

Client Bulletin

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Recent Decisions Address Previously Unsettled Areas Regarding Preemption under the Airline Deregulation Act (ADA)

The Ninth Circuit Court of Appeals recently held that ADA preemption applies to all air carriers, both domestic and foreign. In *In re Korean Air Lines Co., Ltd.*,¹ the Court of Appeals upheld the lower court's decision dismissing plaintiffs' class action, which asserted antitrust claims against Defendants Korean Air Lines and Asiana Airlines.

Plaintiffs filed their lawsuit in federal district court as the representatives of a putative class. In their Complaint, they alleged that defendants illegally conspired to impose a surcharge on passenger airfares, and brought claims under state unfair competition and unfair business practices laws. The district court granted the defense motion to dismiss on preemption grounds.

On appeal, plaintiffs argued that the ADA does not apply to foreign air carriers. They asserted that Congress statutorily defined "air carrier" and "foreign air carrier" as mutually exclusive terms, and that Congress' use of the term "air carrier" in the preemption provision of the ADA means that foreign air carriers are excluded from its reach.

The Court of Appeals disagreed. After reviewing the Federal Aviation Act, the court noted that Congress' use of the term "air carrier" throughout the Act does not always correspond to the term's statutory definition. The court then examined the context in which the term "air carrier" appears in the preemption provision of the ADA and concluded that Congress intended that it apply to all air carriers and not only to domestic carriers. The court found further support for this conclusion in the ADA preemption provision's

purpose and legislative history, which indicated that Congress intended to prevent states from regulating foreign air carriers. The court noted the pragmatic concern in applying the preemption provision only to domestic air carriers; it would be more difficult for foreign air carriers to enter the U.S. market for international flights, and such difference in treatment would conflict with U.S. treaty obligations mandating nondiscrimination.

The appellate court then addressed whether plaintiffs' claims were "related to a price" of an air carrier. Since plaintiffs alleged a price-fixing conspiracy, the court pointed out that their claims were plainly "related to a price" of an air carrier and, therefore, preempted.

In another decision interpreting the ADA, a California federal district court found that airport automated kiosks provide a "service" within the meaning of the ADA preemption provision.

In *National Federation of the Blind v. United Airlines, Inc.*,² plaintiffs alleged that the defendant airline had violated California disability laws by failing to make airport ticketing kiosks accessible to the blind. The defendant moved to dismiss on the grounds that plaintiffs' claims were preempted by the ADA and by the Air Carrier Access Act (ACAA).

Before rendering its decision, the district court requested input from the United States Department of Transportation (DOT) on the preemption issues. The DOT submitted a statement of interest stating that plaintiffs' claims were expressly preempted by the ADA, and were both field preempted and conflict preempted by the ACAA. For purposes of this bulletin, only the ADA express preemption issue is addressed.

Plaintiffs argued that their claims were not within the scope of the ADA because the automated kiosks were not a "service" under the meaning of the Act, relying upon the Ninth

Circuit Court of Appeals’ narrow definition of “service” in *Charas v. Trans World Airlines, Inc.*³

The district court, relying on the Supreme Court’s 2008 decision in *Rowe v. New Hampshire Motor Transp. Ass’n*,⁴ rejected plaintiffs’ argument, finding that because the kiosks facilitate a number of different services that relate to air transportation, the automated kiosks did provide a “service” within the meaning of the ADA.

In a third decision, the First Circuit Court of Appeals held that a claim brought under a Massachusetts employment law regarding tips and gratuities was preempted by the ADA. In *Don DiFiore v. American Airlines, Inc.*,⁵ a group of airport skycaps argued that passengers mistook the fee defendant charged for its curbside check-in for a mandatory gratuity for plaintiffs’ curbside services. Defendant displayed signs near the check-in that notified passengers of the \$2 per bag fee and stated that the fee did not include gratuity. The skycaps filed suit, claiming among other things, that defendant violated a Massachusetts tip law prohibiting an employer from taking a tip or service charge given to the employee by a patron. The federal district court denied defendant’s motion to dismiss on ADA preemption grounds and the case went to trial with a resulting jury award in favor of plaintiffs of over \$300,000.

On appeal, the appellate court ruled in favor of defendant, noting that although preemption does not reach state laws that have only “tenuous, remote, or peripheral” impact on federal regulation, the tip law directly regulates how an airline service is performed and how its price is displayed to customers.

As in *National Federation of the Blind*, the Court of Appeals in *DiFiore* took an expansive view in defining “service” for ADA preemption purposes. Relying upon *Rowe*, as well as other Supreme Court cases, the court held that the preemption provision of the ADA should be read broadly.



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¹ No. 08-56385, 2011 WL 1458794 (9th Cir. April 18, 2011).

² No. C 10-04816 WHA, 2011 WL 1544524 (N.D. Cal. April 25, 2011).

³ 160 F.3d 1259, 1265 (9th Cir. 1998).

⁴ 52 U.S. 364, 378, 128 S. Ct. 989, 169 L. Ed. 2d 933 (2008).

⁵ Nos. 10-1108, 10-1167, 10-1264, 2011 WL (1st Cir. May 20, 2011).