: THE NINTH CIRCUIT APPROACH

Not long after the Fifth Circuit handed down Hodges and Smith, the Ninth Circuit issued Harris v. American Airlines, Inc. The Ninth Circuit's ruling created an intercircuit conflict that could lead to another Supreme Court interpretation of the preemption provision. In Harris, the Ninth Circuit was confronted with the question of whether the ADA preempted state law claims against an airline for negligence, gross negligence, intentional infliction of emotional distress, and violation of a state public accommodation statute.

Plaintiff Harris was a first-class passenger on a flight from Dallas, Texas to Portland, Oregon. During the course of the flight, another passenger seated near Harris allegedly became intoxicated and uttered racial epithets intended to upset Harris. Flight attendants stopped serving the unruly passenger, but the passenger continued to procure alcohol by going to the galley and preparing his own drinks.

Plaintiff Harris filed suit in an Oregon court. The court granted summary judgment for the airline on the merits. The Ninth Circuit, however did not reach the merits of the case, and

93 Id.
94 Id. The court stated that this case was exemplary of those in which the possible effect on the economic aspects of the operation of an airline would be "too tenuous, remote, or peripheral" to be preempted under Morales. Id.
95 55 F.3d 1472 (9th Cir. 1995).
96 Id. at 1473. The statute in question, The Oregon Public Accommodation Act, states: "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, religion, sex, marital status, color or national origin." Or. Rev. Stat. § 30.670 (1988).
97 Harris, 55 F.3d at 1473.
98 Id.
99 Id.
upheld the summary judgment in favor of the airline based on
preemption under the ADA.\textsuperscript{100}

In reaching this conclusion, the court first explained its view
of the \textit{Morales} decision, and discussed its ruling in the post-
\textit{Morales} case of \textit{West v. Northwest Airlines, Inc.}\textsuperscript{101} In \textit{West}, the
Ninth Circuit held that claims arising under state law against an
airline due to the “bumping” of a passenger were “too tenuously
connected to airline regulation to trigger preemption under the
ADA [and \textit{Morales}] . . . .”\textsuperscript{102} Finally, the court summarized the
holding of \textit{Wolens}, and then turned to the particulars of the
plaintiff’s claims against the airline.

The Ninth Circuit found the case to be one concerning “serv-
tices.”\textsuperscript{103} The court stated that “[t]he allegations of [the plain-
tiff’s] complaint . . . show[ed] that she [was] complaining
directly about the service of alcoholic beverages that she claim-
[ed] caused [the allegedly intoxicated passenger’s] repre-
sensible conduct, and about the airline’s response to that con-
duct.”\textsuperscript{104} The court quoted extensively from the plaintiff’s
complaint, in which some form of the term “serve” was used at
least three times.\textsuperscript{105} The court stated that the “allegations per-
tain[ed] directly to a ‘service’ the airlines render: the provision
of drink. Moreover, they pertain[ed] directly to how airlines
treat passengers who are loud, boisterous, and intoxicated.”\textsuperscript{106}

\textsuperscript{100} \textit{Id.} Ironically, if the plaintiff had filed her case in a federal court located in
Texas, her case would have been governed by the Fifth Circuit’s interpretation of
the ADA laid down in \textit{Hodges} and \textit{Smith}. Thus, she would have likely been
successful.

\textsuperscript{101} 995 F.2d 148 (9th Cir. 1993).

\textsuperscript{102} \textit{Id.} at 151. The plaintiff in \textit{West} filed claims under Montana state law alleg-
ing a breach of the covenant of good faith and fair dealing and for unjust dis-
crimination under the Federal Aviation Act.

The opinion found at 995 F.2d 148 is actually the second hearing of \textit{West} by the
Ninth Circuit. In its first opinion, found at 923 F.2d 657, the court distinguished
between state laws that only had an effect on services provided by airlines and
state laws that related directly to such services. \textit{West}, 923 F.2d at 660. The court
held that the ADA only preempted the second category of state laws. \textit{Id.}

The Supreme Court remanded the case to the Ninth Circuit after issuing
\textit{Morales}. \textit{West v. Northwest Airlines, Inc.}, 505 U.S. 558 (1992). On remand, the
Ninth Circuit stated that the Court had “invalidated” its earlier approach to pre-
emption and issued the holding as stated in the text above. \textit{West}, 995 F.2d at 151.
Thus, the plaintiff’s claims for compensatory damages were not preempted while
his claims for punitive damages were. \textit{Id.} at 152.

\textsuperscript{103} \textit{Harris}, 55 F.3d at 1476.

\textsuperscript{104} \textit{Id.}

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} \textit{Id.}
The plaintiff also claimed that the flight crew failed to follow procedures detailed in a "Flight Service College Training Outline." Again, the court concluded "that the conduct of the flight crew relate[ed] to [a] 'service' under the ADA." Having established that the case involved a "service" for purposes of the ADA and, thus, presumptively would be preempted, the court then turned to whether the case could fit under the narrow Wolens exception. The court stated that the plaintiff's claims exemplified an attempt to "subject the airlines' in-flight service to its passengers to . . . state tort law," which meant that the Wolens exception would not be applicable. The claims were therefore preempted by the ADA.

A strong dissent, however, noted that the majority had created an intercircuit conflict with the Fifth Circuit's holdings in Hodges and Smith. Circuit Judge Norris stated that the majority had been mistaken to categorize the plaintiff's claim based on the service of alcohol to a passenger. In contrast, Circuit Judge Norris found the plaintiff's claim in Harris to be analogous to the plaintiff's claim in Smith. He characterized Harris's case as one "for negligence based upon the flight crew's failure to protect her from . . . abusive behavior and for exacerbating the known risk of emotional and physical injury by serving [the abusive passenger] more alcohol." Circuit Judge Norris urged that the majority adopt the Fifth Circuit's approach—that "beverage 'services' preempted under the ADA [be] limited to economic decisions regarding the provision of drinks . . . ." Additionally, Circuit Judge Norris did not agree with the majority's reliance on Wolens. He in-

107 Id.
108 Id.
109 Id. at 1477.
111 Harris, 55 F.3d at 1477 (Norris, J., dissenting).
112 Id. at 1478.
113 Id. Recall, however, that the CAB opined that it preempted the field of "meal service." See supra note 80 and accompanying text. Is the provision of drink any different from "meal service"?
114 Harris, 55 F.3d at 1478 (Norris, J., dissenting).
terpreted Wolens as "suggest[ing] that personal injury claims were not preempted by the ADA."\textsuperscript{115}

C. \textit{Travel All Over the World}: The Seventh Circuit Approach

The Seventh Circuit has also had a recent opportunity to add to the jurisprudence surrounding the preemption issue. In \textit{Travel All Over the World, Inc. v. Kingdom of Saudi Arabia},\textsuperscript{116} a travel agency brought claims based on breach of contract, tortious interference with a business relationship, defamation, slander, fraud, and intentional infliction of emotional distress against an airline.\textsuperscript{117} The district court dismissed all the claims based on the ADA preemption clause.\textsuperscript{118}

The Seventh Circuit began its analysis with an explanation of Morales and Wolens, summarizing the two cases by stating that there are "two distinct requirements for a law to be expressly preempted by the ADA: (1) [a] state must 'enact or enforce' a law that (2) 'relates to' airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect upon them."\textsuperscript{119} It then applied this test to the contract claim, the slander and defamation claims, and the other intentional tort claims.

\textsuperscript{115} \textit{Id.} Circuit Judge Norris offered several quotes from Wolens to support his interpretation: "[The airline] does not urge that the ADA preempts personal injury claims relating to airline operations." Wolens, 115 S. Ct. at 825 n.7. "In my opinion, private tort actions based on common-law negligence or fraud, or on a statutory prohibition against fraud, are not preempted." \textit{Id.} at 827 (Stevens, J., concurring). "[M]y view of Morales does not mean that personal injury claims against airlines are always preempted." \textit{Id.} at 890 (O'Connor, J., concurring in the judgment in part and dissenting in part).

\textsuperscript{116} 73 F.3d 1423 (7th Cir. 1996).

\textsuperscript{117} Saudi Arabian Airlines (Saudi) was the air carrier in question. The plaintiff originally sued both Saudi and its owner, the Saudi government, and the district court granted the government's motion to dismiss.

The travel agency contracted with Saudi to purchase several round trip tickets for a group traveling from New York to Mecca, Saudi Arabia. The agency's clients were to meet at JFK airport and a representative of the agency was to accompany the group on its trip. The representative's flight was delayed, causing him to miss the flight from JFK. Saudi then canceled the group's reservations, forced the group to purchase new tickets (causing the travel agency to lose commissions), and its employees allegedly made several knowingly false statements about the travel agency with the intent to injure the agency's business. \textit{Id.} at 1428.

\textsuperscript{118} \textit{Id.} at 1428-29.

\textsuperscript{119} \textit{Id.} at 1432.
The court first held that the breach of contract claim was not preempted under Wolens. While the application of Wolens appeared to be an open and shut case, the air carrier did present an argument with the hope of distinguishing Wolens, which the court rejected. The air carrier claimed that the exception from preemption created by Wolens for “privately ordered obligations” only applied to duties of air carriers that were not subject to federal regulation and not to practices such as “bumping,” which are subject to federal regulation. The court did not accept this argument, stating that “[t]he question of whether a State has ‘enacted or enforced a law’ cannot depend on the existence of federal regulations in the same area.”

The court then turned to an analysis of the slander and defamation claims. Noting that courts have not come to consistent conclusions regarding whether the ADA preempts slander and defamation claims, the court explained that Morales could not be read as indicating which types of common-law claims are indeed preempted, forcing courts to examine each case with its underlying facts. Upon reviewing the statements, the court concluded that they only related to the travel agency’s services and not to any rate, route, or service provided by the air carrier. Additionally, the claims did not have what Morales termed as “the forbidden significant [economic] effect on airline rates, routes, or services . . . .” Thus, the slander and defamation claims were not preempted by the ADA.

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120 Id.
121 Id.
122 Id. The court did indicate, however, that the existence of federal regulations could lead to an implied preemption of state law claims. Id. at 1432 n.9. The air carrier stated that because regulations permit breach of contract claims to be maintained by “bumped” passengers with confirmed reservations (see Department of Transportation (Aviation Proceedings) Economic Regulations, 14 C.F.R. § 250.9 (1996)), it followed that breach of contract claims by travel agencies whose clients were bumped were preempted. Travel All Over the World, 73 F.3d at 1432. The court stated, however, that the lack of conflict between the regulations in question and the state laws allowing travel agencies to sue precluded a finding of implied preemption. Id.
123 Id at 1433. The allegedly false statements made by Saudi to the group included: (1) the travel agency had a bad reputation; (2) the travel agency had failed to make reservations for the group; (3) the travel agency often lied to its customers; and (4) the travel agency would not be sending a representative to assist the group. Id.
124 Id. The court also expressly adopted the Fifth Circuit’s definition of “services” announced in Hodges: “a bargained-for or anticipated provision of labor from one party to another.” Id. See supra note 78 and accompanying text.
125 Travel All Over the World, 73 F.3d at 1433.
The court lastly examined the remaining intentional tort claims, which were in part based upon the allegedly slanderous and defamatory statements that the court had earlier ruled were not preempted. The court also conceded that the intentional tort claims were based in part on the air carrier's cancellation of the group's reservations which forced the group to purchase tickets directly from the air carrier. The court declined to rule on the question of preemption as applied to the intentional tort claims pending further examination by the district court; however, the court did offer a new methodology to assist the district court in its determination. This determination centered upon the contentious question of what constitutes a "service."

This new methodology departs from that offered by the Fifth Circuit in Hodges and Smith, but did not explicitly accept the methodology developed by the Ninth Circuit in Harris. Nonetheless, the Seventh Circuit's approach can be seen as an implicit approval of the Ninth Circuit's holding in Harris.

The court stated that the intentional tort claims, to the extent that they were not based on the allegedly slanderous and defamatory statements, "expressly refer[red] to airline 'services,' which include ticketing as well as the transportation itself" under the Fifth Circuit's Hodges definition. Thus, the claims could be preempted. The travel agency, however, argued that the claims should not be preempted due to the fact that the air carrier had acted not in regard to its day-to-day business but rather out of spite and with an intent to hurt the travel agency's operations. The court did not accept this argument.

The court then announced its interpretation of Morales:

[T]he proper examination under Morales is not why the airline refused to provide its services, but whether the claims at issue either expressly refer to the airline's services (which they clearly do) or would have a significant economic effect on the airline's services . . . . The crucial inquiry is the underlying nature of the actions taken, rather than the manner in which they are accomplished.

The court summarized its position by stating "[w]e therefore decline to travel down the path paved [by the Fifth Circuit in Hodges and Smith] which found that boarding decisions mot-

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126 Id. at 1434.
127 Id.
128 Id.
129 Id. (emphasis added).
vated by an airline’s ‘economic’ concerns, as opposed to an airline’s ‘safety’ concerns, were preempted.\textsuperscript{130}

Thus, the Seventh Circuit expressly chose not to follow the Fifth Circuit’s dichotomy of “economic” services and “safety” services, in which only claims based on the former are preempted. Such an approach approximates the Ninth Circuit’s \textit{Harris} reasoning in that in \textit{Travel All Over the World} the “allegations pertain[ed] directly to a ‘service’ the airlines render[ed] . . .” and were thus preempted.\textsuperscript{131}

The court concluded by directing the district court to examine the intentional tort claims in light of the aforementioned approach. Only after the district court obtained more information concerning the basis of the intentional tort claims could it rule on the preemption issue.\textsuperscript{132} Moreover, the court pointed out that \textit{Wolens} would not serve to save the intentional tort claims from preemption because the tort claims “constitute[d] the ‘enactment or enforcement’ of a law” and were thus distinguishable from contract claims, despite the fact that intentional tort claims were at least partially based on the same conduct of the nonpreempted contract claims.\textsuperscript{133}

\section*{VIII. QUESTIONS ARISING FROM THE APPELLATE RULINGS}

To date, three courts of appeals have dealt with the ADA preemption provision since the Supreme Court handed down \textit{Morales} and \textit{Wolens}. As the preceding analysis demonstrates, the appellate courts have come to divergent conclusions concerning the application of the Supreme Court’s interpretation of the ADA. This fact is not surprising since \textit{Morales} and \textit{Wolens} do not purport to be definitive opinions. The cases have led to much litigation and will continue to do so.

An analysis will now be presented of three problematic issues arising after \textit{Morales} and \textit{Wolens}. First, do “services” include “operation and maintenance” activities? Second, do “services” include “safety” measures? Third, is \textit{Wolens} subject to manipulation through artful pleading?

\textsuperscript{130} \textit{Id.} at 1434 n.12.
\textsuperscript{131} \textit{Harris}, 55 F.3d at 1476.
\textsuperscript{132} \textit{Travel All Over the World}, 73 F.3d at 1435.
\textsuperscript{133} \textit{Id.}
A. DO “SERVICES” INCLUDE “OPERATION AND MAINTENANCE” ACTIVITIES?

As shown above, the Fifth Circuit in Hodges announced a new dichotomy concerning the interpretation of the term “services.” Under Hodges, state law tort claims arising from the “operation and maintenance of aircraft” are not preempted by the ADA, while those claims that arise from “economic services” are. Will this test prove to be one that leads to consistent results?

Clearly this test can be easily applied to cases involving plane crashes. Burke v. Northwest Airlines, Inc. provides proof for this assertion. The plaintiffs alleged the following: (1) the air carrier had negligently trained its air crews; (2) the air carrier had committed gross negligence in its conduct surrounding the collision; and (3) the pilot of one of the aircraft was negligent. These claims all obviously stem from the “operation” of aircraft and would not be preempted under the analysis put forth by the Fifth Circuit in Hodges.

On the other hand, it may not always prove to be a simple task to delineate what constitutes the “operation” of an aircraft and what constitutes the “service” provided by an air carrier. The provision of services may be inextricably tied to the operation of aircraft. Christoph v. Northwest Airlines, Inc. highlights the often blurry line between “operations” and “services.” In Christoph, the air carrier permitted the plaintiff to bring her seeing-eye dog on board a flight and allowed the dog to sit on the floor in front of its owner while the plane was airborne. The dog, unknown to the plaintiff, had contracted a skin disease, which it allegedly transferred to the plaintiff during flight by rubbing against her leg.

Applying the Hodges formulation, the court ruled that the case fell “within the bailiwick of operations and maintenance, not

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134 See supra note 85 and accompanying text.
135 Hodges, 44 F.3d at 338-39.
136 819 F. Supp. 1352 (E.D. Mich. 1993). This case stemmed from the on-the-ground collision of two aircraft owned by Northwest Airlines at the Detroit Airport on December 3, 1990. It is interesting to note that the court impliedly rejected claims stemming from allegedly deceptive advertising of “safe and reliable” flights based on the Texas DTPA. Id. at 1368.
137 Id. at 1360.
139 Id. at *1-3.
140 Id. at *3.
services." As the court saw it, service animals were "very similar" to carry-on baggage that an airline has a duty to safely stow; therefore, the claim mirrored the claim put forth by the plaintiff in Hodges concerning the handling of a passenger's baggage and, thus, was not preempted.142

Why, however, is the ability to take a seeing-eye dog on board aircraft and its subsequent care by the air carrier not included in the "bargained-for or anticipated provision of labor" indicative of a "service" as indicated by the Hodges court?143 It is entirely plausible to read the Hodges definition of "service" in such a manner so as to result in the preemption of such a claim as brought forth in Christoph.

The court stated that it might have come to a different conclusion if the claim had "concerned the amount of seating space provided to passengers."144 Question whether the claim did indeed stem from the amount of seating space provided passengers. Christoph points out that courts can manipulate the Hodges approach to narrowly interpret the term "services" and shelter claims from preemption.

Similarly, the Hodges approach can be used to broadly interpret the term "services." Marlow v. AMR Services Corp.145 provides an example of judicial manipulation of Hodges to protect an entity owned by an air carrier. In Marlow, a company that maintained jetbridges for an airline terminated an employee after he reported safety violations to his supervisors.146 The employee brought a wrongful termination suit against the employer under the Hawaii Whistleblowers' Protection Act.147

The court found that the claim was preempted by the ADA.148 In reaching this conclusion, the court relied on the statement in the first Hodges opinion that cases involving "boarding procedures" should be preempted.149 The court reasoned, therefore, that the claim was preempted because the service and mainte-

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141 Id. at *2.
142 Id.
143 Hodges, 44 F.3d at 336.
144 Christoph, No. 94-1148, 1995 WL 422147, at *2.
146 Id. at 297.
147 Id. The statutes in question can be found at HAW. REV. STAT. §§ 378-61 to 378-69 (1994).
148 Marlow, 870 F. Supp. at 299.
149 Id. at 298 (citing Hodges, 44 F.3d at 354). Note that the second Hodges opinion adopted the same definition of "services" as used in the first opinion. See supra note 78 and accompanying text.
nance of jetbridges are an integral part of boarding procedures. This result is certainly open to question. It can be argued that maintenance of a jetbridge is not part of the “anticipated provision of labor” that passengers expect when purchasing a ticket. The application of Hodges, therefore, could have led to the opposite result in Marlow.

The Supreme Court of Texas has also spoken out concerning the shortcomings of the services/operations and maintenance dichotomy. In Continental Airlines, Inc. v. Kiefer, Justice Nathan Hecht, in an opinion joined by seven of the eight remaining justices, pointed out three problems with the Fifth Circuit’s Hodges dichotomy.

First, he stated that Morales and Wolens do not support such a dichotomy and that the “services-operations distinction is an unnecessary overlay . . . .” Next, Justice Hecht stated that the dichotomy is “difficult to draw,” as evidenced in Hodges itself by the fact that two justices of the Fifth Circuit viewed the claims under review as relating to services and not operations. Justice Hecht also demonstrated that the Hodges dichotomy will lead to “anomalous results.” As an example, he argued that under Hodges, “[a]n airplane passenger who fell in an aisle would be prohibited from suing if the accident occurred when the passenger slipped on food dropped by a flight attendant, but not if the accident was caused by a sudden banking of the plane.”

One can easily conclude, therefore, that the Hodges

The definition of “services” used by the Fifth Circuit is problematic due to the fact that it can be interpreted in many ways. For example, in Lathigra v. British Airways P.L.C., 41 F.3d 535 (9th Cir. 1994), the court did not preempt a claim against an airline stemming from “negligent reconfirmation” because the conduct complained of did not “serve[ ] the goals of airline deregulation . . . .” Id. at 540. Question, however, whether reconfirmation of a booking is again included in the “bargained-for or anticipated provision of labor” indicative of a “service” as indicated by the Hodges court. Hodges, 44 F.3d at 336.

Marlow, 870 F. Supp. at 299.


920 S.W.2d 274 (Tex. 1996).

Id. at 283-84.

Id. at 283.

Id. (citing Hodges, 44 F.3d at 343-44 (Higginbotham, J. joined by Garza, J., dissenting)).

Kiefer, 920 S.W.2d at 284.

Id. Indeed, claims against air carriers that stem from the negligent flying of aircraft are generally not preempted by the ADA. See, e.g., Trinidad v. American Airlines, Inc., 932 F. Supp. 521 (S.D.N.Y. 1996).
dichotomy of services/operations and maintenance is untenable and will lead to inconsistent results.

B. Do “Services” Include “Safety” Measures?

A second important aspect of the Fifth Circuit’s approach is the argument (initially put forth in the first Hodges opinion) that “services” is not coextensive with airline “safety.”158 As shown above, both the Seventh and Ninth Circuits have declined to follow this dichotomy. Can the Fifth Circuit’s approach be applied with consistent results?

Belgard v. United Airlines, Inc.159 can be used to test the Fifth Circuit’s methodology. Belgard dealt with an airline’s decision not to promote a group of pilots who had undergone radial keratotomy procedures to correct their vision.160 The plaintiffs alleged that their failure to receive promotions constituted a violation of a Colorado statute prohibiting discrimination based on physical handicap.161 The airline naturally argued that the plaintiffs’ claims were preempted.162 Citing Morales, a Colorado appellate court held that the claims were indeed preempted because the Colorado statute in question could “be said to have a connection with or reference to the airline’s ‘services.’”163

The court first pointed to language in the ADA stating that two of its most important purposes are the “maintenance of safety as the highest priority in air commerce” and the “placement of maximum reliance on competitive market forces.”164 The court also reasoned that the ability to work safely is part of the service offered by airlines; thus, the restriction of promotions based on physical characteristics that could potentially impact upon safety concerns was sufficiently related to services to be covered by the preemption provision.165

158 Hodges, 44 F.3d at 354. See supra note 75 and accompanying text.
160 Id. at 468.
162 Belgard, 857 P.2d at 470.
163 Id.
165 Belgard, 857 P.2d at 471. The court cited two cases for support: French v. Pan Am Express, Inc., 869 F.2d 1 (1st Cir. 1989) (state statute mandating drug testing preempted as applied to airline employees); Trans World Airways, Inc. v. International Brotherhood of Teamsters, 578 F.2d 800 (9th Cir. 1978) (prereregulation version of Federal Aviation Act preempted arbitration award under Railway Labor Act).
Under the Fifth Circuit’s approach, however, the plaintiffs’ claims under the Colorado statute may not have been preempted. Because “services’ [are] not coextensive with airline ‘safety,’” courts in the Fifth Circuit might feel compelled to rule differently than the Belgard court. There is no doubt that the refusal to promote pilots who have undergone radial keratotomy procedures stems entirely from safety concerns. Thus, under Hodges, such a claim could be shielded from preemption.

The logic of the Belgard court, on the other hand, is quite sound. Would anyone refute the fact that “few factors are more important in determining the nature of the services that an airline is to provide than the quality of its employees”? Belgard is not the only case that views pilot staffing as part of the “services” provided by airlines. In Abdu-Brisson v. Delta Airlines, Inc., several hundred former Pan Am pilots hired by Delta sued Delta claiming that it had discriminated against them based on their age in violation of New York law due to the fact that the pilots were required to serve ten years before becoming eligible for full post-retirement medical benefits. The court found that pilot staffing related to the services provided by Delta as “an integral element of the transportation itself.” Thus, the pilots’ claims were preempted.

Moreover, Texas Supreme Court Justice Hecht in his Kiefer opinion also pointed out that the services/safety dichotomy does not serve to ease the analysis required of courts in preemption cases. As Justice Hecht stated, “It is hard to imagine a service provided by airlines that does not have both an economic and a safety component.” The clear implication of this statement and the above analysis is that the services/safety di-

166 Hodges, 44 F.3d at 354.
167 Belgard, 857 P.2d at 471. Another interesting example in the employment area is provided by Ruggiero v. AMR Corp., No. C-94-20160 JW, 1995 WL 549010 (N.D. Cal. Sept. 12, 1995). The plaintiff brought a wrongful termination suit against an airline stemming from his termination after failing to gain certification on a certain aircraft. The plaintiff also alleged that he was terminated due to the fact that he had encouraged fellow employees to make safety and sexual harassment complaints against the airline. The court concluded that the claim was not preempted and distinguished Belgard on the grounds that it was not dealing with a case regarding physical requirements to operate aircraft. Id. at *8-9.
169 Id. at 110. See N.Y. EXEC. LAW § 296 (McKinney 1993 & Supp. 1997).
170 Abdu-Brisson, 927 F. Supp. at 112.
171 Kiefer, 920 S.W.2d at 284.
172 Id.
chotomy can lead to inconsistent results and is simply untenable.

Another group of cases that is difficult to deal with under the services/safety dichotomy are those involving a failure to provide key personnel. *Moore v. Northwest Airlines, Inc.* is an excellent test case. In *Moore*, the plaintiff sued an air carrier stemming from personal injuries incurred when the plaintiff’s wheelchair overturned backwards in a jetbridge while disembarking from an aircraft. The plaintiff claimed that the air carrier was grossly negligent in failing to provide him with personnel and services which would have guaranteed his safety.

The air carrier argued that the claim should have been preempted and relied upon the language in *Hodges* that the ADA preempts cases involving “boarding procedures.” The court, however, did not accept this argument and stated that *Smith* obliged it to distinguish between claims that involve economic decisions concerning the provision of services and those that do not. Such reasoning again reflects the dichotomy of “services” versus “safety” now in effect in the Fifth Circuit.

In coming to its conclusion, the court quoted from *Smith*: “[I]t is reasonable to interpret the ‘service’ of boarding to be limited to economic decisions concerning boarding . . . . “ On the other hand, however, is it not equally as reasonable to interpret the “service” of boarding to include the actual physical process of boarding itself? Again, is assistance with boarding, especially for one confined to a wheelchair, not included in the “bargained-for or anticipated provision of labor” indicative of a “service” as indicated by the *Hodges* court? Such an analysis becomes less complicated when a disabled passenger pays an airline to provide such “meet and assist” services and the airline fails to do so, as was the situation in one of the cases dealt with by the Texas Supreme Court in the aforementioned *Kiefer* case. Clearly such claims can be couched in

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174 Id. at 314.
175 Id. at 315. See *Hodges*, 44 F.3d at 336.
177 Id.
178 *Hodges*, 44 F.3d at 336. See supra note 78 and accompanying text.
179 *Kiefer* dealt with two consolidated claims against two airlines. The first claim stemmed from injuries incurred when a passenger was struck in the head by a falling briefcase and the second claim stemmed from the failure to provide “meet and assist” services under a fee agreement between a passenger and an airline. *Kiefer*, 920 S.W.2d at 275.
terms of breach of contract and, therefore, under Wolens, would not be preempted. Damages would, of course, be limited to those for breach of contract and not for negligence. Absent a fee agreement, as demonstrated above, the analysis is much less clear. The fact that a "meet and assist" claim arguably could be preempted but for the existence of a contract to provide such a service highlights why it is important to review the propriety of cases such as Moore.

The preceding analysis highlights the interpretive problems inherent to the Fifth Circuit's approach. Such problems no doubt played a role in the Seventh and Ninth Circuits' refusal to follow Hodges and Smith in their entirety. It is noteworthy, however, that the Ninth Circuit's Harris reasoning has come under scrutiny as well.

A California appeals court criticized Harris in Romano v. American Trans Air, a case involving passenger battery. The court pointed out that Harris included a forceful dissent and that the Ninth Circuit panel appeared to neglect the aim of the ADA, namely the economic deregulation of the airline industry. According to the Romano court, the Hodges dichotomies are correct in that they serve to protect the "legitimate interest[s]" of airlines (the rights to advertise, set routes, and determine inflight menus, among others). At least two other cases exist which similarly chide the Ninth Circuit for supposedly ignoring the intent of the ADA through its broad reading of the term "services." Such discourse indicates the need for further guidance from both Congress and the Supreme Court.

C. Is Wolens Subject to Manipulation Through Artful Pleading?

Another problematic issue raised by recent interpretations of the ADA preemption clause is that the Supreme Court's holding in Wolens may create an incentive for litigants to engage in artful pleading. For example, in Stone v. Continental Airlines, Inc., the plaintiffs filed suit against an air carrier by asserting claims of assault and battery, negligence, and breach of implied war-

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181 Id. at 432.
182 Id. at 433.
The court dismissed the assault and battery and negligence claims because they were very similar to the claims found to be preempted by the Ninth Circuit in *Harris* in that the claims "directly pertain[ed] to Continental’s treatment of its passengers." The court then examined the claim of breach of implied warranty that arose from the air carrier’s alleged failure to "provide [the] Plaintiffs a safe and secure premise for the airline flight." The court stated that the *Wolens* exception from preemption only applied to terms in contracts for which the parties actually bargained. In the eyes of the court, the ADA nonetheless preempted "any state law or public policy claims disguised as contract claims."

Upon examining the plaintiffs’ claims, the court ruled that the claims did not fit within the *Wolens* exception because the claim of "breach of implied warranty [was] based on the same facts and allegations underlying [the] tort actions." What was important to the court was the substance of the claim and not the form in which it was presented. The court concluded that ruling otherwise would result in the purposes of the ADA being subverted.

Not all courts, however, may be as willing as the *Stone* court to apply *Wolens* in a similar manner. *Aguasviva v. Iberia Lineas Aéreas de España* provides an example of this fact. In *Aguasviva*, the plaintiff brought suit against an air carrier stemming from her arrest in Istanbul, Turkey, during a layover on a flight from San Juan, Puerto Rico, to Israel due to the fact that she did not have a Turkish visa. The plaintiff alleged what the court termed as two “distinct” claims against the air carrier: (1) a

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185 *Id.* at 824. The claims stemmed from an incident that allegedly took place on a flight from Los Angeles to Honolulu and continuing to Australia during which a passenger punched Plaintiff Stone. Stone also brought claims under the Warsaw Convention and for punitive damages. *Id.*
186 *Id.* at 826.
187 *Id.*
188 *Id.*
189 *Id.* The court further quoted from *Wolens*: “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.” *Id.* (quoting *Wolens*, 115 S. Ct. at 826).
190 *Id.*
191 *Id.*
193 *Id.* at 316.
breach of contract that resulted from the air carrier’s failure to notify her about the visa requirement; and (2) a statutory claim under Puerto Rico law for defamation, false arrest and imprisonment, assault, and negligence. The court held that neither claim was preempted and relied on the Fifth Circuit’s approach to reach this conclusion on the tort claims.

Turning to the breach of contract claims, the court stated that Wolens left “no doubt” that those claims were not preempted due to the fact that the plaintiff was seeking to enforce a private agreement between herself and the air carrier. If, however, the court had chosen to use the Ninth Circuit’s approach and preempted the tort claims, would not the contract claims have been “based on the same facts and allegations underlying [the] tort actions”? As stated above, such reasoning led the Stone court to preempt the breach of contract claims. Thus, the Wolens decision appears to be open to manipulation if courts are not wary of tort claims disguised as breach of contract claims.

Manipulation of Wolens is also possible by litigants who attempt to recast legitimate contract claims in terms of negligence. An example of this possibility is provided by Trujillo v. American Airlines, Inc., a case dealing with an air carrier’s failure to deliver a package.

The plaintiff contracted with the air carrier to ship jewelry valued at $23,490 from Los Angeles to Dallas. An employee of the air carrier mistakenly informed the plaintiff that insurance was unavailable for the package, a fact which was untrue. At the same time, however, the plaintiff failed to inform the air carrier of the value of the items he wished to ship. The court

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194 Id. at 317. The relevant provision of the Puerto Rico Civil Code states: “A person who by an act or omission causes damage to another through fault or negligence shall be obliged to repair the damage so done.” P.R. LAWS ANN., tit. 31, § 5141 (1991).
196 Id. at 318.
197 Stone, 905 F. Supp. at 826.
200 Id. at 393.
201 Id.
202 Id.
granted summary judgment in favor of the air carrier on a breach of contract claim, but awarded plaintiff $126.50 as provided for in the waybill.203 Thereafter, the plaintiff asserted claims against the air carrier for negligence, gross negligence, and under the Texas DTPA.204 In dismissing those claims, the court stated that the “[p]laintiff’s breach of contract claim was the means by which he could enforce the agreement for services . . . . [and that he could not] cast his claims as ones for negligence or deceptive trade practices to extend his recovery beyond the terms of the contract.”205

This analysis demonstrates that courts must pay particular attention to the substance, and not merely the form, of claims against airlines. Failure to do so can result in an abuse of the Wolens exception.

IX. CONCLUSIONS

In conclusion, it has been shown that the appellate rulings interpreting Morales and Wolens will not lead to consistent adjudication of claims involving the application of the ADA preemption clause. This fact is not surprising because each of the three circuits that have handed down cases interpreting Morales and Wolens have interpreted those two cases in different ways. Further guidance is therefore needed to resolve the conflicting interpretations of the ADA preemption clause. This guidance should preferably come from Congress.

Congress should clarify whether it agrees with the position advocated by the Fifth Circuit in Hodges and Smith or the vastly different positions supported by the Ninth Circuit in Harris and the Seventh Circuit in Travel All Over the World. While the Fifth Circuit’s interpretation appears to have a logical basis, it has been demonstrated that its application will very likely lead to irreconcilable results. On the other hand, it can be argued the position taken by the Seventh and Ninth Circuits ignores the intent of the ADA.

Additionally, the Supreme Court should clarify the exception it crafted in Wolens. As the holding now stands, it is subject to manipulation by litigants attempting to construe tort claims as contract claims or contract claims as tort claims through the use of artful pleadings.

203 Id. at 393 n.3.
204 Id. at 393.
205 Id. at 394.
The airline industry is a vital part of the U.S. economy. In order for air carriers to properly assess the risk and rewards inherent in their operations, Congress and the Supreme Court must announce a more definitive explanation of the preemption of state law claims against airlines provided for in the ADA.
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