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Something Special in the Fares - Regulating Commercial Airline Advertising

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SOMETHING SPECIAL IN THE FARES?
REGULATING COMMERCIAL AIRLINE ADVERTISING

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I. INTRODUCTION

AIRLINE ADVERTISEMENTS quoting airfares, such as American Airline's "London $239,"¹ are published in newspapers across the country daily.² These fare advertisements were the source of protracted litigation involving as many as thirteen airlines, thirty-four states and, although not a party, the Department of Transportation (DOT).³ The central issue of the litigation was purely ju-

² Douglas W. Nelms, Sending The Right Signal: Airline Advertising, AIR TRANSPORT WORLD, Feb. 1991, at 2. Airlines pour millions of dollars into national advertisements of special low fares, tour packages and special membership privileges, such as frequent flier promotions. Id. A survey by ADVERTISING AGE MAGAZINE revealed that the top nine airlines spent $489.2 million on national advertising: $290.4 million on print advertising, $188.7 million on radio and television advertisements, and $7.1 million on billboard and poster advertisements in 1989. These estimates are much lower than those reported by the airlines as the airlines' reports include a broader range of promotions. Id.

The DOT kept a relatively low profile throughout the litigation and allowed "the airlines to take the initiative in the court battles." Bill Poling, Texas Attorney
risdictional, involving the roles of the federal government and state governments in regulating airline advertising. The litigation arose, however, due to a dispute over whether certain common airline advertising practices are misleading to consumers.

Many state and local governments contend that certain popular airfare advertisements are misleading. Take, for example, the $239 fare to London advertised by American Airlines. The actual price of the advertised airline ticket is more than double the $239 quoted. First, the airline does not offer a discounted price for a one-way ticket but, instead, requires a round-trip ticket purchase before the consumer can obtain the advertised one-way fare. The ticket, then, is $478. The price becomes $506 upon the addition of applicable customs and immigration fees and an international departure tax. A round-trip ticket to London for $506 might still seem quite reasonable. The traveler, however, must depart on certain limited days of...
the week and must stay in London for a certain number of days to obtain the discounted price. Consumers, through their state and local governments and consumer protection organizations, contend that such a fare advertisement is misleading and should be subject to regulations that would require a more accurate and clear portrayal of the actual fare.

Currently, the DOT exercises exclusive authority to impose regulations in order to protect consumers from misleading airline advertisements. The DOT maintains that such advertisements are not misleading and that any additional regulation of airfare advertising is unnecessary. The DOT's characterization of necessary regulation in the area of airfare advertising, however, is highly disputed.

The National Association of Attorneys General (NAAG) has been the most active in contesting the DOT's regulatory policy. Dissatisfied with the substance of the DOT's regulation of airline advertising and the DOT's enforcement efforts, the attorneys general of several states have taken steps pursuant to their own more comprehensive consumer protection laws to stop airline advertising practices not addressed by federal regulations. The recent Supreme Court decision in *Morales v. Trans World Airlines Inc.*, however, halted the states' ability to enforce their own consumer protection laws in the airline advertising

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9 Id.  
10 Bill Poling, Consumer Groups Continue to Battle Carriers, DOT over Ads, TRAVEL WKLY, Oct. 23, 1989, at 10. Consumer organizations that are unhappy with the DOT's regulations include the Consumer Federation of America, the National Consumers League, the National Association of Consumer Agency Administrators, the Aviation Consumer Action Project, and the Consumer Reports Travel Letter. Id. The National Association of Attorneys General (NAAG) also objected to the DOT's methods of regulation and created the NAAG Guidelines for Air Travel Advertising (NAAG Guidelines). Id. Local consumer protection agencies have also complained, for example, the New York City Department of Consumer Affairs. Id.  
13 Poling, supra note 10, at 10.  
14 Id.  
context. While the Court's decision addressed a purely jurisdictional question, the Court's holding has a significant impact on the substance of airline advertising regulation.

This Comment argues that current federal regulation does not provide adequate consumer protection and that either Congress or the DOT should take steps to ensure that fare advertising is not deceptive. Part two outlines the scope of the DOT's regulation of airline advertising and discusses the perceived problems arising from this regulation. Part three examines the opposition to the DOT's current regulatory practices focusing largely on the litigation before the Supreme Court. Finally, part four argues that, in the best interest of both consumers and the airlines, Congress should provide for concurrent regulation by the DOT and the states pursuant to the NAAG Guidelines, or the DOT should confront the troublesome airline advertising practices with new federal regulations.

II. THE DOT'S REGULATION OF AIRLINE ADVERTISING

A. THE ORIGINS OF FEDERAL AIRLINE ADVERTISING REGULATION

Upon enacting the Civil Aeronautics Act of 1938 (CAA), Congress established a comprehensive scheme for the federal regulation of the air transportation industry. By enacting the CAA, Congress sought to promote sound economic development and safety within the field of civil aeronautics. The CAA provided for the creation of the Civil Aeronautics Board (CAB) to administer necessary

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16 Id.
18 Guidelines for Air Travel Advertising, 53 ANTRUST & TRADE REC. REP. (BNA), No. 1345, at s-7 (Dec. 17, 1987) [hereinafter NAAG Guidelines].
20 Id. The CAA also contained § 1106, a savings clause, which provided that
regulations. Through the CAA, Congress attempted to ensure the best possible service by air carriers and to eliminate any undue advantages or unfair and deceptive practices that would harm consumers or competing air carriers. This policy, at least nominally, has survived despite significant changes to the federal air transportation regulatory framework since the CAA's enactment.

Authority for the federal regulation of airline advertising derives specifically from section 411 of the CAA. Section 411 authorized the CAB to determine whether a party had engaged in deceptive practices and, if so, to order the party to cease and desist from the practices. The CAB did not take any regulatory action addressing airline advertising until 1975. In that year the CAB promulgated a regulation, addressing only tour operators, requiring that tour advertisements include the costs of both the air and ground components of the tour.

B. THE EFFECTS OF DEREGULATION ON AIRLINE ADVERTISING

Congress reversed the longstanding position favoring extensive economic regulation of air transportation and opted to deregulate the industry in 1978. Congress enacted the Airline Deregulation Act of 1978 (ADA) in order to restore competition to the airline industry on the theory that competition would benefit both consumers and the industry. Consumers would benefit by resulting

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21 Id.; 52 Stat. at 980-81.
22 Id.; 52 Stat. at 980; see also H.R. Rep. No. 793, 98th Cong., 2d Sess. 3-4, reprinted in 1984 U.S.C.C.A.N. 2859-60; 49 U.S.C. app. § 1374 (requiring air carriers to provide safe and adequate service); 49 U.S.C. app. § 1381 (giving the CAB authority to proceed against unfair or deceptive practices or unfair methods of competition).
24 Civil Aeronautics Act of 1938, 52 Stat. at 1003.
25 Id.
lower fares and the airlines would have an incentive "to be innovative and more productive." While competitive market forces were to determine airline industry development, the ADA nevertheless reaffirmed the policy, established in the CAA, that regulation was necessary to ensure protection from deceptive practices.

As Congress had hoped, enactment of the ADA did lead to lower airfares and increased numbers of passengers. Airlines began to compete intensely for travelers. Airfare advertisements increased dramatically, reflecting the new price competition. Regulation of the increased airline advertising, however, remained minimal. Following deregulation, the DOT has largely limited the scope of regulation of airline fare advertising to addressing surcharges, such as international departure taxes, immigration and custom fees, security charges and fees, agriculture inspection fees, and fuel and tourism surcharges, that are either absent from the advertisement or included in very small print, separate from a large prominently advertised fare.

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29 49 U.S.C. app. § 1302(a)(3). Congress stressed reliance "on competitive market forces to determine the quality, variety, and price of air services." The ADA, however, stressed the continuing need for the "development and maintenance of a sound regulatory environment . . . responsive to the needs of the public." 49 U.S.C. app. § 1302(a)(5).
31 Brief for the United States as Amicus Curiae at 10, Morales IV, 112 S. Ct. 2031.
32 NAAG Guidelines, supra note 18, at s-4.
33 14 C.F.R. § 399.84 (1992). In 1984, the CAB, responding to numerous complaints that tour operators featured an attractive tour price in large, bold type and set forth a separate "percentage add-on" in separate, small print, amended the earlier regulation, applicable to tour operators, that allowed the separate listing of
For a short time the CAB characterized the separation of surcharges as a deceptive advertising practice confusing to consumers. The DOT, however, which assumed the CAB's authority pursuant to the CAB Sunset Act of 1984, has long claimed that the separation of price components is not inherently deceptive and that consumers rarely complain about the practice to the DOT. While

the tour components. The amended regulation prohibited the separation of components. Id. This amendment was also the first regulation applicable explicitly to direct air carriers, as the CAB extended the regulation to include airfares sold without a tour component. CAB Adopts Advertising Rule for Tours and Flights, TRAVEL WKLY, Dec. 6, 1984, at 3.

Only months after the CAB had prohibited the practice of separating price components on the grounds that it was misleading to consumers, the DOT, assuming the CAB's authority, issued an "Order Granting Exemption" from the previous amendment, which allowed advertisers to "unbundle" their advertised fares. DOT Order No. 85-12-68 (1985). This unbundling provided for the separation of an international departure tax of three dollars from the primary fare as long as the tax was stated elsewhere in the advertisement. The DOT explicitly rejected the argument that the separation of certain price components was deceptive to the consumer. Id.

The DOT expanded this exemption in a 1988 Order, allowing direct or indirect carriers for scheduled and charter service, including tour operators, to state foreign departure taxes, security charges, custom fees, immigration fees, security fees, agriculture inspection fees, tourism and fuel surcharges, as well as any other surcharges that . . . may be imposed by the U.S. Federal, State or local governments, or foreign governments, separately from other charges in advertisements and promotional materials, provided that all such advertisements clearly and conspicuously state elsewhere in the advertisement the amount of such charges and the services such charges cover and indicate that such charges must be paid by the consumer in addition to the advertised price. DOT Order No. 88-3-25 (1988).

This regulation was amended further in the same year in order to clarify that any taxes, charges, fees, or surcharges not levied by and remitted to a government were excluded from the previous exemptions. Id. Orders 88-3-25 and 88-8-2 were vacated for failure to comply with notice-and-comment procedures in Alaska v. United States, 868 F.2d 441 (D.C. Cir. 1989). The DOT, however, has reaffirmed its policy that separate listing of surcharges is permissible in a new 1992 rule. 14 C.F.R. §§ 380, 399 (1992). This rule also codifies the current practice of allowing the advertisement of one-way fares that are available only on a round-trip basis, provided the advertisements are clear with regard to the round-trip conditions. Id.


DOT Order No. 85-12-68, at 6-7 (1985).
the DOT requires the airlines to "clearly and conspicuously" state the surcharges elsewhere in the advertisement, the DOT has not defined "clearly and conspicuously" as it relates to airline advertising.57

C. CRITICISMS OF THE DOT'S REGULATION OF AIRLINE ADVERTISING

While the federal government has claimed a commitment to protecting against unfair and deceptive trade practices in the air transportation industry, many critics question that commitment in the area of airfare advertising regulation.58 State governments, local governments, and consumer advocate groups contend that the DOT is too lax in enforcing the existing regulations. Additionally, critics believe that the DOT neglects, and even condones, the deceptive nature of several airline advertising practices.59

1. The DOT's Enforcement Practices

The DOT has a variety of procedures in place to monitor deceptive advertising. The DOT may become aware of problems by (1) informal complaints from consumers, (2) routine review of advertisements in newspapers and periodicals by the DOT's Investigation Division, or (3) non-routine review of advertisements by attorneys in the Office for Aviation Enforcement.40 The DOT's procedures for enforcing its regulations vary as well. If an advertisement has only minor problems, the DOT's Consumer Office may work with the airline to correct them.41 If the situation is more serious, the Office of Aviation Enforcement may issue warning letters and, eventu-

57 DOT Order No. 88-3-25 (1988).
41 Id.
ally, may enter into "cease and desist" agreements.\textsuperscript{42} Finally, the DOT's Consumer Office may assess civil penalties or bring an action against the air carrier.\textsuperscript{43}

Despite the presence of structured procedures, the DOT has faced severe criticism for the low number of violations that the DOT has discovered and the even lower number of penalties that the DOT has assessed.\textsuperscript{44} From 1984 to 1991, only seven cease and desist orders involved airline advertising.\textsuperscript{45} The low numbers are probably attributable to the fact that only between two and four DOT inspectors are searching for deceptive advertisements and the DOT has admitted to being administratively "overwhelmed."\textsuperscript{46} As the DOT is, at least presently, the only

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Flint, \textit{supra} note 38, at 2; see, \textit{e.g.}, DOT Order No. 88-8-3 (1988) (Continental Airlines, Inc. fined $9,500 for failing to disclose that a one-way fare is subject to a round-trip purchase requirement, violating 14 C.F.R. \textsection 399.84); DOT Order No. 89-4-25 (1989) (Pan American World Airways, Inc. assessed a $20,000 penalty for listing "fuel surcharges separately from fares . . . in a number of newspapers"); DOT Order No. 91-9-45 (1991) (American Airlines, Inc. assessed a $12,000 fine for advertising fares alongside twelve destinations when travel to only three of the twelve destinations was available at the stated rate).

Interestingly, in 1988, the DOT issued only "four consent orders against companies engaged in false or misleading airline advertising" and "uncovered only three of these instances" themselves. Flint, \textit{supra} note 59, at 2. The fourth was discovered by the General Accounting Office (GAO) and was located, incredibly, "in the Washington D.C. Metro subway that stops at DOT headquarters . . . . Leaving aside the implausibility of there being only four misleading airline-fare advertisements in all of 1988, one has to wonder about the eagerness of DOT to pursue offenders when such ads go unnoticed literally under its nose." \textit{Id.}


\textsuperscript{46} Eric Weiner, \textit{Decoding Ads for Special Fares}, \textit{N.Y. Times}, Nov. 18, 1990, at 32; see also Cowan & Gargan, \textit{supra} note 45, at A1 (In light of the fact that the Department has only four people scrutinizing the "$730 million in media advertising that the airlines buy each year," it is no surprise that the "airlines feel free to do just about anything in their ads . . . , because who is going to take them on?").
party responsible for protecting consumers from deceptive advertising, the fact that the DOT expends so little effort in policing airline advertisements is troublesome.47

Several parties, including another department of the federal government, the General Accounting Office (GAO), have noted a need for increased cooperation between the DOT and the state governments in policing airline advertising.48 DOT General Counsel Phillip Brady claims that the DOT desires coordinated consumer protection activities and has tried to improve communications with state governments.49 Effective cooperation, however, seems unlikely due to a fundamental disagreement between the DOT and the state attorneys general as to the substance of necessary airfare advertising regulation.50

2. The DOT's Failure to Address Misleading Airfare Practices

The substance, or perceived lack of substance, of the DOT's regulations is the primary focus of the ongoing dispute. Consumers and various agencies have widely characterized airline fare advertisements as deceptive, claiming that several particular advertising practices pre-


48 The GAO issued a report calling for cooperation between the DOT and the states in policing the airline industry after concluding that the DOT did not have the manpower necessary to be the sole party responsible for monitoring airline advertising. Meier, supra note 39, at 48.

49 Bill Poling, DOT Attempts to Bridge Rift With States' Attorneys General, TRAVEL WKLY, Oct. 8, 1990, at 99. DOT agents have "lamented recently that federal sleuths simply are not getting much in the way of tips, inquiries or assistance from . . . state officials anymore." Id. Thus far, however, the DOT has only appealed to "state officials to contact the DOT 'any time [they] become aware of any unfair or deceptive practices [pursuant to federal law] in the airline industry.'" Id.

50 Id.
vent the consumer from assessing the actual cost of the advertised fare and the restrictions and limitations that apply to the fare.51 These advertising practices are (1) the separation of taxes, fees, and surcharges from a boldly advertised fare; (2) limitations and restrictions that are either absent from an advertisement or are poorly disclosed; and (3) the advertising of fares that are rarely available for the advertised route.52

a. Controversial Airfare Advertising Practices

Airlines often advertise one low fare in large, bold print and include various surcharges in tiny, mouse print in an attempt to make the boldly advertised fare appear as low as possible.53 The mouse print is often as much as 136 times smaller than the boldly advertised fare.54 This practice, among others, is often characterized as a bait-and-switch routine; the airlines lure ticket-purchasers in with the promise of a low price, but, ultimately, sell a ticket at a significantly higher price.

The mouse print in airline advertisements also includes limitations and restrictions on the airfare in addition to surcharges.55 For example, the ticket's status as non-refundable, non-transferable or non-exchangeable is often included only in small print.56 This practice allows the

51 Poling, supra note 10, at 10.
52 Id.; Diamond, supra note 45, at D1. The NAAG Guidelines also address “frequent flyer” or “travel reward” programs by the airlines. The most common problem arising from these programs is unilateral modification. Preate: Feds Shouldn’t Condone Misleading Airline Ads, PR NEWSWIRE, Sept. 26, 1989. Several airlines unilaterally increase the mileage level needed for awards to popular destinations. Id. at 32. The airlines, at least temporarily, have rolled back such changes due to a “flurry of class action lawsuits, and negative press.” Weiner, supra note 46, at 32.
53 NAAG Guidelines, supra note 18, at s-3; Mark Pestronk, Airline’s ‘Rip-offs’ Require Regulations, TRAVEL WKLY, June 11, 1990, at 44. The airlines claim that the surcharges are listed separately to let the consumer know that the Government imposes many of them as opposed to the airline. Weiner, supra note 46, at 32.
54 Meier, supra note 39, at 48.
55 Id.; NAAG Guidelines, supra note 18; Commissioner Mark Green, N.Y.C. Dep’t of Consumer Affairs Report, Flights of Fancy: Deception in Airfare Ads, July 1990.
56 NAAG Guidelines, supra note 18, at s-8.
airlines to reduce any loss due to “no-shows” by shifting the risk of any change in plans to the consumer.\textsuperscript{57} Airlines also commonly advertise the cost of a one-way fare in large bold print but only mention that the fare is subject to a round-trip purchase in the small print.\textsuperscript{58} An actual one-way fare is often much higher than the advertised price.\textsuperscript{59} The small print also often includes advance-purchase requirements, cancellation and change of itinerary penalties, and length of stay requirements.\textsuperscript{60}

In addition to the difficulties in assessing the actual fare and conditions placed on the advertised ticket, critics complain that airline advertisements also neglect to convey the availability of the fare. Airlines have a sophisticated computerized marketing technique, known as “yield-management,” that allows the airlines to change fares constantly upon indication of a changing demand for a particular flight.\textsuperscript{61} Air fare advertisements, however, do not reflect the fact that an advertised fare is subject to continual fluctuations of availability.\textsuperscript{62} Consumers have no guarantee that the advertised fares of many of the major airlines will be available, even on the date that the advertisement runs.\textsuperscript{63} At most, airlines are required to

\textsuperscript{57} Id. Consumers who have a change of plans “forego any refunds of the price of the ticket.” \textit{Id.} at s-5.
\textsuperscript{58} Meier, supra note 39, at 48.
\textsuperscript{59} NAAG Guidelines, supra note 18, at s-3.
\textsuperscript{60} Meier, supra note 39, at 48.
\textsuperscript{61} NAAG Guidelines, supra note 18, at s-4, 5. “[A]irlines make thousands of fare changes in their computers every day.” \textit{Id.} “If full fare seats are selling well, the number of seats allocated for low fare seats can be reduced temporarily, only to be increased later if unsold costlier seats remain.” \textit{Id.} “The frustration stems from the airlines’ increasing skill at mixing the balance of low and high priced seats on a given flight right up until takeoff. . . . This “yield-management” pricing has spread rapidly in the 13 years since the airlines were deregulated and is constantly being refined with the use of cheaper and ever-more-powerful computers.” Cowan, supra note 46, at A1.
\textsuperscript{62} NAAG Guidelines, supra note 18, at s-5.
\textsuperscript{63} Cowan & Gargan, supra note 45, at A1. Many consumers have been frustrated by the advertisements. \textit{Group Proposes that Ads Reveal Fare Availability}, \textit{Travel WKLY}, March 23, 1987, at 1. “If an airline is going to . . . emphasize price, it is realistic for travelers to assume that by acting diligently, they will have at least a reasonable opportunity to purchase the fares being advertised.” \textit{Id.}

More often than not, the wrath of the upset consumer is directed at travel
convey only that the availability of the discounted fare is limited. Air travelers, therefore, have to face the fact that only five to twenty per cent of the seats may be initially allotted to the advertised discount price and must face, additionally, the probability that the number of available fares will rapidly decrease further as the "[a]d whips up customer demand." State laws prohibit other industries from all of these advertising practices, as does the Federal Trade Commission (FTC). For example, the FTC and state laws have consistently required price advertisers of an item to have a quantity of that item in stock to sufficiently meet the "anticipated demand" created by an advertisement, or, if inventory does not meet this demand, the advertisement must announce the possible shortfall in "prominent disclaimers." These laws, however, seem not to apply to the airlines, and the DOT shows no intention of promulgating comparable regulations.

agents who have nothing to do with the airlines' pricing practices. Cowan & Gargan, supra note 45, at A1. Interestingly enough, some travel agents are now "fighting back" by using their own computer systems to monitor the airlines' price changes and tapping in to purchase tickets for their clients at the lowest fees. While this may lower their immediate commissions, their focus is on client loyalty, a goal the airlines have not pursued. Id. Weiner, supra note 46, at 32.


Cowan & Gargan, supra note 45, at A1. Airlines maintain that "yield-management" is a "matter of survival" in the competitive market of deregulation, but former airline executives and state officials recommend a "clean-up" of the practice, noting that, unfortunately, there are no cops. Id.

Air Transport: Airline Observer, supra note 66, at 41. The airlines are exempt from FTC regulations. Id. There was a vote in the House of Representatives on Oct. 7, 1987, to shift authority for regulating airline advertisements from the DOT to the FTC, but the motion lost by a 246 to 171 vote. Id. Nevertheless, consumer advocates want to know why the "airlines get a break that no one else does." According to former Texas Assistant Attorney General Steve Gardner, "Busses, trains, taxis and blimps cannot ignore state laws." Poling, supra note 3, at 99.
b. The DOT's Regulatory Philosophy

The DOT has not taken any action to prevent these particular practices because it claims that the practices are not misleading to consumers and that, even if the advertisements are potentially confusing, the practices are not harmful enough to warrant a restriction on competition.\textsuperscript{69} The DOT and its supporters contend that consumers' interests are adequately protected by the combination of existing federal regulation, the ability of national advertisers to bring deceptive advertising actions against their competitors, and the advertising industry's self-regulation processes.\textsuperscript{70} The DOT's refusal to consider implementing additional regulation reflects the DOT's philosophy that consumers and the airline industry are best served by avoiding excessive regulation.\textsuperscript{71}

According to the DOT, if its consumer protection authority is to be properly exercised in the public interest, competition must be a consideration in determining the best overall regulatory policy for consumers.\textsuperscript{72} The DOT claims that consumers will be served optimally by the fewest possible restrictions on airline price competition.\textsuperscript{73} Further, the DOT contends that any expanded regulation of airline advertising would force certain information, such as fares, out of national advertising and, therefore, limit airline price competition.\textsuperscript{74} Consumers then would


\textsuperscript{71} Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 ANTITRUST 49, 73 (1989). "When Congress deregulated the airline industry in 1978, it did not want the airlines handcuffed by local or state laws." Poling, supra note 3, at 99.

\textsuperscript{72} 14 C.F.R. §§ 380, 399.

\textsuperscript{73} Id. The ADA defined "in the interest of the public" to include "maximum reliance on competitive market forces." 49 U.S.C. app. § 1302(a)(4).

\textsuperscript{74} 14 C.F.R. §§ 380, 399. The DOT's philosophy has been pervasive in the area of federal regulation of deceptive advertising throughout the Reagan and Bush administrations. The Federal Trade Commission (FTC) shares the DOT's philosophy with regard to advertising regulation claiming that "excessive government intrusion in advertising hurts business by increasing the costs of disseminating information, and hurts consumers by limiting access to useful information" as the
not have any opportunity to take advantage of discounted fares.\textsuperscript{75} The DOT admits, however, that the preservation of competition never calls for the toleration of advertisements conveying deceptive information.\textsuperscript{76} The difficulty arises over whether the airfare advertising practices in question qualify as deceptive.

Currently, the only explicit regulation of fare advertising that the DOT has found "necessary" to prevent deceptive advertising requires that the entire fare be included some place in the advertisement.\textsuperscript{77} The DOT supports the airlines' practice of "unbundling" fares as long as the applicable surcharges are listed somewhere in the advertisement. The DOT contends that it would be virtually impossible for the airlines to meet a single fare requirement, including all applicable charges, as some of the surcharges do not apply uniformly in all markets.\textsuperscript{78}

Similarly, the DOT feels that any regulation that would limit the airlines' yield management practices would unnecessarily lead to the elimination of lower fares. Because air travel is highly seasonal, airlines often operate with empty seats.\textsuperscript{79} As a result, airlines try to recoup costs by

\textsuperscript{75} Fraser, \textit{supra} note 74, at 539.


\textsuperscript{77} Brief for the United States as Amicus Curiae at 11, \textit{Morales IV}, 112 S. Ct. 2031.

\textsuperscript{78} \textit{Id.} "[T]he total price of a ticket may vary up to $12 depending on the embarkation, disembarkation, and connecting airports to be used by the traveller." \textit{Id.}

\textsuperscript{79} \textit{Id.} Airlines serve two major markets: (1) individuals, primarily business travelers, with a "relatively inelastic" demand for air travel; and (2) travelers, primar-
filling would-be empty seats with consumers who pay lower fares and by charging higher fares to persons with an inelastic demand for air travel. The DOT allows airline advertisements to continue advertising fares when a particular fare may not be available, contending that it is too burdensome for airlines to represent the complexity of fare availability in an advertisement. Furthermore, DOT representatives claim that consumers have come to understand the advertising practices and are used to it, maintaining that consumers rarely complain to the DOT. The National Advertising Division of the Council of Better Business Bureaus (NAD) supports the DOT’s claim, stating that they faced a “declining case load” during the ’80s.

60 Id. at 10.
61 Id. The government claims that it is “increasingly difficult to convey in any advertisement the full complexity of the fare structure and ticket restrictions, while keeping the advertisement sufficiently short and clear so that it can serve as an affordable and effective price competition tool.” Id.
62 Diamond, supra note 45, at 1D. The DOT standard for fair advertising is if “[a]n ordinary person reading such ads would be aware of the total amount to be paid for the transportation and, in addition, would be provided with valuable information on associated government imposed or approved surcharges.” 14 C.F.R. §§ 380, 399. The DOT contends that “cases in which false or misleading national advertising could result in harm to a reasonable customer are increasingly rare.” Diamond, supra note 45, at 1D. However, critics note that “disgruntled passengers simply can’t get through to the department’s understaffed hot line to complain.” Weiner, supra note 46, at 32.
63 Diamond, supra note 45, at 1D. The advertising industry spoke loudly in opposition to the prospect of state enforcement of state laws. The advertising industry, opposed to the NAAG’s attempt to erect a new regulatory scheme upon national advertisers without first consulting the industry or its representatives, insisted that the NAAG first demonstrate that state regulation will serve to regulate “more efficiently” than the current federal structure and will not result in a lack of uniformity. John O’Toole, A Crazy Quilt of Ad Regulation, ADWEEK, Mar. 28, 1988, at 20.

The Council of Better Business Bureaus (CBBB) suggested that advertisers become more involved in the regulation and the CBBB “urged the states to shift gears and work through the advertising industry’s self-regulation process.” Jennifer Lawrence, Feds Tell States to Back Off on Ad Restrictions, ADVERTISING AGE, Mar. 7, 1988, at 2. State officials were “encouraged” to “[w]ork through the CBBB’s National Advertising Division, which reviews complaints about national advertising and has handled more than a dozen cases involving airline ads.” Id. A dozen or so investigations by the NAD, however, hardly seems to constitute an “expan-
The number of consumer complaints regarding airline advertising, however, is widely disputed. Consumers complained to their state attorneys general and consumer protection agencies often enough to lead those parties to characterize consumer dissatisfaction as having reached "crisis proportions." Despite the DOT's intentions to protect consumers, many parties are left with the feeling that the DOT offers no legitimate reason to exempt the airline industry from the standards of advertising accountability that apply to all other industries across the country. The rising numbers of consumer complaints led the NAAG, local consumer protection agencies, and members of Congress to challenge the DOT's current scheme of regulation.

III. SUGGESTIONS AND CHALLENGES TO THE DOT'S REGULATION OF AIRLINE ADVERTISING

While the DOT may consider current airfare advertising practices relatively harmless in comparison to a possible chill on airline price competition that might arise from broader regulations, consumers are still upset by many advertisements. The notion of deceptive advertising from the perspective of a potential ticket purchaser differs dramatically from the perspective of the DOT, which is committed to protecting competition within the air trans-

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84 Diamond, supra note 45, at 1D. "That numerous states have joined in a common interpretation of these statutes indicates a significant national consensus that the airline industry has engaged in widespread false, misleading and deceptive practices." Felix H. Kent, Curb on State Power to Regulate Advertising, N.Y. L.J., March 24, 1989, at 4.

85 Preate: Feds Shouldn't Condone Misleading Airline Ads, supra note 52.

86 NAAG Guidelines, supra note 18, at s-3.

87 Id.
portation industry, despite the fact that both parties want to secure the lowest fares possible. Widespread dissatisfaction with the DOT's regulation of airline advertising has prompted calls for a change in DOT policy, which resulted in a direct challenge to the DOT's regulatory authority, and calls for Congress to amend the current legislation.

A. ALTERNATIVE FEDERAL REGULATIONS

Many parties would like to see the DOT adopt and enforce broader regulations. New York City's Consumer Affairs Commissioner, Mark Green, following a thorough investigation of the DOT's regulation of airline advertising, made explicit suggestions to the DOT for improved consumer protection. The suggestions were comprised mostly of regulations already applicable to advertising on state and local levels. They were (1) to rescind DOT regulations that allow the exclusion of fees and taxes from advertised fares; (2) to draft new regulations requiring advertisements to clearly display restrictions such as advance-purchases, non-refundability, and penalties for

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88 See supra notes 72-76 & infra notes 146-148 and accompanying text.
89 Rhea Mandulo, Green: Prosecute Airlines for False Advertising, UPI, July 17, 1990, available in LEXIS, Nexis Library, UPI file. Green concluded that the DOT has ignored the problem of deceptive advertising practices and appealed to Samuel Skinner, the United States Secretary of Transportation, "to either pursue the charges," or to let local and state governments "protect the flying public." Id. Green singled out Continental Airlines, Inc., Trans World Airlines, Inc., Midway Airlines, Inc. and Delta Airlines, Inc. for most often failing to provide passenger space at the advertised rates. Id. Trans World Airlines, Inc., Pan American World Airways, Inc., Northwest Airlines, Inc., United Airlines, Inc., British Airway, Ltd., and Midway Airlines, Inc. were the airlines cited for advertising low one-way fares and announcing that a round-trip purchase was required to obtain the advertised fare in very small, fine print. Id.; see also Pestronk, supra note 53, at 44; Consumer Affairs Commissioner Asks DOT to Stop Deceptive Ads, AVIATION DAILY, July 20, 1990, at 129. Continental denied the findings and cited full compliance with DOT's regulations. Continental Airlines Refutes Commissioner's Announcement, SOUTHWEST NEWSWIRE distributed to Business/Aviation Desks, July 17, 1990.
90 Pestronk, supra note 53, at 44. Public service groups have actively encouraged either tougher federal regulations or state enforcement. Aviation Consumer Action Project, a Washington-based group, "has been urging the Transportation Department to compel airlines to set aside at least 10 per cent of their seats at the prices they advertise." Id.
itinerary changes; (3) to draft regulations prohibiting the practice of advertising one-way fares that are available only by purchasing round-trip tickets; and (4) to penalize airlines for not having sufficient seats available to meet the demand that could reasonably be expected upon publication of an advertisement.91

Congress, although only cursorily thus far, has also addressed the DOT's regulatory policies. Senator Howard Metzenbaum and Representative Peter A. DeFazio sponsored the Airline Consumer Rights Bill in March of 1987 that aimed to make the airline industry more accountable to the public.92 The bill, if enacted, would have required airlines that advertise discounted fares to set aside at least one-third of the seats on the flights advertised at the quoted price.93 The bill also called for the disclosure of several specific restrictions in advertisements.94 There is also a bill in the House of Representatives currently that would amend the Federal Trade Commission Act to provide for FTC regulation of airline advertising.95

B. CONCURRENT STATE AND FEDERAL REGULATION

As an alternative to more expansive federal regulation by the DOT, critics have supported efforts by states' attorneys general to enforce their own, more rigorous, state advertising laws. Despite the DOT's widespread authority to regulate the airline industry, several state attorney general offices, opposing what they perceived as lackadaisical federal regulation, have tried to regulate airline advertis-

91 Id.; see Consumer Affairs Commission Asks DOT to Stop Deceptive Ads, supra note 89, at 129.
93 Id. § 4(a) (1987).
94 Id. § 4(b) (1987). The bill would have required disclosure of "all restrictions with respect to advance purchase of tickets, refundability of money, minimum stay requirements, and any and all other restrictions or conditions with respect thereto." Id.
ing pursuant to their own state laws. These state attorneys general acted to regulate airline advertising pursuant to guidelines adopted by the NAAG.

1. The NAAG Guidelines

In December 1987, the NAAG adopted Guidelines for Air Travel Advertising (NAAG Guidelines). The NAAG Guidelines were a response to increased consumer complaints about airline advertising to states' attorney general offices and consumer affairs departments. The NAAG directed a task force to investigate the nature of the consumer complaints and to determine if existing airline advertising practices were deceptive. The NAAG task force determined that several fare advertising practices were misleading to consumers and issued the NAAG Guidelines to notify the airlines of the problem practices and to demonstrate what action needed to be taken to conform the advertisements to state advertising law requirements. The NAAG Guidelines were to prevent deception by ensuring that airfare advertisements conveyed certain basic information to consumers. The information is (1) whether the consumer would be eligible for the advertised fare, (2) the risks to the consumer associated with purchasing the ticket at the advertised price, and (3) whether the consumer could determine the actual availability of a ticket offered at the advertised price.


97 NAAG Guidelines, supra note 18, at s-2.

98 Id.

99 Id. at s-8. Airline advertisements often characterize fares offered as special low fares but the fact is that the "majority of airline tickets sold each year sell at prices significantly lower than the . . . standard regular coach fare." Id. at s-11. This restriction would require that only those fares that "represent a true savings over regularly available air fares," such as those that are available for short periods of time and are substantially below any regularly offered fare, would carry a term qualifying them as a special or discounted fare. Id.

100 Id. at s-10.

101 Id. at s-9.
Like the regulations proposed to the DOT by the New York City Consumer Affairs Department, the NAAG Guidelines reflect requirements for price advertising that state and local advertising laws already dictate. Specifically, the NAAG Guidelines require that a single, total advertised price of the fare include all surcharges and that round-trip fare advertising be identified as such. The NAAG Guidelines also prohibit the deceptive use of terms such as “sale,” “discount,” “reduced,” or other similar qualifiers. A sufficient quantity of the advertised fares must be available to meet the applicable market’s “reasonably foreseeable demand.” Perhaps most importantly, and unlike current federal requirements, the NAAG Guidelines define what is meant by “clear and conspicuous” in terms of size, color, contrast, and audibility in order to protect consumers in the realm of print, billboard and broadcast advertisements.

Despite the fact that the easiest path for the states would be to take a free ride from the federal government and not incur the expense of enforcing their own regulations, the state attorneys general clearly felt an overwhelming duty to protect their consumers and concluded that the DOT had neglected its duty. The NAAG

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102 Mandulo, supra note 89. See supra notes 88-90 and accompanying text.
103 NAAG Guidelines, supra note 18, at s-8.
104 Id. at s-10.
105 Id.
106 Id. at s-9.
107 Id. at s-7. “Clear and conspicuous,” for example in print advertising, would require that certain restrictions and limitations that are often outlined in tiny “mouse” print must be “at least one-third the size of the largest type size used in the advertising,” or “10-point type in advertisements that are 200 square inches or smaller, [or] 12-point type in advertisements that are larger than 200 square inches.” Id. Examples of the type of restrictions that the NAAG Guidelines require to be “clear and conspicuous” are: limited-time availability; limitations on right to refund or exchange of ticket; length of stay requirements; advance purchase requirements; and round-trip purchase requirements. Id. at s-8.
108 Note, To Form a More Perfect Union?: Federalism and Informal Interstate Cooperation, 102 HARV. L. REV. 842, 846 (1989) [hereinafter Perfect Union?]. Individual state attorneys general certainly have the opportunity to try and increase their own political clout by actively regulating national airline advertising. But the political position of the state attorney general can be more advantageous than that of an administrative agency, such as the DOT. As the state attorneys general are
Guidelines gave notice to the federal government that states and consumers were not pleased with either the substance or enforcement of the existing federal regulations and that the states intended to enforce their own consumer protection laws. The attorneys general adopted the NAAG Guidelines with the hope that the airline industry would comply and that litigation would be unnecessary.

2. Trans World Airlines, Inc. v. Mattox

Unfortunately, the NAAG Guidelines resulted in exactly the litigation that the NAAG sought to avoid. In November 1988, then Texas Attorney General Jim Mattox, joined by the attorneys general of California, Massachusetts, New York, and Washington, notified three major airlines that their national advertisements, which did not violate federal law, violated the NAAG Guidelines and Texas deceptive advertising laws. The airlines failed to include taxes and surcharges in a single advertised fare. Mattox threatened prosecution unless the airlines ceased publishing the particular advertisements. The airlines did stop the advertisements that were illegal under Texas law, but only briefly. The airlines, in an effort to enjoin any attempt by Mattox to prosecute, responded by filing

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109 NAAG Guidelines, supra note 18, at s-6.
110 Id.
113 Supreme Courts Asks for Justice Department Opinion of Airline Advertising, supra note 17, at 485.
114 Mattox, 712 F. Supp. at 102.
115 Laurie P. Cohen, TV Networks Balking at Ad Guidelines on Disclosure of Air Fare Restrictions, WALL ST. J., Feb. 9, 1988, at 44.
suit in federal district court in Texas.\textsuperscript{116}

In \textit{Trans World Airlines, Inc. v. Mattox},\textsuperscript{117} the airlines contended that federal law preempted any attempt by the states to regulate airfare advertising according to their own state laws. The applicable federal law provides that "any [State] law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services" of any interstate air carrier is preempted by federal regulation.\textsuperscript{118} The airlines claimed that airline advertising related to "rates, routes or services" and, thus, was not subject to state consumer protection laws. The airlines maintained that the preemption clause was specifically added by Congress at the time of deregulation to avoid any prospect of conflicting state regulation.

Mattox argued that advertising was too indirectly related to "rates, routes or services" to be expressly preempted and that a savings clause in the federal act preserved such a state action.\textsuperscript{119} Mattox contended that Congress included an exclusive list of practices that the states could not regulate in the legislative history and the absence of advertising from the list indicated that advertising was not properly included in the "relating to" language. Furthermore, the savings clause provided that the federal regulations shall not "abridge or alter the remedies now existing at common law or by statute."\textsuperscript{120} Mattox claimed that state regulation of advertising has consistently played a crucial role in the marketplace and that, as Congress intended to subject the airline industry to the full extent of marketplace conditions, airline advertising regulation was the very type of regulation that Congress intended to protect.

Thirty-three other states joined in opposing the air-

\textsuperscript{116} \textit{Mattox}, 712 F. Supp. at 102.
\textsuperscript{117} \textit{Id.}
\textsuperscript{119} The savings clause is 49 U.S.C. app. § 1506.
\textsuperscript{120} 49 U.S.C. app. § 1506.
lines’ motion and specially appeared in federal district court in Trans World Airlines, Inc. v. Mattox.\textsuperscript{121} Meanwhile, three other attorneys general brought charges against airlines in federal district court in their own states for violations of applicable state consumer protection laws.\textsuperscript{122} These other federal courts, as well as a state court, agreed with Mattox’s analysis.\textsuperscript{123} While all of the other federal district courts remanded the cases to state court, the district court in Texas granted the preliminary injunction sought by the airlines on the grounds that it was probable that the plaintiffs could establish their claim of preemption.\textsuperscript{124}

Upon a motion by the airlines, the district court in Texas broadened the preliminary injunction to include all of the attorneys general who specially appeared and attempted to use state law to enforce the NAAG Guide-

\footnote{121 \textit{Trans World Airlines, Inc. v. Mattox}, 712 F. Supp. 99, 102 (W.D. Tex. 1989) (states made special appearances without submitting to subject matter or personal jurisdiction).}


The court also allowed the intervention of ten additional airlines as plaintiffs. This decision had the immediate effect of prompting air carriers to actively advertise the "unbundled" fares again.

Mattox appealed to the Court of Appeals for the Fifth Circuit. The court held that the district court properly issued the preliminary injunction as the legislative intent of section 1305(a)(1) indicated that Congress wished to preclude all state regulation in order to prevent conflicting regulations. As congressional intent is the crucial factor for determining preemption, the court concluded that the states were without authority to take action against airline advertisements that are deceptive pursuant to state law. Although the final judgment in Trans World Airlines, Inc. v. Mattox was not binding on the other federal district courts in which the attorneys general filed suit prior to the broadening of the preliminary injunction, the state courts, to which the cases had been remanded, deferred to the Fifth Circuit under the principles of res judicata.

126 Id. at 104. The airlines were Lufthansa German Airlines, Air Canada, Compagnie National Air France, Alitalia-Lines Aeree Italiane, El Al Israel Airlines, Ltd., Finnair, Japan Airlines Company, Ltd., Quantas Airways, Ltd., Scandinavian Airlines System, and Viacao Aerea Rio-Grandense. Id. at 102.
127 Jennifer Lawrence, Airlines Win First NAAG Bout, Advertising Age, Feb. 6, 1989, at 8; see also Meier, supra note 39, at 48. This decision, coupled with a 1988 DOT Order that expressly permitted the unbundling of certain surcharges, spurred the airlines to resume fare advertising. Meier, supra note 39 at 48.
129 Mattox, 897 F.2d at 783. The court relied on the congressional intent expressed in H.R. Rep. No. 793, 98th Cong., 2d. Sess. 4 (1984), reprinted in 1984 U.S.C.C.A.N. 2857, 2860. See also Illinois Corporate Travel v. American Airlines, Inc., 889 F.2d 751 (7th Cir. 1989) (finding that price advertising "surely" relates to price), cert. denied, 495 U.S. 919 (1990). As the preemption was found to be express, the "absence of contrary federal law is irrelevant" and, thus, the savings clause is inapplicable. Trans World Airlines, Inc. v. Mattox, 897 F.2d at 754. For an in-depth analysis of the preemption arguments and the court's rationale, see Daniel Petroski, Airlines' Response to the DTPA Section 1305 Preemption, 56 J. AIR. L. & COM. 125 (1990).
130 See supra notes 122-124 and accompanying text.
and collateral estoppel. The Fifth Circuit again affirmed the district court, upon a second appeal, when the district court subsequently granted a permanent injunction protecting the airlines from any action by the states to enforce deceptive advertising laws.

In *Morales v. Trans World Airlines, Inc.* thirty-three state attorneys general joined Texas Attorney General Dan Morales, Mattox's successor, in appealing the Fifth Circuit's decision. The Supreme Court agreed to consider whether "enforcement of the NAAG guidelines on fare advertising through a State's general consumer protection laws is pre-empted by the ADA." The majority of the Supreme Court affirmed the Fifth Circuit's opinion, firmly establishing that the DOT has sole authority to regulate airline advertising. This decision, while not addressing the merits of current airfare advertising practices, strongly influences the substance of airline advertising regulation.

Justice Scalia, writing for the majority, held that the "relating to" language of the preemption provision of the ADA indicated that Congress intended that the ADA broadly preempt state laws and regulations, analogizing the language to that used in the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a). The majority agreed with the airlines' contention that the regulations set out in the NAAG Guide-

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134 *Morales IV*, 112 S. Ct. at 2036.

135 Justices White, O'Connor, Kennedy, and Thomas joined in Justice Scalia's opinion. Justice Souter did not participate in the decision.

136 *Morales IV*, 112 S. Ct. at 2037. "Since the relevant language of the ADA is identical, we think it is appropriate to adopt the same standard here: State en-
lines "related to" air fares and that enforcement of these regulations would have a "significant" economic impact on airline rates. While Scalia noted that the airlines do not have "carte blanche" to engage in deceptive advertising, he characterized the scope of the DOT's regulatory power as the prohibition of "advertisements which in its opinion do not further competitive pricing." 

Justice Stevens, joined by Chief Justice Rehnquist and Justice Blackmun, dissented and took exception to both the majority's analysis of the preemption issue and the conclusion that the NAAG Guidelines would have an actual detrimental economic impact on the airline industry. Justice Stevens noted that "[s]urely Congress could not have intended to pre-empt every state and local law and regulation that similarly increases the airlines' costs of doing business and, consequently, has a similar 'significant impact' upon their rates." 

The Supreme Court's opinion elicited a quick response from NAAG. Only a few weeks after the Supreme Court resolved the preemption issue in favor of the airlines, the NAAG adopted a resolution seeking congressional action to amend the ADA to clarify "the states' authority to en-
force their deceptive trade practice laws against any airline that deceptively advertises its rates, routes, or services."\textsuperscript{141} While there is not currently a bill in Congress to provide for amendment of the ADA, Representative Charles E. Shumer of New York introduced a bill on May 7, 1992 to amend the Federal Trade Commission Act in order to provide for regulation of air carrier advertisements by the FTC.\textsuperscript{142} The bill, entitled the Airfare Advertising Reform Act of 1992, specifically incorporates requirements for "clear and conspicuous" disclosure of material restrictions, the inclusion of taxes, fees, fuel and other surcharges, and advertisement of a round-trip fare price if the fare requires a round-trip ticket purchase.\textsuperscript{143}

IV. THE FUTURE OF AIRLINE ADVERTISING REGULATION

A. AGREEING ON DECEPTIVE AIRFARE ADVERTISING PRACTICES

While the Supreme Court's decision established the DOT's current position as the sole regulator of airline advertising, the decision does nothing to alleviate the consumer dissatisfaction with airfare advertisements and the DOT's regulation of those advertisements. The DOT's sole argument for maintaining severe limits on regulation

\textsuperscript{141} NAAG Favors Airline Act Amendment on State Regulation of Deceptive Ads, 63 Antitrust & Trade Reg. Rep. (BNA), No. 1574, at 81 (July 16, 1992). On July 10, 1992, Attorneys General Daniel E. Lungren of California, Robert T. Stephan of Kansas, Hubert H. Humphrey, III, of Minnesota, William L. Webster of Missouri, Robert Abrams of New York, Dan Morales of Texas, and Kenneth O. Eikenberry of Washington submitted the resolution to Congress. \textit{Id.}; see also Claudia MacLachlan, AGs to Press Multistate Drive; Despite Air Fare Defeat, \textit{Nat'l L.J.}, June 15, 1992, at 3 ("Unless Congress decides otherwise, we are out of the consumer protection area as far as airline rate advertising goes,' said Tennessee Attorney General Charles W. Burnson, chairman of NAAG's consumer protection taskforce.").

\textsuperscript{142} H.R. 5124, 102nd Cong., 2d Sess. (1992). Other Representatives have subsequently become co-sponsors of the bill. They are Representative Hyde of Illinois and Representative Owens of New York, joining on June 10, 1992, and Representative Scherer of New York and Representative Machtley of Rhode Island, joining on July 1, 1992.

\textsuperscript{143} \textit{Id.} § 3.
is based on its duty to preserve competition in the air transportation industry to the greatest extent possible.\textsuperscript{144} This position has a significant affect on the DOT's approach to protecting consumers and other airlines from unfair and deceptive trade practices such as misleading airfare advertising.\textsuperscript{145} A large part of the DOT's determination of whether an airfare advertisement is deceptive hinges on whether a finding of deception and a corrective regulation will be a potential impediment to price competition among the airlines.\textsuperscript{146} From past experience, the DOT appears unwilling to rethink its position.

While price competition clearly plays a role in whether consumers have access to low airfares, the DOT seems to neglect the actual issue in policing advertising: if a particular advertising practice misleads or deceives consumers. Other advertisement regulators on the federal, state, and local government level are concerned first and foremost with whether the advertisement conveys accurate information.\textsuperscript{147} The DOT, on the other hand, seems to advocate that consumers put up with misleading or confusing advertisements in the interest of protecting the current level of competition in the air transportation industry.\textsuperscript{148}

The DOT should approach the suggestions for changes to the current regulatory scheme by first considering the advertisements. Once an airline decides to advertise a fare, the advertisement should, at a minimum, convey what the airline is actually offering. Preventing unfair and deceptive advertising practices is an important goal, separate from preserving price competition. Nevertheless, through either increased efforts by the DOT or concurrent regulation by the DOT and the state attorneys general, it is possible to protect consumers from deceptive

\textsuperscript{144} Brief for the United States as Amicus Curiae at 10-12, \textit{Morales IV}, 112 S. Ct. 2031 (1992).


\textsuperscript{146} Brief for the United States as Amicus Curiae at 10, \textit{Morales IV}, 112 S. Ct. 2031.

\textsuperscript{147} \textit{Air Transport: Airline Observer}, supra note 66, at 41.

\textsuperscript{148} Diamond, supra note 45, at D1.
advertising and to preserve fare competition to the extent that it exists under the current federal regulatory scheme.\textsuperscript{149}

\section*{B. Preventing Misleading Fare Advertisements While Preserving Fare Competition}

Consumers, the states, and consumer protection agencies share the DOT's interest in enabling the airlines to charge the lowest fares possible. Those parties who want to subject airfare advertisements to more rigorous standards do not want to affect either fares or restrictions on those fares. Rather, they want to make sure that airlines meet the consumers' minimum expectations and convey to the consumer what they offer in the advertisement. For example, if an airfare is subject to a round-trip purchase, the round-trip cost of the ticket should be included in the advertisement.\textsuperscript{150}

Under the suggested framework of regulations, however, airlines could continue to use fares as an instrument of competition. While the fares quoted in airline advertisements would be higher, the price would reflect the actual cost of the ticket and competition would be preserved as the round-trip fare disclosure requirement would be applied uniformly to all airlines. Consumers would be told directly what the airline had to sell and at what price. Likewise, requiring that all airlines reveal the material conditions that apply to a particular fare in uniformly defined "clear and conspicuous" terms will only serve to better inform the consumer and need not impair competition between the airlines.

Finally, if airlines choose to generate publicity by offering low fares to consumers through advertising, they should have some seats available at the fare advertised.\textsuperscript{151} The airlines should set aside a number of seats at the low fare, no matter how small, and should include some indi-

\textsuperscript{149} \textit{NAAG Guidelines}, supra note 18, at s-8.

\textsuperscript{150} \textit{Id.} at s-10.

\textsuperscript{151} See \textit{NAAG Guidelines}, supra note 18, at s-9.
cation of the seat availability in the advertisement. Most consumers understand that low fares offered by airlines are subject to some restrictions. An advertisement, however, should convey those restrictions to the consumer.\textsuperscript{152} Airlines will still be able to compete fairly as they will all be required to disclose information with greater accuracy.

Despite the fact that the airlines challenged the enforcement of state consumer protection laws, airlines have also indicated a willingness to modify their fare advertising practices so long as other airlines do.\textsuperscript{153} Those forming the NAAG Guideline Taskforce found that many "airlines stated candidly that their advertising and marketing practices were dictated by the practices of their competition."\textsuperscript{154} In fact, some airlines went so far as to object to the DOT's lax regulatory policy.\textsuperscript{155} For example, a Southwest Airlines representative characterized current airfare advertisements, which feature "fictitious one-way fares," as "inherently deceptive."\textsuperscript{156} Noting that the reputations of the national airlines are declining in the eyes of consumers, airline industry commentators claim that this reputation is hardly "enhanced by ads that are confusing at best, badly misleading at worst."\textsuperscript{157}

While the airlines have defended their methods of fare

\textsuperscript{152} Id.

\textsuperscript{153} Id. at s-4.

\textsuperscript{154} Weiner, supra note 46, at 25. "Some airlines said they would prefer not to promote the each-way fares, but that competitive pressures are too great." Id. Many commentators feel that the airlines are unlikely to change their advertising practices voluntarily, citing the Iraqi conflict, during which many airplanes flew close to empty and fuel costs doubled, as well as the already poor financial shape of so many of the larger airlines, evidenced by the bankruptcies of Continental Airlines, Air Midwest, Pan American World Airways, and Eastern Airlines. Cowan & Gargan supra note 45, at A1.

\textsuperscript{155} Meier, supra note 39, at 49.

\textsuperscript{156} Id. at 48. There are defectors in the airline camp. Southwest Airlines, Northwest Airlines, and USAir have all voiced objections to current advertising practices and the lax regulatory policy with regard to these practices. "The law does not permit a shoe retailer to advertise the price of one shoe when that shoe can only be purchased as part of a pair," noted Randall Malin, an executive of USAir. "So why should (you) permit airlines to advertise a one-way fare when one-way travel is not offered at that fare?" Poling, supra note 10, at 10.

\textsuperscript{157} Meier, supra note 39, at 48.
advertising as a "matter of survival" necessary to avoid competitive disadvantages in the current regulatory landscape, there is no evidence that these practices are a necessary part of price competition or that requiring the suggested changes in advertising would diminish that competition. Congress did not deregulate the air transportation industry solely to eliminate regulation. Congress sought to improve the efficiency, innovation, consumer services, and rates of the airline industry.

Congress retained regulatory power to prevent unfair and deceptive trade practices in order to facilitate fair competition. Deceptive trade practices, such as misleading advertising, only subvert competition. Ensuring that consumers receive accurate information from advertisements should maximize fair competition as "[f]airness in the marketplace . . . depends in part on accurately informed consumer choice, and not caveat emptor." Consumers would obviously benefit from more accurate advertisements.

158 Weiner, supra note 46, at 32.
159 Flint, supra note 38, at 2.
160 Perfect Union?, supra note 108, at 846. "Although the Airline Deregulation Act stressed the importance of markets and free competition, Congress sought to establish efficient, not simply deregulated, markets and thus noted the importance of controlling unfair and deceptive practices." Id. at 857.
161 Id.
162 NAAG Guidelines, supra note 18, at s-6. "[D]eceptive and misleading advertising does not enhance consumer welfare, it lessens it." Id. Eliminating misleading advertising should further goals of protecting true competition as unfair advertising practices subvert competition. Id. "A bedrock assumption supporting the model of perfect competition is that buyers have accurate and complete information concerning the purchases they are making." Id.
163 Fraser, supra note 74, at 562. "The premise of the regulation of deceptive advertising is that a fair system of free enterprise depends on the consumer's ability to make an informed choice among a variety of competing products in the marketplace." Id. The enforcement policies of the DOT, like those of the FTC, under the Reagan and Bush administrations will "jeopardize the efficient operation of the marketplace by undermining consumers' trust in the information they receive." Id.
I. Preventing Excessive Regulation

At some point, regulation could become so excessive that it would force airlines to eliminate national fare advertising. Undergradably, the DOT is fearful of the possible effects of excessive regulation. For example, the DOT is very concerned that an advertising regulation that disallows the separation of fare components will be too burdensome for the airlines and will result in the elimination of fare advertisements altogether. The DOT cites the fact that some markets have two or more airports and, as a result, ticket prices in that market can vary depending on the embarkation or destination points for a particular flight. To comply with the NAAG Guidelines, however, would only require that such airline advertisements identify the airport when quoting the fare, a practice that many airlines have already used. Alternatively, it would not be too burdensome for the airlines to "clearly and conspicuously" denote that in markets with two or more airports fares may vary slightly.

The regulations that have been suggested to the DOT and those regulations outlined in the NAAG Guidelines are not intended to result in the elimination of fare advertising. In the interest of consumer protection, legislators have seen a more significant need for local ordinances, state laws, and even federal laws that restrict the very type of advertising practices for which the airlines are currently

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165 Brief for the United States as Amicus Curiae at 11, *Morales II*, 112 S. Ct. 632. Studies have revealed that consumers have paid higher prices when advertising in other areas has been subject to extensive regulations. Bates v. State Bar of Arizona, 433 U.S. 350, 377 (1977); see also Lee Benham, *The Effect of Advertising on the Price of Eyeglasses*, 15 J. Law & Econ. 337 (1972). Airlines have explained that the increasing amount of national "image" advertising is a result of the difficulty in disclosing all of the pertinent conditions placed on fares. *Id.* However, this trend in advertising is also explained by the airlines' desire to avoid fare advertising based on their belief that the fare wars of the '80s played a large role in the many airline bankruptcies. Jennifer Lawrence, *State Ad Rules Face Showdown*, *Advertising Age*, Nov. 28, 1988, at 3.


167 *Id.* at 10-11.

168 *NAAG Guidelines*, supra note 18, at s-6.
criticized. The DOT, on the other hand, seems to protect the airlines at the expense of the individual consumer.\textsuperscript{169} In light of the relatively slight risk of a chill on airline fare competition, the DOT should consider invoking its authority to control unfair and deceptive trade practices to prevent further consumer dissatisfaction.

2. Ensuring Uniformity

While it does not seem that the regulatory changes suggested need diminish airfare competition, competition could very likely be affected if regulations were not applied uniformly across the nation. Airlines would find it overly burdensome to advertise fares nationwide without a uniform regulatory policy.\textsuperscript{170} If the states were to enforce their own consumer protection laws, a potential lack of uniformity could arise at two levels. First, the federal regulations and the NAAG Guidelines, representing state consumer protection laws, differ significantly. Second, all of the different state governments would be able to enforce their own advertising regulations. Under a system of concurrent jurisdiction, the airlines could face the prospect of several varying regulations applying to the same national advertising.

Concurrent jurisdiction, however, need not result in a lack of uniform regulation. The DOT's substantive regulations would effectively become obsolete. As the DOT's regulation of price advertising is considerably more lenient than state regulation pursuant to the NAAG Guidelines, airline industry compliance to the NAAG Guidelines would require surpassing the federal standards.

The possibility of all fifty states enforcing their own consumer protection laws is perhaps more problematic for the prospect of uniform regulation. The NAAG Guidelines, however, were drafted and approved specifically to address problems of uniformity.\textsuperscript{171} The attorneys

\textsuperscript{169} Meier, \textit{supra} note 39, at 48.
\textsuperscript{171} NAAG Guidelines, \textit{supra} note 18, at s-3.
general, cognizant of the difficulties that would arise from different advertisement requirements, adopted the NAAG Guidelines to prevent inconsistent state regulations.\textsuperscript{172}

The NAAG Guidelines established uniform national standards, thus presenting the airline industry with "safe harbors."\textsuperscript{173} If states were able to regulate airline advertising pursuant to the NAAG Guidelines, the industry could be assured that compliance with the NAAG Guidelines would protect them from state actions, notwithstanding inconsistencies between the laws of different states.\textsuperscript{174} There is always a slight risk that a maverick state attorney general might choose to enforce a stricter state advertising law, resulting in disparate regulation across the nation and possibly precluding advertising in some markets.\textsuperscript{175} The overwhelming support for the NAAG Guidelines, however, as well as the concerted efforts of the state attorneys general to create the NAAG Guidelines and to enforce state laws pursuant to those Guidelines, thus far indicate that prosecutorial discretion will be exercised.\textsuperscript{176}

Uniformity is in the interest of the states as well as in the interest of the airlines.\textsuperscript{177} States will be motivated to cooperate fully with each other, pursuant to the NAAG Guidelines, in order to prevent economic disparity in the enforcement of the advertising regulations. A state will not want to single-handedly shoulder the burden of enforcing regulations at odds with the rest of the country.\textsuperscript{178}

\textsuperscript{172} Id.

\textsuperscript{173} Perfect Union?, supra note 108, at 842.

\textsuperscript{174} Id. The NAAG Guidelines sought to "provide coordinated consumer protection that avoids the danger of a single state creating an uneven playing field." NAAG Guidelines, supra note 18, at s-3.

\textsuperscript{175} Jennifer Lawrence, States Defend Airline Authority, ADVERTISING AGE, Nov. 13, 1989, at 87.

\textsuperscript{176} All but two state attorneys general, those of Utah and New Mexico, approved the NAAG Guidelines. Felix H. Kent, Growth of State Regulation, N.Y.L.J., Nov. 25, 1988, at 4.

\textsuperscript{177} Id.

\textsuperscript{178} Perfect Union?, supra note 108, at 842. Unlike federal regulation of a national industry, state regulation might result in those states that most actively enforce the regulations incurring disproportionate costs of enforcement. A regulating
Neither will a state want to preclude fare advertisements in their market, thus depriving their consumers of the opportunity to take advantage of the fares.

C. ALTERNATIVE REGULATIONS WARRANTED

The Supreme Court's determination that only the DOT, at least presently, will regulate airline advertising has a significant impact on the substance of airfare advertising practices. Airlines are able to continue their current fare advertising practices without regard to the standards required by the NAAG Guidelines, standards to which advertising in other areas is already held. Ultimately, it is in the DOT's best interest, as well as that of the airlines, to consider the suggestions of those who advocate stricter regulations. Advertising low fares in large bold print may initially attract the attention of consumers. The practices may even lead some consumers to purchase tickets at a higher price upon learning of the applicable restrictions or lack of availability. Fare advertising, however, has taken its toll on consumers, and the DOT should at least address the criticisms.

Furthermore, the DOT should not continue to support the current advertising practices in the interest of furthering competition. The great majority of the practices that consumers want to stop have no real bearing on competition. For example, advertising one-way fare costs when a round-trip purchase is required or putting restrictions in print so small that consumers have difficulty reading them are only efforts to attract consumers to a service that does not really exist. The DOT should consider the real effects that these and other advertising practices have on competition and work with the consumers and the airlines to determine the best possible requirements for disclosure to give the consumer accurate and complete information. The DOT should not automatically dismiss any potential state "might suffer the focused wrath of the advertising and travel industries." Id. States will want to act together and share the costs of enforcement to best serve their citizens. Id.
regulation based on a chilling effect to competition, but should work with the states, consumers, and airlines.

V. CONCLUSION

The DOT has exclusive authority to regulate national airline advertising. The Supreme Court, by deciding that the DOT is the sole regulatory agent of airline advertising, has effectively eliminated the possibility for state attorneys general to exercise concurrent regulatory authority at this time.179 Notwithstanding the Supreme Court's decision on this jurisdictional issue, the question remains as to whether certain national airline advertising practices are deceptive to consumers.

While the DOT claims commitment to protecting consumers from misleading and deceptive airfare advertisements,180 consumers, through their state and local governments and consumer protection organizations, contend that the protection offered by the DOT is not sufficient to ensure accurate advertising. The DOT's commitment to preserving competition within the air transportation industry, a commitment that the DOT claims that its critics do not share, strongly influences the DOT's determination as to whether an airline advertising practice is deceptive or misleading to consumers. Consumers argue that this determination should not depend so heavily on whether requiring accurate advertising might have an impact on industry competition. Rather, a judgment as to the accuracy or deception of an advertisement should look to factors such as whether the advertisement accurately portrays the actual fare, the fare availability, and the material conditions attached to that fare.

Excessive regulation or regulations that are not uniformly applied nationwide could stall airfare competition. Suggested alternative federal regulations and those regu-
lations that comprise the NAAG Guidelines, however, seem neither to pose any significant problems with uniform application nor to be excessive. The DOT, while continuing to work to preserve competition, can also work to alleviate the dissatisfaction of consumers who have been unhappy with airfare advertisements that are misleading. As the DOT, however, seems unwilling to change its position, Congress should take legislative action to specifically eliminate the DOT's current preemption, forcing concurrent federal and state regulation, or otherwise insure that federal regulation adequately protects consumers.