

**ORAL ARGUMENT – 1-15-03**  
**02-0255**  
**DELTA AIRLINES V. BLACK**

WEAVER: I would like to start off with a short summary of the facts just to set the stage for our argument. On the morning of June 23, 1995, Mr. Robert Black went to Smith Travel, a travel agency, to procure flight accommodations on Delta Airlines from DFW Airport to Las Vegas. That flight would be leaving some 5 hours after he made his contact with Smith Travel.

The travel was going to be for he and his wife. And he was told by Smith Travel that the tickets they were giving him were for first class for both he and his wife, but they would not be sitting together in first class.

The tickets that were assigned, however, only showed a seat assignment for Mr. Black. It did not show a seat assignment for Mrs. Black. It merely stated okay in that section. Ultimately Delta informed Mr. Black at the gate that Mrs. Black did not have a confirmed reservation on first class, but she was in coach, and that first class was sold out, and they could not put her there.

They offered to give Mr. Black a refund of the upcharge that he had paid between coach and first class, that being \$60, plus two free domestic travel vouchers. They were \$2,000 tickets, because they were purchased that day. It was only \$120 total for the upcharge. And the reason for that was he was a frequently flyer and had the advantage of upgrading to first class if available for a \$60 upcharge.

They offered him \$60, plus two free tickets to fly anywhere but he declined that. Then they tried to make some other accommodations for him none of which ultimately were acceptable to him. What he did was he took his wife from DFW, drove to Love Field, chartered a private jet and made his own first class accommodations by flying the private jet to Las Vegas and housing the jet's crew there for the 2 days he was there to come back. The charges associated with that were in excess of \$13,000.

Mr. Black sued Delta and Delta's gate agent, Al Perez in state DC in Dallas County. They also sued the travel agent, Smith Travel. The causes of action alleged against Delta and Perez were intentional and negligent misrepresentation, and against Delta alone was a breach of contract.

The TC granted summary judgment on behalf of Delta and Perez among other grounds, the grounds that the claims were preempted by the airline deregulation act or the ADA.

The reason why this case is so old is there was no severance of that summary judgment, and the case went on with Smith Travel. And Smith Travel ultimately got a motion for

summary judgment granted and both went up to appeal. It was reassigned to the Waco CA. Now the Waco CA reversed the judgment of the TC holding that none of Mr. Black's claims against Delta or Perez were barred by preemption.

The ADA preempts all of Mr. Black's claims in this case, however, and the CA's opinion is in error.

49 U.S.C. §41713(b) provides that a state 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.

Mr. Black's causes of action relate to Delta's ticketing and boarding procedures and, as such, they relate to a service rendered by an airline. This fact has been recognized by a number of cases that we've cited in our briefing, including Hodges and Lynn Lee Travel a 5<sup>th</sup> circuit case.

HECHT: So does putting the bag in the overhead compartment. So how is this different?

WEAVER: The putting the bag is, I think in Kiefer, it was decided that was a service. I think the question of whether it's a service or not is really the easy question in this case. Where the CA stumbled really involves the second prong of preemption as to where the ADA prohibits enacting or enforcing a law or regulation or other provision having the force or effect of law. And that gets us to American Airlines v. Wolens, where the US SC held that in that particular case bringing state law base breach of contract cause of action did not amount to such a law or regulation or other provision having the force and effect of law. It's not whether it relates to the price, route or service, but whether there's some sort of state regulation of that.

Wolens involved a suit brought by members of American Airlines frequent flyer program against American Airlines, claiming deceptive trade, but also a breach of contract in that American was trying to modify its program unilaterally and retroactively.

American Airlines had argued that that claim was preempted by the ADA, and the US SC disagreed. The court reasoned that the state contract claims do not constitute state imposed regulations where the plaintiff seeks redress for violation of contract terms set by the parties themselves.

The US SC made it expressly clear, however, that the ADA confines courts in breach of contract actions to the party's bargain with no enlargement or enhancement based on state laws or policies external to the agreement. And the Austin CA has recognized this as well in Boone Insurance Agency v. American Airlines, in which it held that a class action suit seeking to invalidate a reissue fee as an impermissible penalty under Texas contract law was preempted by the ADA, because it went beyond the strict contract...

JEFFERSON: This wasn't a sold out flight right?

WEAVER: That's correct.

JUDGE: Can't hear question.

WEAVER: What they are saying is that the contract with us is really a contract of carriage. That's the primary thing. The problem that we have here is that we get into federal regulations that do involve this type of situation.

PHILLIPS: Can't hear.

WEAVER: There is a regulation that's about being downgraded in class. And that is 14 C.F.R. 250.6(c). The section 250 regs set up a compensation scheme for bumping of passengers. And in that there are exceptions written in, and this is one of the exceptions. What this regulation says is that where a passenger is booked on one class of service, but is still offered accommodations on another class of service within the airplane, they are not entitled to get into this scheme of compensation. They have not been bumped essentially. And what they are entitled to if they are going down is a refund with respect to the difference between the classes. In that class that was \$60, and that's what was offered and refused.

What happens is, we've got the plaintiff that comes in and argues very strenuously that the regulations allow him to reject the compensation, the denial of boarding compensation, and bring a suit in state court. The flaw in that argument is that he is not entitled to the denied boarding compensation, and, therefore, he's not in the position to reject that and bring suit. The regulations do provide that if you're entitled to the denied boarding compensation, then you can reject that. You're being bumped. You can reject that, and bring suit for your actual damages. Because the denied boarding compensation doesn't require actual proof of actual damages. You just automatically get it.

250.6(c) says a passenger in the position of Mrs. Black is not denied boarding so long as she's given accommodations and that refund.

And the distinction that's made is really one that's rationally made. Where a person has been bumped off a flight, it is reasonable, foreseeable to see that that person could incur damages beyond what has been set up in the compensation scheme. Because they've missed the flight, they might have had an important meeting that they might have to make certain emergency accommodations to get there, and it is foreseeable that that type of person would have damages that go beyond that provided by the scheme. And so the regulation allows that person to reject the offer of compensation and sue. But in this situation where someone is not denied boarding but is simply moved from first class to coach, and here done in a situation of where the flight is within 5 hours of being booked, it's not...

HECHT: Can't Hear all of question.

WEAVER: Mr. Black concedes in his briefing that the contract of carriage incorporates the regulations, and that it becomes part of the contract of carriage.

JUDGE: Can't hear.

WEAVER: In order for the court to award him the damages that he is seeking and to find a breach of contract, the court would have to go beyond the terms of the agreement as bargained for between the parties and impose some other responsibility here, and to go beyond that regulation. What we're saying is that the regulation itself imposes - basically Mr. Black agreed when he got the contract of carriage that he could be downgraded and what he would get would be given the \$60 back.

HECHT: So you're trying to get this \_\_\_\_\_ argument in Wolens?

WEAVER: That's correct.

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RESPONDENT

HARDEN: I would like to point out the petitioners have started off their argument by claiming that you need to go into some sort of definition of service under the ADA. I submit that's completely irrelevant to a disposition of this case.

For the first reason that Wolens didn't really need to address that issue of services neither did this court in Kiefer. What both courts did was look at the statutory language of whether or not something amounted to an enactment or enforcement of state law.

HECHT: Can't hear.

HARDEIN: First of all, that issue we don't need to address it. But if you did address it, I would argue that you need to look at the 9<sup>th</sup> circuits definition of service in \_\_\_\_\_ v. TWA.

HECHT: Can't hear.

HARDEN: I will submit it will be. If you want to look at the definition of service broadly, I would submit that you should look at it narrowly meaning that you would do a definition of service to mean whether or not something affected the point to point transportation of airline passengers to particular markets at various times, which is the 9<sup>th</sup> circuits definition.

HECHT: I'm just trying to get my \_\_\_\_\_ argument is that we need to address?

HARDEN: I don't think you need to address that at all. I think it's unnecessary to the disposition of this case.

HECHT: Can't hear.

HARDEN: I would say it's not because of the 9<sup>th</sup> circuit's definition. But if you did find even if it was a service then you go to the next prong of the test, which is whether or not there is an enactment of state law under the second prong of the Wolens test.

Now the petitioners have argued that the presence of some federal regulations seem to make a preemption of our claims necessary. I submit that again is a red herring for the reason being that these contracts are in actuality a hybrid of state and federal law. The parties have contracted around both state and federal law based on the contract of carriage as it presently stands.

PHILLIPS: The contract includes many of the regulations.

HARDEN: Yes. It would incorporate all of them. And I would point the court both to page 230 of the Wolens opinion where the court said that the federal regulations and the federal administration act itself presupposes the validity of contracts and allows the airlines to incorporate the federal regulations, and incorporate those into the contract of carriage.

PHILLIPS: Can't hear.

HARDEN: No we don't. The reason being if you look at §14 C.F.R. 253.4(a) it says in addition to other remedies at law an air carrier may not claim the benefit as against the passenger of and the passenger shall not be bound by any contract term incorporated by reference if notice of that term has not been provided to that passenger in accordance with this part. They haven't produced no summary judgment evidence that they complied with that regulation. If they want one regulation they have to take them all.

WAINWRIGHT: Speaking of taking them all how does 250.9 come into play here?

HARDEN: 14 C.F.R. 250.9 allows a passenger to reject the compensation offered by an airline, and actually bring a suit for damages or any other remedies at law.

ENOCH: Only if their bumped. Right?

HARDEN: No it does not. The reason why it's not is that first of all the particular regulation does not state only if you are eligible for denied boarding - a compensation. It actually says if you are denied boarding you are probably entitled to compensation. And it also requires the airline to give you these notices, not just to a passenger that's denied boarding, but to any passenger. So in my opinion it does not just specifically - there's no if and or buts.

PHILLIPS: Can't hear.

HARDEN: In my research I did locate a case that I think is important to the court, which is Nader v. Allegheny Airlines, 426 US 290, 307(18). And the reason why I raise that, even though it is a pre-ADA case, it does address the exact denied boarding compensation regulations. And there the US SC said that the CAB specifically rejected the carrier's proposal that the denied boarding compensation be made an exclusive remedy. It says, we shall condition our approval of the agreement to make clear that the prescribed penalty, which is the denied boarding compensation, is a minimum obligation of the carrier, which only if accepted by the passenger would terminate the carrier's obligation.

HECHT: Can't hear.

HARDEN: Our breach of contract claim definitely survives under Wolens, because it allows routine breach of contract claims to be decided by state courts. The issue then becomes whether or not the fraud/intentional misrepresentation and the negligent misrepresentation claims are also preempted under the statute. Now the briefing doesn't really address it, at least the petitioner's brief doesn't really address that issue. They just make the assumption well if the breach of contract is, all the other ones therefore follow. This court looked both under Morales and under Wolens when they decided the Kiefer case to determine whether or not ordinary negligence claims are preempted under the ADA. And what this court ruled was that yes, the SC allows state courts to adjudicate a contract claims because there's not so much of an intrusive regulation on the airlines and the airline industry. And what the court did, although it said that there was some reservations over allowing ordinary negligence claims to proceed, it did allow negligence claims to go ahead and go forward and not be preempted. And what the court said, look the DOT doesn't have a regulatory facility or the ability to go ahead and adjudicate a negligence claims any more than it does the ability to adjudicate contract claims...

HECHT: Can't hear.

HARDEN: And this court found that exact same point in the Kiefer case, but still allowed negligence claims to proceed anyway. What this court found was that there was little risk of diverse, nonuniform or confusing adjudication of tort claims in similarity to the argument that the Wolens court found on the breach of contract claims.

HECHT: If \_\_\_\_\_ baggage was overhead, that's pretty much bad whatever state you're in, but the state might have to review about whether somebody who gets bumped should be compensated for damages, \_\_\_\_\_ statute violation. That seems to me very much affect the price, route and service \_\_\_\_\_ airlines.

HARDEN: I would say no, because there's little risk of what the court's concern is. Because the state contract law is nondiverse, and it's not confusing, and it's fairly uniform throughout the US. And I would submit to this court that the same thing applies to both the fraud

and the negligent misrepresentation claims. It's similarly like a negligence and you have duty, breach of duty and causation and damages. I mean the elements are pretty similar throughout the...

ENOCH: Would you agree that this claim would be preemptive if the plane was over-booked? If it was an over-booking is it preemptive or not?

HARDEN: I don't see how it could be preemptive.

ENOCH: Mr. Weaver makes the argument that if there is actually a seat that will get you where you are going, and it's not an over-booked situation, you could still get there. If you were allowed to have a claim when the plane is not over-booked just because you didn't like the seat, that might be some concern that would affect the rates of transportation. Because now the plane could be sued just because the particular place you are seated as opposed to whether or not you get to go at all.

HARDEN: I would point out that Mr. Weaver is incorrect by saying that just because you move from a particular class of the airplane that there is no over-booking. I would point the court to 32 Fed. Register 460, 1967(3) where the agency says "strictly speaking an over-sale also occurs when a passenger is not accommodated in the class of service for which he holds a confirmed reserved space, but is seated in a lower class of service downgraded or a higher class upgraded. However, this type of over sale presents a far less severe problem.

OWEN: Can't hear.

HARDEN: I would submit that that's not the case. Because this notice of proposed new rule making was for these specific regulations.

PHILLIPS: Can't hear.

HARDEN: That's correct. They have to provide the notice in accordance with the terms of that section.

PHILLIPS: Can't hear.

HARDEN: Section 253.4. It says in addition to other remedies at law an air carrier may not claim the benefit as against the passenger of, and the passenger shall not be bound by any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part.

And then if you look at 253.5 it tells you how the notice of incorporated terms is supposed to work. And it says each air carrier shall include on or with a ticket or other written instrument given to a passenger that embodies the contract of carriage and incorporates by reference in that contract a conspicuous notice that any terms incorporated by reference are part of the contract

passengers may inspect the full text of each term incorporated by reference at the carrier's airport or city ticket offices and passengers have the right upon request at any location where that carrier's tickets are sold within the US to receive free of charge by mail or other delivery service the full text of each such incorporated term.

WAINWRIGHT: Did Black and his wife make the Tom Jones' concert?

HARDEN: No. They did not. They missed it.

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#### REBUTTAL

WEAVER: Counsel references the CFR 250.9. I would like to point out that that really only kicks in where a passenger has been denied boarding. Where you have to give that passenger the notice of their rights. And one of the rights that they have is they can decline the compensation and go to court. If they accept the compensation, then they waive that right to go to court.

PHILLIPS: Can't hear.

WEAVER: What we're saying is that whole scheme where the regs allow a suit to be brought in state court doesn't apply to our situation.

Blacks' conceded in their briefing that the regs are incorporated in the contract of carriage. And they also cite the US SC American Airlines v. Wolens as saying it becomes part of that agreement.

HECHT: So are you saying that they can sue for breach of bad conduct. And your position is that's not preemptive but it was a breach?

WEAVER: We're saying that their suit is preemptive, because they are suing for something beyond what they were entitled to under the contract. They would be entitled to sue, I think, for breach of contract if they were not - they would be entitled to sue for the refund of their \$60. A lot of cases the first class is a lot higher. And if that was not tendered to them or ever given to them, then I would think they would be able to get that because the regulation says that they are entitled to have that.

But what we're saying is that under American Airlines v. Wolens, the courts can find to the bargain itself, and that bargain includes in this case the regulation.

HECHT: So they can sue for that. They can't sue for anything else including fraud \_\_\_\_\_ . That is preemptive.

WEAVER: Fraud, negligent misrepresentation and claims for mental anguish I believe



under Kiefer would probably be...

PHILLIPS: Can't hear.

WEAVER: I think it's really akin to conspicuousness to complain that it's not conspicuous and it would have to be raised at some point in time, and it hasn't been raised at all.

I think sometimes we can get lost in semantics. And we've talked about denial of boarding. We've talked about over-booking, and we've talked about bumping. I think first class in this case may have been over-booked. But was there a denial of boarding? Was there bumping? No. There is no bumping in this case.

PHILLIPS: Can't hear.

WEAVER: We think the regulations of 250 came in and regulated this area of bumping and downgrading. And what they've done is they've said there is this scheme of compensation set up. And if these factors occur, if you qualify for this denied boarding compensation you're entitled to it. You're entitled to it within 24 hours, or directly, or as the regulations talks about. Or they say you can deny that, you can refuse it and then come around and sue us. I think if they haven't said that, if they haven't you can come and sue us I think that regulation would have preempted it because it came up with its own compensation scheme. What it did is it said in this situation you can still sue. But that's not our situation. Because the regulation also touched upon what happens in first class.

We have a situation here where the plaintiff is arguing in their briefing that it's good public policy of the state to try and discourage Delta Airlines from over-booking first class by making them pay for all this.

O'NEILL: Can't hear.

WEAVER: I think what that proposed rule making said was, that technically you would fall within the class of being bumped. But in that situation where you are just simply downgraded, that type of person is not really damaged as the other people are. And I think that proposed rule making was also carving out an exception for saying that technically as a matter of semantics you are bumped, but you're not in that same position. And so the different rule is going to apply.