Notes

Interpreting the Airline Deregulation Act of 1978: Federal Preemption Over State Deceptive Advertising Laws

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I. INTRODUCTION

The visionaries who instituted the Airline Deregulation Act of 1978[1] had a definite goal in mind: to make air transportation affordable to the general public. Indeed, this has been the case. It is estimated that consumers have saved approximately six billion dollars per year as a result of deregulation.[2]

While deregulation has generally benefitted the traveling public, it has created enormous trouble for the United States airline industry. Many once very stable airlines are now struggling to keep their heads above water. As a result, the air carriers have had to resort to some extremely creative tactics in order to generate revenue. Chief among these tactics is ticket pricing strategies. While airlines have developed intricate methods of pricing, it is questionable how deceptive or unfair these pricing schemes actually are.

The Supreme Court recently addressed this issue in *Morales v. Trans World Airlines, Inc.*[3], where the Court interpreted section 105[4] of the Airline Deregulation Act of 1978 as essentially permitting airlines to engage in fare advertisement practices of their choice.[5] Specifically, the Airline Deregulation Act[6] preempts individual states from prohibiting allegedly deceptive airline fare advertisements through enforcement of their consumer protection statutes.[7] This Comment will focus on the rationale behind the Court's interpretation of section 105 of the Airline Deregulation Act (ADA) and the impact *Morales* will have on future airline advertising practices.

II. BACKGROUND

Prior to Deregulation, airlines were not permitted to set their own fare levels. In the heavily regulated industry, the Civil Aeronautics Board[8] (CAB) exercised exclusive control over pricing in the industry. Air carriers were required to file with the CAB detailed tariffs setting forth their classifications, rules, regulations, practices and services.[9] The CAB had the power to require certain information be included in tariffs

1. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (amending Title IV of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1557 (1988 & Supp. III 1991).
2. Paul S. Dempsey, *Time For Regulatory Reform*, AIRLINE PILOT, Sept. 1991, at 17.
3. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992).
4. 49 U.S.C. § 1305(a)(1) (1988).
5. *See generally* Morales, 112 S. Ct. at 2040.
6. 49 U.S.C. §§ 1301-1557 (1988 & Supp. III 1991).
7. Morales, 112 S. Ct. at 2036-37.
8. 72 stat. 731, *as amended*, 49 U.S.C. §§ 1301-1542 (1976), *formerly* Civil Aeronautics Act of 1938, Pub. L. No. 601, 52 stat. 973.
9. Calvin Davison & David H. Solomon, *Air Carrier Liability Under Deregulation*, 49 J. AIR L. & COM. 31 (1983).

and to reject tariffs not in conformity with such requirements.[10] Subsequent to the passage of Deregulation in 1978, the CAB was gradually phased out, and the airlines were given near complete discretion over the rates, routes or services offered.

Most courts have interpreted section 105 of the deregulation act in the fashion opposite the recent *Morales* decision. The underlying rationale of *Morales* is that airlines cannot be expected to follow the different advertising laws of all fifty states. Imposing such a large burden would undermine the goal of deregulation: relying upon the competitive forces to best further the variety and quality of air transportation services.

A. Statutory Framework

The foundation of air carrier regulation is provided for in Title IV of the Federal Aviation Act of 1958 ("the Act").[11] The Act, along with its predecessor, the Civil Aeronautics Act of 1938,[12] established and granted authority to the CAB.[13] The CAB was established as an independent agency having special competence to deal exclusively with problems in the air transportation industry.[14] The CAB was provided with broad discretion to govern the daily economic affairs of the air carriers.[15] Basically, the CAB had the authority to protect consumers and ensure fair competition.[16]

Under section 411[17] of the Act, the CAB was empowered to order air carriers to cease and desist from "unfair or deceptive practices or unfair methods of competition in air transportation."[18] From its inception, section 411 served to supplement, not displace, state common law and statutory causes of action challenging deceptive practices in the airline

10. *Id.*

11. 49 U.S.C. §§ 1301-1557 (1988 & Supp. III 1991).

12. Pub. L. No. 601, 52 stat. 973, *repealed by* the Federal Aviation Act of 1958, 49 U.S.C. app. §§ 1301-1552 (1982 & Supp. V 1987)(For the first time the airline industry could look upon a firm regulatory system).

13. The Civil Aeronautics Authority was established by the Civil Aeronautics Act of 1938 and was subsequently renamed the Civil Aeronautics Board and granted regulatory authority under the Federal Aviation Act of 1958. *See supra* notes 11 & 12 and accompanying text.

14. Robert M. Kane & Allan D. Vose, Air Transportation 9-1 (1987)(noting that the CAB was comprised of five members appointed for five year terms by the President with the advise and consent of the Senate).

15. *Id.* at 9-2.

16. Daniel Petroski, *Airlines' Response to the DPTA Section 1305 Preemption*, 56 J. Air L. & Com. 125, 130 (1990).

17. 49 U.S.C. § 1381 (1988).

18. John W. Freeman, *State Regulation of Airlines and the Airline Deregulation Act of 1978*, 44 J. Air L. & Com. 747, 748 (1979)(noting that the CAB had broad jurisdiction over the airline industry).

industry.[19] Incorporated within the Act was a savings clause that stated "[N]othing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[20] The Supreme Court has interpreted the savings clause as preserving state actions within section 411's purview, stating: "§ 411 confers upon the Board [CAB] a new and powerful weapon against unfair and deceptive practices that injure the public."[21]

The advent of the ADA in 1978 significantly altered the regulatory atmosphere of the airline industry. The ADA established "a thorough program of economic deregulation of the airline industry, following a transition period culminating in the dissolution of the CAB."[22] The CAB's authority to regulate rates was significantly reduced and eventually phased out under the Sunset Provision[23] of the ADA in 1984. Congress then transferred all of its remaining functions, including responsibility for section 411, to the Department of Transportation (DOT).[24]

Incorporated in the ADA was section 105[25], which was enacted to ensure that the states would not undo the anticipated benefits of federal deregulation of the airline industry.[26] The relevant portion of section 105 contains a preemptive provision prohibiting any state from enforcing any law "relating to [an air carrier's] rates, routes, or services."[27] In essence, the ADA gave the carriers unbridled discretion to carry out practices of their choice relating to rates, routes, and services. It is section 105 that has been a source of conflict in case law addressing deceptive advertising practices.

B. Case History

1. Pre-Deregulation

The structure of the airline industry in the years preceding 1978 was completely different from the modern industry. During the pre-deregulation era, the courts relied on the CAB's interpretation of what constituted unfair methods of competition and deceptive advertising practices. In two significant Supreme Court cases, the CAB's exercise of power was affirmed.

19. New York v. Trans World Airlines, Inc., 728 F. Supp. 162, 169 (S.D.N.Y. 1989).
20. 49 U.S.C. § 1506 (1988).
21. Nader v. Allegheny Airlines, 426 U.S. 290, 303 (1976).
22. Freeman, *supra* note 18, at 754.
23. Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703 (1984).
24. *Id.*
25. 49 U.S.C. § 1305 (1988).
26. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2034 (1992).
27. 49 U.S.C. § 1305.

In *American Airlines v. North American Airlines,*[28] the Court held the CAB had the jurisdiction to inquire into the disputed methods of competition. Essentially, North American had requested permission from the CAB to use the name "North American Airlines". American Airlines requested the CAB deny North American's application because the use of the name "North American" would infringe upon its long-established trade name "American," and was a violation of section 411[29] of the Act. Since this was a case of first impression for the Court under section 411, the Court relied on section 5 of the Federal Trade Commission Act.[30]

Section 411 of the ADA was modeled closely after section 5 of the Federal Trade Commission Act, which also prohibits "unfair methods of competition in commerce, and unfair or deceptive acts or practices."[31] In *American* the Court stated that the air carrier business is of special and essential concern to the public.[32] Section 5 and section 411 both were concerned with protecting the public interest.[33] The CAB wanted to prevent further public confusion between the two airlines due to the similarity of names, and therefore granted American's request. The Court interpreted section 411 as not concerning the punishment of wrong doing or protecting injured competitors, but rather with protection of the public interest. Furthermore, it was not necessary for the CAB to find the practice as intentionally deceptive or fraudulent.

Similarly, the Supreme Court in *Nader v. Allegheny Airlines, Inc.*[34] also followed the notion of protecting the public interest. In this case, Mr. Nader was denied boarding on a flight upon which he had a confirmed seat. Subsequently, he brought an action against Allegheny Airlines seeking damages for the airline's failure to disclose its overbooking practices.

Nader[35] affirmed the CAB's authority to investigate and determine whether an air carrier is engaging in unfair or deceptive practices and if so, to issue a cease and desist order.[36] It is section 411 which conferred upon the CAB this powerful weapon against unfair and deceptive practices that injure the public. However, section 411 does not provide for private challenges or wrongs.[37] In its analysis, the Court, through the savings clause, found that the Act preserved the remedies existing at

28. American Airlines, Inc. v. North American Airlines, Inc., 351 U.S. 79 (1956).
29. 49 U.S.C. § 1381 (1988).
30. Federal Trade Commission Act, § 5 (1973) (current version at 15 U.S.C. § 45 (1988)).
31. *Id.*
32. American, 351 U.S. at 84.
33. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2037 (1992).
34. Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976).
35. *Id.*
36. *Id.* at 301.
37. *Id.* at 302.

common law or by statute. Therefore, the Court ruled that even if the CAB were to find no violation of Section 411, the airline would not be immunized from any common law liability.[38] In effect, consumers had two possible sources of protection, section 411 and common law rights.

2. Post-Deregulation

In 1978, Congress enacted the Airline Deregulation Act.[39] Congress' intent was to allow for maximum reliance on the competitive market forces, which would further efficiency and innovation in the airline industry.[40] In fostering this notion, the focus shifted from protecting the consumer to protecting the marketplace. To ensure that the states did not undo the benefits of deregulation by enacting regulations of their own, the ADA was equipped with a preemption provision.[41] Essentially, this provision prohibits the individual states from enforcing any law "relating to rates, routes or services."[42]

Since deregulation, the preemption provision has been inconsistently applied by the courts. The majority of decisions rendered prior to *Morales* held that the practices in question were not pre-empted by section 105.[43] In *Brunwasser v. Trans World Airlines, Inc.*[44], the court determined that Pennsylvania's Unfair Trade Practices and Consumer Protection Law[45] was not preempted by the federal ADA. In *Brunwasser*, Trans World Airlines, Inc. (TWA) began a promotional campaign in the Pittsburgh market advertising non-stop, economical air service from Pittsburgh to London.[46] TWA subjected this service to several limitations and restrictions. Following the plaintiff's purchase of her tickets, TWA suspended this special service and subsequently notified passengers, including the plaintiff, offering alternatives to the daily non-stop flights previously provided.[47] When none of these alternatives were acceptable to the plaintiff, she filed a complaint against TWA claiming fraudulent misrepresentation of the terms of the special offer. The court held that the Pennsylvania statute was not preempted by the federal statute. The court based its decision on the language of section 1506 of the Federal Aviation Act.[48] Section 1506 states, "[N]othing contained in

38. *Id.*
39. 49 U.S.C. §§ 1301-1557 (1988 & Supp. III 1991).
40. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2034 (1992).
41. 49 U.S.C. § 1305.
42. *Id.*
43. *Id.*
44. Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338 (W.D. Pa. 1982).
45. PA. STAT. ANN. tit. 73, §§ 201-1 to -6 (1978).
46. Brunwasser, 541 F. Supp. at 1339.
47. *Id.*
48. 49 U.S.C. § 1506.

this Chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies."[49] Thus, federal law preserves legal remedies for air travelers beyond those set forth in the Federal Aviation Act and the ADA.[50]

Similarly in *People v. Western Airlines, Inc.*[51], the court held that the state and federal laws would remain in co-existence given that there was no inconsistency between California's false advertising statute and the federal ADA.[52] In this action, Western Airlines was sued for making false and misleading statements implying a fare savings in its advertising promotions. The court held, as the court did in *Brunwasser*, that the ADA generally preserves existing common law and statutory remedies while providing additional remedies.[53] Section 105 did not insulate Western Airlines from liability for violating California false advertising statutes.

In *In Re: Air Crash at Stapleton International Airport*[54], the plaintiffs claimed that Continental Airlines 1987 advertising campaign focusing on pilot training and safety amounted to a deceptive trade practice. The court concluded that this campaign was deceptive under the Texas Deceptive Practices Act. Additionally, the court concluded that "regulation of the conduct of commercial air carriers throughout the Federal Aviation Act and regulations promulgated thereunder do not pre-empt traditional tort remedies which have the same effect of regulating the same conduct.[55] Thus, as in *Brunwasser* and *Western*, the court upheld the principle that common law and statutory remedies are preserved by the ADA.

When the plaintiff, West, was denied a seat on an overbooked flight in *West v. Northwest Airlines, Inc.*[56], he sued Northwest Airlines for breach of covenant of good faith and fair dealing under Montana law. West had purchased a non-refundable, non-changeable ticket on Northwest. Before his scheduled departure, West had confirmed his scheduled departure with his travel agent. Some time after West purchased his ticket, Northwest downsized the aircraft from a Boeing 727 to a DC-9[57] without informing West or any of her passengers. Northwest argued that the federal ADA pre-empted Montana's common law duty to deal

49. Brunwasser, 541 F. Supp. at 1345.
50. *Id.*
51. People v. Western Airlines, Inc., 202 Cal.Rptr. 237 (Cal. App. 4d 1984).
52. *Id.* at 239.
53. *Id.*
54. In Re: Air Crash at Stapleton International Airport, 721 F. Supp. 1185 (D. Colo. 1988).
55. *Id.* at 1187.
56. West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1990).
57. *Id.* at 658 (a Boeing 727 holds 146 passengers, whereas a DC-9 holds 89 passengers).

fairly and in good faith.[58] Examining this issue, the court noted that there is a presumption against finding preemption of state law where Congress has legislated in a field traditionally occupied by the states, such as common law tort and contract remedies in business relationships.[59] Additionally, there are three ways in which preemption may occur:[60] 1) Congress may preempt state law expressly in a statute; 2) Congress may intend that federal law occupy a certain field; and 3) even if Congress does not occupy the field, state law will be preempted where it conflicts with federal law. In this case, the district court found that West's state claims were expressly preempted by Congress. The court of appeals disagreed. When Northwest contended that "relating to. . .services"[61] include boarding policies, the court of appeals agreed. However, the court of appeals disagreed with Northwest and the district court that "law[s] relating to airline services" encompass all state laws that affect airline services.[62] The court felt that preemption would be over-expanded if this interpretation were adopted.[63] In this case, the state law simply imposes a duty on all who enter into contractual relations to act with good faith and fair dealing. Federal preemption is not invoked just because this duty is applicable to airlines.[64] Moreover, the court found no inconsistency between the Montana law and the federal ADA. There was no reason to believe that requiring the airline to conform to Montana's duty of good faith and fair dealing would prevent it from following federal regulations.[65]

Finally, in *Kansas ex. rel. Stephan v. Trans World Airlines, Inc.*[66], the attorney general of Kansas brought an action against TWA under the Kansas Consumer Protection Act, asserting violations of the Act in connection with newspaper advertisements published in March of 1989.[67] The court found the language of the preemption section precluding state regulation "relating to rates, routes or services" does not by its terms include advertising.[68] This holding is consistent with the holding in *Western Airlines*,[69] where it was determined that section 105 did not insulate

58. *Id.* at 659.
59. *Id.*
60. *Id.*
61. 49 U.S.C. § 1305(a)(1).
62. West v. Northwest Airlines, Inc., 923 F.2d 657, 660 (9th Cir. 1990).
63. *Id.*
64. *Id.*
65. *Id.* at 661.
66. Kansas ex. rel. Stephan v. Trans World Airlines, Inc., 730 F. Supp. 366 (D. Kan. 1990).
67. *Id.* at 367.
68. *Id.* at 368.
69. People v. Western Airlines, Inc., 202 Cal. Rptr. 237 (Cal. App. 4d 1984).

Western Airlines from liability for violating California statutes prohibiting false advertising.[70]

III. *MORALES v. TRANS WORLD AIRLINES, INC.*

A. Facts

The facts leading up to the Supreme Court decision in Morales began when the National Association of Attorneys General (NAAG)[71] adopted Air Travel Industry Enforcement Guidelines.[72] These guidelines contain provisions and standards governing the content and format of airline advertising, frequent flyer programs, and compensatory practices for overbooking flights. They were not implemented to establish new laws or regulations, but rather to explain how existing state laws would apply to airfare advertising and frequent flyer programs.[73] The Attorneys General of seven states[74] sent out an advisory memorandum to the major airlines stating that airlines needed to bring their advertisements into compliance with the standards delineated in the guidelines. The memorandum threatened immediate enforcement action if certain practices were not discontinued immediately.

Subsequently, the NAAG sent letters to several major airlines as formal notices of intent to sue. The air carriers then filed suit in federal district court[75] claiming the state regulation of fair advertisements is preempted by section 105. The airlines, including Trans World Airlines, Inc. (TWA), sought a declaratory judgment that the NAAG guidelines were preempted, and requested an injunction restraining Texas from taking any action under its laws in conjunction with the NAAG guidelines that would regulate the airlines' rates, routes, or services, or their advertising and marketing of the same.[76]

The federal district court entered a preliminary injunction against the NAAG.[77] The court reasoned that the airlines were likely to prevail on their preemption claim. The court of appeals affirmed the decision to issue an injunction.[78] Subsequently, the district court permanently enjoined the states from enforcing any action restricting the airlines fare

70. *Id.* at 238.

71. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2034 (1992). NAAG is an organization including Attorneys General from all 50 states.

72. *See generally id.* app. at 2041-54.

73. *Id.* at 2034.

74. *Id.* The group included Attorneys General from Colorado, Kansas, Massachusetts, Missouri, New York and Wisconsin, and including petitioner's predecessor Mattox as Attorney General of Texas.

75. Trans World Airlines, Inc. v. Mattox, 712 F. Supp. 99 (W.D. Tex. 1989).

76. Morales v. Trans World Airlines, Inc, 112 S. Ct. 2031, 2035 (1992).

77. Mattox, 712 F. Supp. at 101-102.

78. Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 775 (5th Cir. 1990).

advertising, or operations "relating to rates, routes or services."[79] Once again, the court of appeals affirmed the lower court decision.[80] The Supreme Court granted Certiorari[81] to determine whether the guidelines regarding airline fare advertising were expressly preempted by the Airline Deregulation Act.

B. Majority Opinion

The United States Supreme Court made a determination of two specific issues presented in this case.[82] The first issue decided was whether the district court could properly award the air carrier with injunctive relief.[83] Analyzing this question, the Court assumed section 105 did in fact pre-empt state enforcement of the NAAG guidelines.[84] The basic principle the Court relied upon in its decision was of equity jurisprudence.[85] In applying this doctrine, the air carriers were awarded injunctive relief because they did not have an adequate remedy at law and would, in fact, suffer irreparable harm[86] if not granted an injunction.[87]

The Court specifically relied on *Ex Parte Young*[88] in reaching its conclusion with respect to injunctive relief. In *Young*, the Attorney General of Minnesota was restrained from taking any action against various railroads in enforcing a Minnesota state act requiring railroads not to charge in excess of the passenger rates proscribed.[89] The day after the injunction was issued, Young ordered the Northern Pacific Railway Company to publish its rates. The carriers in *Morales*, as the plaintiff in *Young*, faced a Hobson's choice: either the air carrier could continue to violate Texas law, exposing themselves to enormous liability, or violate the law one time and suffer the economic injury of obeying the law during the duration of the proceedings and subsequent review.[90] Thus, the district court decision[91] preceding the *Morales* Supreme Court decision enjoined the petitioner from threatening any enforcement action over any aspect of the airlines' rates, routes and services. However, the Supreme

79. Morales, 112 S. Ct. at 2035.
80. Trans World Airlines, Inc. v. Morales, 949 F.2d 141 (5th Cir. 1991).
81. Morales, 112 S. Ct. at 2035.
82. *Id.* at 2035.
83. *Id.*
84. *Id.* at 2037.
85. *Id.* at 2035.
86. *Id.*
87. Historically federal courts have enjoined state officers in situations where parties will suffer irreparable harm because no remedy at law exists. *E.g.*, O'Shea v. Littleton, 414 U.S. 488, 489 (1974); Ex Parte Young, 209 U.S. 123, 156 (1908).
88. Ex Parte Young, 209 U.S. 123 (1908).
89. *Id.* at 125-126.
90. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2035-36 (1992).
91. Trans World Airlines, Inc. v. Mattox, 712 F. Supp. 99, 102 (W.D. Tex. 1989).

Court[92] held that the district court had overstepped the limits of its power with respect to injunctive relief in instituting such a broad declaration.[93] Therefore, the Supreme Court vacated the injunction insofar as it restrained the operation of state laws with respect to other matters.[94]

The second issue, the one most relevant to this Comment, centers around whether "enforcement of the NAAG guidelines on fare advertising through a state's general consumer protection laws is preempted by the ADA."[95] In rendering its affirmative answer, the Court based its decision on statutory intent,[96] and began its analysis by applying the ordinary meaning of the language of the federal statute. Section 105 expressly[97] preempts the states from "enact[ing] or enforc[ing] any law, rule, regulation, standard, or other provisions having the force and effect of law relating to rates, routes, or services of an air carrier. . .".[98]

The Court then wrestled with the meaning of the words "relating to" as written in the statute.[99] The Court interpreted the statutory language "relating to" as it did in case law surrounding the Employee Retirement Income Security Act of 1974 (ERISA).[100] This case law[101] supports a broad interpretation of the phrase "in so far as they. . .relate to any employee benefit plan."[102] Thus, the Court adopted the same broad standard in *Morales* because the relevant language of the ADA is identical to that of ERISA.[103]

In response to the Court's interpretation of statutory intent,[104] the petitioner based his objection of the Court's interpretation of the phrase "relating to" on the Federal Aviation Act savings clause.[105] The

92. Morales, 112 S. Ct. at 2031.

93. *Id.* at 2036.

94. *Id.* at 2035. Petitioner only threatened to enforce the obligations described in the guidelines regarding fare advertising.

95. *Id.* at 2036.

96. *Id.*

97. *Id.* The Court also noted "[p]re-emption may be express or implied and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (citing FMC Corp. v. Holliday, 111 S. Ct. 403, 407 (1990)).

98. 49 U.S.C. § 1305.

99. *Morales*, 112 S. Ct. at 2037.

100. Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (1974) (ERISA is a comprehensive antidiscrimination statute, prohibiting, among other things, employment discrimination on the basis of sex).

101. Morales, 112 S. Ct. at 2037.

102. 29 U.S.C. § 1144(a) (1988).

103. Morales, 112 S. Ct. at 2037.

104. *Id.* Petitioner stated that the interpretation could not be based on using the identical language in ERISA as a guide. *Id.* Petitioner also asserted that ERISA has a wide and inclusive, comprehensive scheme, that the ADA does not have. *Id.*

105. *Id.* The savings clause was included within the Federal Aviation Act of 1958 and preserved "the remedies now existing at common law or by statute". 49 U.S.C. § 1506 (1988).

Supreme Court rejected this view because it did not believe that Congress intended to undermine this carefully written statute through a general face saving clause.[106]

The petitioner also read section 105 as completely excluding the phrase "relating to"[107] thereby giving the statute a very narrow interpretation. The Court refuted this assertion, stating that if the drafters had intended such a narrow reading they would have instead written into the statute a phrase forbidding the states to *regulate* rates, routes, and services.[108] The Supreme Court next determined that state and federal laws were inconsistent in this case.[109] The Court found that nothing in the language of section 105 suggests that the "relating to" preemption is limited to inconsistent state regulation.[110]

C. Dissenting Opinion

Justice Stevens attacked a number of analytical lines in the majority opinion. First, he did not agree with the analogy drawn between the language of ERISA[111] and the ADA.[112] The Justice felt that the majority quickly lumped the language with that of ERISA instead of giving it a careful examination for statutory intent.[113] Thus, Justice Stevens would "approach preemption question with a presum[ption] that Congress did not intend to preempt areas of traditional state regulation."[114]

Justice Stevens also disagreed with the manner in which the phrase "relating to" was interpreted. Justice Stevens stated, "[b]y definition, a state law prohibiting deceptive or misleading advertising of a product 'relates', 'pertains' or 'refers'. . .to the advertising, (particularly any deceptive or misleading aspects), rather than to the product itself."[115] Justice Stevens continued stating that the prohibition was designed to affect the nature of the advertising, not the nature of the product.[116] Justice Ste-

106. The savings clause is a relic of pre-ADA where there was no preemption. The Court felt a general savings clause cannot "be allowed to supersede the specific substantive preemption provision." Morales, 112 S. Ct. at 2037.

107. *Id.*

108. *Id.* at 2038.

109. *Id.*

110. *Id.* The Court relied on its previous interpretation of the "relating to" language as in ERISA cases. *Id.*

111. 29 U.S.C. § 1144(a) (1988).

112. 49 U.S.C. §§ 1301-1557.

113. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2055 (1992).

114. *Id.* (*quoting* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985)).

115. *Id.*

116. In a similar New York case the distinction was explained:

"[A]ny relationship between New York's enforcement of its laws against deceptive advertising and Pan Am's rates, routes, and services is remote and indirect. In challenging Pan Am's advertising, New York does not care about how much Pan Am charges,

vens agreed with the plain language of section 105, which pre-empts any state law that relates directly to rates, routes or services. However, he felt that section 105 could not be interpreted to preempt every traditional state regulation that had some indirect relationship to rates, routes, or services, unless there was an indication that Congress had intended to do so.[117]

The ADA was enacted to encourage and develop an air transportation system which relies on the market forces to determine quality, variety and price of air service. At the same time, Congress retained section 411[118], giving CAB power to prohibit unfair or deceptive practices or methods of competition. Although the CAB is no longer in existence, Justice Stevens concluded that by not eliminating federal regulation of unfair or deceptive practices, and because state and federal regulations regarding deceptive practices co-existed prior to deregulation, there is no reason to believe Congress intended section 105 to immunize the airlines from state liability for engaging in deceptive advertising practices.

Finally, Justice Stevens stated that even if he were to concede that state regulation of deceptive advertising could relate to rates within meaning of section 105, he would still dissent if such a regulation had a significant impact on rates. Thus, Justice Stevens was not persuaded by the airlines' argument that NAAG guidelines will have a significant impact on the price of airline tickets.[119] In fact, Justice Stevens believed that the airlines "argument is not supported by any legislative or judicial findings."[120]

IV. ANALYSIS

The notion that federal law preempts state law has its origin in the United States Constitution.[121] The Supreme Court has held that the fed-

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where it flies, or what amenities it provides its passengers. Its sole concern is with the manner in which Pan Am advertises those matters to New York consumers."

New York v. Trans World Airlines, Inc., 728 F. Supp. 162, 176 (S.D.N.Y. 1989).

117. Morales, 112 S. Ct. at 2055, 2056.

118. 49 U.S.C. § 1381 (1988).

119. Justice Stevens summarized the airlines' argument as:

[E]ssentially that (1) airlines must engage in price discrimination in order to compete and operate efficiently; (2) a modest amount of misleading price advertising may facilitate that practice; (3) thus compliance with the NAAG guidelines might increase the cost of price advertising or reduce the sales generated by the advertisements; (4) as the costs increase and revenues decrease, the airlines might purchase less price advertising; and (5) reduction in price advertising might cause a reduction in price competition, which, in turn, might result in higher airline rates.

Morales, 112 S. Ct. at 2058-59.

120. *Id.* at 2059.

121. U.S. CONST. art. IV, § 2.

eral law may preempt state law by explicitly prohibiting state regulation in the area or, absent express statutory language, by occupying the entire field, leaving no room for state regulation.[122] Even where federal law has not completely preempted state regulation in one of these ways, state law is invalid to the extent it actually conflicts with federal law.[123] With this in mind, the Supreme Court in *Morales* correctly upheld the lower court decisions that the federal ADA will preempt any state laws "relating to rates, routes or services."[124] Applying the constitutional implications of federal preemption, it is particularly disturbing that air carriers have been given such discretion over regulate rates, routes, or services.[125] In fact, the initial federal district court decision, *Trans World Airlines, Inc. v. Mattox*[126], was the first instance where the marketers - the airlines - have prevailed in a suit to preempt state regulation of deceptive low ball fare advertising.[127]

Even with the historical case law stating that state deceptive advertising laws are not preempted, it is amazing how the *Morales* Court made its decision. The Court seemingly ignored this line of precedent and instead based its holding on *Shaw v. Delta Air Lines, Inc.*.[128] Although *Shaw* is a statutory interpretation case, it is not a deceptive advertising case. In effect, the majority based its whole preemption argument on its interpretation of the ERISA "relating to" phrase as it did in *Shaw.*

Deceptive trade practice laws are designed with the primary purpose of protecting the trusting as well as the suspicious.[129] This concept is deeply ingrained in American society. In fact, in 1962 President Kennedy set forth four basic rights to consumers: the right to safety, the right to be informed, the right to choose among a variety of products and services at competitive prices, and the right to be heard.[130] It is the second basic right, the right to be informed, that is violated in light of the Court's recent *Morales*[131] decision. The right to be informed includes "the right to be protected against fraudulent, deceitful or misleading information, advertising, labeling and other such practices, and the right to be given the facts necessary to make informed choices."[132] This concept is con-

122. New York v. Trans World Airlines, Inc., 728 F. Supp. 162, 175 (S.D.N.Y. 1989).

123. *See* Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152-53 (1982).

124. 49 U.S.C. § 1305.

125. *Id.*

126. Trans World Airlines, Inc. v. Mattox, 712 F. Supp. 99 (W.D. Tex. 1989).

127. Stephen Gardner & Albert N. Sheldon, *See Dick and Jane Sue: A Primer on State Consumer Protection Laws*, 739 ALI 253, 261 (1992).

128. Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).

129. Gardner & Sheldon, *supra* note 127, at 253.

130. *Id.* at 254.

131. Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031 (1992).

132. Gardner & Sheldon, *supra* note 127, at 254.

firmed repeatedly in the deceptive trade practice laws enacted or adopted in various states.[133] *Morales* prohibits the consumer's right to full information by permitting the airlines unfettered discretion in pricing practices.

It is well understood that the protection of consumers from unfair and unlawful advertising practices is an area traditionally regulated by the states under their police powers.[134] For an advertiser to be subject to a given jurisdiction's law, the advertisement must have appeared within that jurisdiction. Once this occurs, the advertiser is subject to the local jurisdiction's laws.[135] Clearly, airlines meet this criteria given that most airlines advertise in the city markets in which they serve.

The majority completely ignores the individual states' focus on curtailing deceptive practices and instead bases is decision on the federal preemption doctrine.[136] The rationale is if the states were allowed to initiate laws that were in conflict with and could override federal statutes, federal laws would be virtually meaningless. Constitutionally, this analysis is correct. However, the federal ADA was formulated with the intention of prohibiting states from enforcing any law "relating to rates, routes, or services", but does not address this area itself. Thereby, the airlines are virtually free to advertise as they choose.

The majority erroneously bases its position on a safeguard which may work in theory, but not in practical application. The majority firmly believes that the DOT will use its vested power under section 411[137] to police deceptive advertising practices. However, the DOT has traditionally been quite lethargic in carrying out its duties. In fact, there are numerous documented instances to demonstrate the DOT's hands-off approach. For instance, the DOT has maintained an inactive enforcement policy against rebating practices[138] and has been reluctant to investigate continued computer reservation system (CRS) vendor abuses.[139]

In opposition to the majority, the dissent[140] discusses what in its opinion were errors made by the majority. First, Justice Stevens correctly identified the ADA preemption language as differing from that of

133. *See, e.g.*, COLO. REV. STAT. § 6-1-101 to -115 (1989 & Supp. 1993).

134. *See, e.g.*, California v. ARC America Corp., 489 U.S. 93, 100 (1989).

135. Gardner & Sheldon, *supra* note 127, at 260.

136. U.S. CONST., art. IV, § 2.

137. 49 U.S.C. § 1381.

138. Bert W. Rein, *DOT's Continuing Regulatory Oversight of the Airline Industry*, 425 PRAC. L. INST. ORDER No. A4-4193 1 (1987) (noting that rebating is the charging or collecting of a fare or rate less than the carrier's published price for services).

139. *Id.* at 4.

140. Morales, 112 S. Ct. 2031 (1992) (Stevens, J., dissenting).

the ERISA.[141] The majority incorrectly disposed of this issue in relying on the "similarity of the language to give ADA's preemption provision a similarly broad reading."[142] This error in interpretation was nevertheless harmless, because the actual language of the ADA does state relating to rates, routes or services. Thus, it is this "relating to" phrase which does in fact broadens the statute[143] to include advertising practices.[144]

In a related area, the rationale behind allowing the airlines to initiate advertising of their choice is rooted in their pricing strategy. The airlines typically divide the passenger market into price sensitive and price insensitive consumers.[145] The airlines attempt to sell as many seats as possible to insensitive travelers and then fill up the remainder of the seats by selling discounted tickets to the price sensitive consumers.[146] In order to keep costs at a minimum, the airlines must be able to place significant restrictions on deeply discounted tickets.[147] Restrictions typically include specific dates of travel, non-refundability and advance purchase requirements. Airlines target sensitive buyers generally through radio, television, or print media advertising. In these advertisements the discounted fare is readily apparent with the restrictions either printed so small or not mentioned at all. Thus, the unseasoned traveler may be unpleasantly surprised when it comes time to pay for the perceived great vacation deal.

The Court in *Morales* argued that if the air carriers are required to place any and all material restrictions on fares[148] in their advertisements, this burden would "serve to increase the difficulty of discovering the lowest cost seller. . .and [reduce] the incentive to price competitively."[149] Additionally, the Court stated that where consumers have the benefit of price advertising, prices are often much lower than they would be without advertising.[150] Even if this rationale holds true, it is important to weigh

141. Morales, 112 S.Ct at 2054-55 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). The *Morales* majority gives the "relating to" language a broad reading just as in ERISA. *Id.* at 2037. Although ERISA contains similar, but not identical language, *see Shaw*, 463 U.S. at 96, the *Morales* majority easily ignores the language, structure and history of ADA.

142. Morales, 112 S. Ct. at 2055 (Stevens, J., disenting).

143. *Id.* at 2037-8; *see generally* Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987).

144. Morales, 112 S. Ct. at 2058 (Stevens, J., dissenting). If the drafters had wanted a narrow reading the statute would have been written as forbidding states *to regulate* rates, routes or services. *See Id.* at 2055-2058 (Stevens, J., dissenting).

145. TRANSPORTATION RESEARCH BOARD NATIONAL RESEARCH COUNCIL, SPECIAL REPORT 230, WINDS OF CHANGE: DOMESTIC AIR TRANSPORTATION SINCE DEREGULATION 89 (1991) [hereinafter WINDS].

146. Morales, 112 S. Ct. at 2040.

147. WINDS, *supra* note 145, at 95.

148. Morales, 112 S. Ct. at 2039.

149. *Id.*

150. *Id.*

this aspect against the consumers' right to make an intelligent and informed decision.[151] The small burden of having air carriers include a phrase such as "restrictions may apply" in advertisements and then providing the public with easy viewing access to these restrictions would be a substantial improvement. Additionally, travel and reservation agents should inform consumers that restrictions may apply, and offer an explanation or the opportunity to view the applicable restrictions.

V. CONCLUSION

Since the federal ADA will preempt any state laws "relating to rates, routes, or services"[152] simply because it is a federal statute, it is crucial that steps then be taken at the federal level to tackle deceptive advertising problems in the airline industry. Admittedly, it would place an undue burden on airlines engaged in interstate commerce to require them to follow deceptive advertising laws of all fifty states. Thus, one possibility would be to amend the federal ADA to include stricter standards for deceptive advertising practices thereby uniformly decreasing the prevalent practice. Another possibility would be to narrow the scope of the ADA somewhat as to exclude advertising practices from its reach; then airlines could be subjected to general federal deceptive advertising statutes. Regardless of the method employed, public policy dictates that consumers be able to make fully informed choices and decisions relating to rates, routes, or services of the United States airlines.

151. Gardner & Sheldon, *supra* note 127, at 254.
152. 49 U.S.C. § 1305.