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Harris v. American Airlines: Flying Through the Turbulence of Federal Preemption and the Airline Deregulation Act

John T. Houchin

CASENOTE

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I. INTRODUCTION

On September 30, 1990, Donna Jean Harris, an African-American woman, boarded American Airlines Flight 1289 for a flight from Dallas, Texas to Portland, Oregon.[1] She had purchased a first class ticket and was assigned to seat 4E.[2] Little did she know that her experiences on the subsequent flight would be anything but first class.

Subsequent to the boarding of the aircraft, but prior to the plane's departure from Dallas, Texas, John Doe, a caucasian male seated directly in front of Ms. Harris,[3] ordered and consumed four alcoholic beverages.[4] Shortly after takeoff, John Doe uttered a number of racially denigrating remarks.[5] As a result his actions and comments during the

1. *See* Harris v. American Airlines, Inc., 55 F.3d 1472, 1473 (9th Cir. 1995). In addition, Ms. Harris was the only African-American passenger on the plane. *See id.*

2. *See id.*

3. *See id.*

4. *See id.*

5. *See* Harris v. American Airlines, Inc., 24 Av. L. Rep. (CCH) 17156, 17157 (D. Or. Mar. 27, 1992).

flight, Mr. Doe humiliated, intimidated, and frightened Ms. Harris to the extent that she became visibly shaken and began to cry.[6]

In response to John Doe's remarks, an American Airlines flight attendant attempted to alleviate the situation by refusing to serve additional alcoholic beverages to Mr. Doe.[7] However, the flight attendant's actions were to no avail.[8] Rather than follow the American Airlines procedures that the flight attendants are taught during their training,[9] the flight attendant allowed Mr. Doe to continue to obtain drinks from the galley.[10]

As a result of her experiences on the flight, Ms. Harris brought suit in Oregon state court against American Airlines and John Doe.[11] Ms. Harris alleged that American Airlines violated Oregon's Public Accommodation Act;[12] and that American Airlines and Mr. Doe were liable for intentional infliction of emotional distress and negligence.[13] Subsequently, American Airlines removed the case to federal court on the basis of diversity jurisdiction.[14]

Following removal, American Airlines filed a motion for summary judgment, arguing that the Airline Deregulation Act (ADA) preempted Harris' state tort claims;[15] the Oregon Public Accommodations Act was

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6. *See id.*

7. *See id.*

8. *See* Harris v. American Airlines, Inc., 55 F.3d at 1473. After the flight attendant informed John Doe that she would not serve him any more alcoholic beverages, Mr. Doe went to the galley and returned with a drink. *See id.* Although it is uncertain whether the additional drinks were alcoholic in nature, the flight attendant did not inform Ms. Harris of this fact, and thus failed to provide Ms. Harris with information which likely would have reduced her level of anxiety. *See* Harris v. American Airlines, Inc., 24 Av. L. Rep. (CCH) at 17159.

9. *See Harris*, 55 F.3d at 1476. According to the flight attendant's deposition, once a passenger appears to be intoxicated, "the employee is to (1) inform the passenger that they are disturbing others and (2) ask them to settle down." *Id.* Additionally, once passenger misconduct occurs, the flight attendant should attempt to deal with the passenger and then, if necessary, notify the captain who will, if necessary, take action ranging from speaking with the passenger to making an unscheduled stop and having the passenger removed from the aircraft. *See id.*

10. *See id.*

11. *See id.* at 1473. John Doe never became a real party to the suit because his real identity could not be established due to American Airlines' procedure of destroying the passenger manifest forty-eight to seventy-two hours after a scheduled flight deplanes. *See id.* at 1473 n.1.

12. *See* OR. REV. STAT. §§ 30.670 - 30.685 (1995). § 30.670 states: "All persons within the jurisdiction of this state shall be entitled to the full and equal accommodations, advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of race, religion, sex, marital status, color or national origin." *Id.*

13. *See* Harris v. American Airlines, Inc., 55 F.3d at 1473.

14. *See id.*

15. *See* 49 U.S.C. app. § 1301-1557 (1988), *repealed in part by* Pub. L. No. 103-272, 108 Stat. 745 (1994) and recodified in various sections of 49 U.S.C. (1994). The ADA was enacted in 1978 as an amendment to the Federal Aviation Act of 1958 (FAA), and was intended to "encourage, develop, and attain an air transportation system which relies on competitive market

not violated;[16] American Airlines' acts were not sufficient to cause Harris severe emotional distress;[17] and that Harris' negligence claim was barred because her injuries were purely emotional with no economic loss.[18] The district court, adopting the findings and recommendations of the federal magistrate,[19] granted American Airlines' motion for summary judgment. Although the court concluded that the ADA did not preempt Harris' state tort claims,[20] it ruled that (1) American Airlines' actions did not constitute a violation of the Oregon Public Accommodations Act;[21] (2) American Airlines' actions were not sufficient to constitute a claim for intentional infliction of emotional distress;[22] and (3) Harris could not recover on a claim of negligence because she lacked an economic loss.[23] On appeal, the Ninth Circuit Court of Appeals affirmed the granting of summary judgment, but on different grounds.[24] Without reaching the merits of the state law claims, the court held that the conduct of an air carrier's flight crew constitutes "service" within the ADA and therefore, any state tort and public accommodations claims that arise out of such service are preempted.[25] It is the Ninth Circuit's interpretation of the ADA that is the focus of this Note.

Harris created more questions than it answered. Unfortunately for plaintiffs, the effect of the decision could make it more difficult for plaintiffs to bring actions against the airlines.[26] This result occurs because the Ninth Circuit failed to adequately interpret, apply, and clarify established ADA jurisprudence. Instead, the Ninth Circuit interpreted "services" broadly, having the effect of making the scope of the ADA less clear by causing a split among the circuits.[27]

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forces." Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705, 1705 (1978) (codified as amended in 49 U.S.C.), *repealed in part by* Pub. L. No. 103-272, 108 Stat. 745 (1994).

16. *See Harris*, 55 F.3d at 1476.

17. *See id.*

18. *See id.*

19. *See* Harris v. American Airlines, Inc., 24 Av. L. Rep. (CCH) 17156, 17157 (D. Or. Mar. 27, 1992).

20. *See id.* at 17158.

21. *See id.* at 17159.

22. *See id.* at 17160.

23. *See id.*

24. *See* Harris v. American Airlines, Inc., 55 F.3d 1472, 1476 (9th Cir. 1995).

25. *See id.* at 1477.

26. *Id.*

27. *See* Travel All Over The World, Inc. v. The Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996) (holding contract claim was not preempted by ADA, but punitive damages claim was preempted); Stagl v. Delta Airlines,Inc., 52 F.3d 463 (2d Cir. 1995) (holding that ADA did not preempt negligence claim); Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995) (en banc) (holding that state law claim for personal injuries based on airline's negligence was not preempted by ADA); Smith v. America West Airlines, Inc., 44 F.3d 344 (5th Cir. 1995) (en banc) (rejecting view that ADA does not preempt state law claims for negligent rendition of services); Sedigh v. Delta Airlines, Inc., 850 F. Supp. 197 (E.D.N.Y. 1994) (rejecting broad preemption in state

Harris may also foreshadow the Ninth Circuit's willingness to further expand the federal preemption clause of the ADA.[28] However, as this Note demonstrates, such a broad interpretation of the scope of the ADA's preemption clause[29] is inconsistent with both Congress' intent[30] and with the United States Supreme Court's interpretation of the ADA and federal preemption.[31] Additionally, the Ninth Circuit's interpretation renders the ADA's savings clause meaningless.[32] However interpreted, the significance of the decision rests on the extent to which the airlines will use it as a shield to protect themselves from liability in future suits.[33]

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common law claim not relating to airline competition); Kay v. USAir, Inc., No. 93-4856, 1994 WL 406548 (E.D. Pa. July 28, 1994) (holding that "traditional state law claims for negligence" are not preempted by ADA); O'Hern v. Delta Airlines, Inc., 838 F. Supp. 1264 (N.D. Ill. 1993) (holding that state law action for personal injuries resulting from airlines' alleged negligence is not preempted by ADA); Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993) (holding that because the ADA does not provide for private remedies for injured passengers, the ADA does not preempt common law negligence claim); *see also* Manning v. Skywest Airlines, Inc., No. CV 95-4567-WMB, 1996 WL 407847, at *4 (C.D. Cal. Jun. 16, 1996) (recognizing that *Harris* is contrary to the weight of authority interpreting the ADA preemption, but nonetheless, this court is bound by the decision); Von Hundertmark v. Boston Professional Hockey Ass'n, Inc., No. CV-93-1369 (CPS), 1996 WL 118538, at *5 (E.D.N.Y. Mar. 7, 1996) (recognizing that *Harris*' expansive reading of the meaning of "service" has not been adopted in other jurisdictions); Romano v. American Trans Air, 48 Cal. App. 4th 1637, 1641 (Cal. Ct. App. 1996) (recognizing that *Harris* is wrongly decided).

28. *See* Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995).

29. *See infra* notes 34-60 and accompanying text.

30. *See id.*

31. *See* American Airlines v. Wolens, 115 S. Ct. 817 (1995); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992). There are three primary types of preemption: express, conflict, and field preemption. Express preemption occurs when Congress explicitly declares a certain area of law to be governed by federal law. The supremacy clause establishes conflict preemption; state law will be preempted when it conflicts with federal law. In contrast, field preemption is established when "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." Hillsborough v. Automated Medical Labs, 471 U.S. 707, 713 (1985) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). However, when Congress acts to preempt areas traditionally occupied by the States, it must manifest its intent clearly. *See* English v. General Electric Co., 496 U.S. 72, 79 (1990).

32. *See* 49 U.S.C. app. § 1506 (1988), *repealed by* Pub. L. No. 103-272, 108 Stat. 745 (1994) (replaced in substance by 49 U.S.C. section 40120(c)). The savings clause states "[n]othing contained 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." *Id.* This clause was originally developed prior to the ADA. *See* Federal Aviation Act of 1958, Pub. L. No. 85-726, § 1106, 72 Stat. 731, 798 (1958); Civil Aeronautics Act of 1938, ch. 601, § 1106, 52 Stat. 973, 1027 (1938). The importance of the savings clause cannot be understated, for it, coupled with § 1371(q), can only be interpreted to limit the scope of services thereby limiting the reach of preemption with respect to state law. Otherwise, a complete preemption of state law would render the savings clause and the requirements of § 1371(q) completely nugatory. For a discussion of the requirements of § 1371(q) see *infra* note 138 and accompanying text.

33. Since the *Harris* decision, at least nine parties have attempted to rely on *Harris* to support their argument that the ADA preempted the claims alleged in their suit. *See* Meinhold v. Trans

II. PERSPECTIVE

A. *Statutory History*

1. CIVIL AERONAUTICS ACT OF 1938

Although federal legislation of aviation originally developed along two tracks with the Air Mail Act of 1925 (Kelley Bill)[34] and the Air Commerce Act of 1926,[35] the first major economic regulations evolved from the Civil Aeronautics Act of 1938 (CAA).[36] The CAA created two separate agencies, the Civil Aeronautics Administration and the Civil Aeronautics Authority,[37] later changed to the Civil Aeronautics Board (CAB) in 1940.[38] The Civil Aeronautics Administration was responsible for promoting the development, safety, and regulation of civil aeronautics,[39] while the Civil Aeronautics Board was responsible for the economic regulation of civilian aviation.[40]

Section 1106 of the CAA provides the most significant section of the Act with respect to current issues of preemption. Section 1106, the savings clause,[41] provides the basis for which a state common law claim may survive federal preemption. The clause states: "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[42] The CAA continued until the 1950's when problems arose as to who controlled the air space, the military system or

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World Airlines, Inc., No. CV 96-6077 DDP (VAPX), 1996 WL 731899 (C.D. Cal. Dec. 6, 1996); Vieira v. United Parcel Service, Inc., No. C-95-04697, 1996 WL 478686 (N.D. Cal. Aug. 5, 1996); Ducombs v. Trans World Airlines, Inc., 937 F. Supp. 897 (N.D. Cal. 1996); Manning v. Skywest Airlines, No. CV 95-4567-WMB, 1996 WL 407847 (C.D. Cal. 1996 Jun. 16, 1996); Von Hundertmark v. Boston Professional Hockey Ass'n, Inc., No. CV-93-1369 (CPS), 1996 WL 118538 (E.D.N.Y. Mar. 7, 1996); Stone v. Continental Airlines, Inc., 905 F. Supp. 823 (D. Haw. 1995); Gee v. Southwest Airlines Co., No. C 94-03983 CW, 1995 WL 652463 (N.D. Cal. Oct. 31, 1995); Costa v. American Airlines, Inc., 892 F. Supp. 237 (C.D. Cal. 1995); Romano v. American Trans Air, 48 Cal. App. 4th 1637 (Cal. 2d Ct. App. 1996).

34. 43 Stat. 805 (1925). For a discussion on the history of the Air Mail Act see CHARLES S. RHYNE, CIVIL AERONAUTICS ACT ANNOTATED WITH THE LEGISLATIVE HISTORY WHICH PRODUCED IT AND THE PRECEDENTS UPON WHICH IT IS BASED 20-24 (1939) [hereinafter RHYNE].

35. 44 Stat. 568 (1926) as amended 45 Stat. 1404 (1929), 48 Stat. 933 (1934), 49 U.S.C. 171 (1934). For a discussion of the history of the Air Commerce Act of 1926 see RHYNE, *supra* note 34, at 37-40.

36. Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938); *see also* RHYNE, *supra* note 34, at 41-188.

37. *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

38. The CAA was subsequently renamed the CAB and received its regulatory authority from the Federal Aviation Act of 1958. *See infra* notes 44-48 and accompanying text.

39. *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938) (preamble).

40. *See* Federal Aviation Act of 1958 *infra* notes 44-48 and accompanying text.

41. *See* Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973 (1938).

42. *Id.*

the civilian system.[43]

2. THE FEDERAL AVIATION ACT OF 1958

In 1958, Congress enacted the Federal Aviation Act of 1958 (FAA).[44] The FAA established "a new Federal agency with powers adequate to enable it to provide for the safe and efficient use of the navigable airspace by both civil and military operations."[45] This Act transferred the powers of the CAA to the Federal Aviation Agency and included a savings clause like its predecessor in the Civil Aeronautics Act of 1938.[46] The Act also provided for the continuance of the CAB which still maintained the authority to regulate interstate air fares and to take action against certain trade practices.[47] This regulation went substantially unchanged until the mid-1970's when Congress recognized the need to make regulatory changes to the airlines.[48]

3. THE AIRLINE DEREGULATION ACT OF 1978

In 1978, Congress, following a request from President Carter,[49] responded to the need to modernize the regulatory scheme of the airline industry by passing the Airline Deregulation Act of 1978 (ADA).[50] In the ADA, Congress abandoned previously restrictive regulations in favor of deregulation.[51] It did so with the intention of increasing competition among the airlines.[52] The airlines were to benefit by a "maximum reliance on competitive market forces," resulting in an efficient and

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43. *Id.*

44. Pub. L. No. 85-726, 72 Stat. 731 (later codified as amended at 49 U.S.C. app. §§ 1301-1557 (1988)).

45. H.R. Rep. No. 2360, 85th Cong., 2d Sess., pt. 1, at 1 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3741.

46. *See* 49 U.S.C. app. § 1506 (1988), *repealed by* Pub. L. No. 103-272, 108 Stat. 745 (1994) (replaced in substance by 49 U.S.C. section 40120(c)). The clause states: "[n]othing contained in this Act shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies." *Id.*

47. *See* Pub. L. No. 85-726, § 201, 72 Stat. 741 (1958) (codified as amended at 49 U.S.C. 1506 (1988)).

48. *See* H.R. Rep. No. 1211, 95th Cong., 2d Sess. 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737.

49. *See Reduced Federal Regulation of the Domestic Commercial Airline Industry," Message from Pres. Carter to the Congress*, March 4, 1977, 13 WEEKLY COMP. PRES. DOCS. 285 (1977). The message urged Congress "to enact, without delay, regulatory reform of domestic commercial aviation." *Id. See also* ANDREAS F. LOWENFELD, AVIATION LAW § 3.2 (2d ed. 1981).

50. 49 U.S.C. app. §§ 1301-1557 (1988), *repealed in part by* Pub. L. No. 103-272, 108 Stat. 745 (1994) and recodified in various sections of 49 U.S.C. (1994).

51. *See id.*

52. *See id.* This helps establish that the primary goal of deregulation was to compel the airlines to compete in a free market absent conflicting state regulations such that consumers would receive the most benefit.

innovative airline industry.[53]

Although the ADA, like its predecessors,[54] contained a savings clause which was incorporated without any changes,[55] it also added a federal preemption clause.[56] This clause stated:

> [e]xcept as provided in paragraph (2) of this section, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under title IV of this Act to provide air transportation.[57]

Through the preemption clause, Congress intended to prevent states from creating varying regulations and laws which would have a deleterious effect on federal deregulation.[58] This preemption clause, coupled with the continued inclusion of the savings clause,[59] has been the source of controversy in numerous suits involving the airlines.[60]

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53. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992).

54. *See* 49 U.S.C. § 1506 (1958); Civil Aeronautics Act of 1938, ch. 601, 52 Stat. 973.

55. 49 U.S.C. app. § 1506 (1988), *repealed by* Pub. L. No. 103-272, 108 Stat. 745 (1994) (replaced in substance by 49 U.S.C. section 40120(c)).

56. *See* 49 U.S.C. app. § 1305(a)(1) (1988), *repealed by* Pub.L. 103-272, § 7(b), 108 Stat. 1379 (1994).

57. *Id.*

58. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992). There is evidence that the ADA was intended to "prevent conflicts and inconsistent regulations" resulting from the federal government's reduced role in the regulation of the airlines. H.R. Rep. No. 95-12611, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3752.

59. *See* 49 U.S.C. app. § 1506 (1988), *repealed by* Pub. L. No. 103-272, 108 Stat. 745 (1994) (replaced in substance by 49 U.S.C. section 40120(c)).

60. *See* American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995); West v. Northwest Airlines, Inc., 505 U.S. 1201 (1992); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992); Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983); Travel All Over The World, Inc. v. The Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996); Harris v. American Airlines, Inc., 55 F.3d 1472 (9th Cir. 1995); Stagl v. Delta Airlines, Inc., 52 F.3d 463 (2d Cir. 1995); Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995) (en banc); Smith v. America West Airlines, Inc., 44 F.3d 344 (5th Cir. 1995) (en banc); Trans World Airlines, Inc. v. Mattox, 897 F.2d 773 (5th Cir. 1990); Dykens v. Eastern Airlines, Inc., 865 F.2d 1271 (9th Cir. 1989); O'Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir. 1989); Air Transport Assoc. v. Pub. Utilities Comm'n, 833 F.2d 200 (9th Cir. 1987); Western Airlines, Inc. v. Port Auth. N.Y. and N.J., 817 F.2d 222 (2d Cir. 1987); Hingson v. Pacific Southwest Airlines, 743 F.2d 1408 (9th Cir. 1984); Meinhold v. Trans World Airlines, Inc., No. CV 96-6077 DDP (VAPX), 1996 WL 731899 (C.D. Cal. Dec. 6, 1996); Chrissafis v. Continental Airlines, Inc., 940 F. Supp. 1292 (N.D. Ill. 1996); Vieira v. United Parcel Service, Inc., No. C-95-04697 CAL ARB (N.D. Cal. Aug. 5, 1996); Ducombs v. Trans World Airlines, Inc., 937 F. Supp. 897 (N.D. Cal. 1996); Trinidad v. American Airlines, Inc., 932 F. Supp. 521 (S.D.N.Y. 1996); Manning v. Skywest Airlines, No. CV 95-4567-WMB, 1996 WL 407847 (C.D. Cal. Jun. 16, 1996); Abdu-Brisson v. Delta Airlines, Inc., 927 F. Supp. 109 (S.D.N.Y. 1996); Von Hundertmark v. Boston Professional Hockey Ass'n, No. CV-93-1369 (CPS), 1996 WL 118538 (E.D.N.Y. Mar. 7, 1996); Torraco v. American Airlines, Inc., No. 94 C 1852, 1996 WL 6560 (N.D. Ill. Jan. 4, 1996); Stone v. Continental Airlines, Inc., 905 F. Supp. 823 (D. Haw. 1955); Gee v. Southwest Airlines Co., No. C 94-03983 CW, 1995 WL 652463 (N.D. Cal. Oct. 31, 1995); Moore v. Northwest Airlines, Inc., 897 F. Supp. 313 (E.D. Tex.

4. THE SUNSET PROVISIONS OF 1984

In addition to changing the regulatory scheme of the airline industry, the ADA also eliminated the Civil Aeronautics Board (CAB).[61] Congress achieved this by enacting the Civil Aeronautics Board Sunset Act of 1984 (Sunset Provisions).[62] Although the Sunset Provisions transferred the CAB's authority to the Department of Transportation,[63] it did not change either the savings clause or the preemption clause contained in the ADA.

B. *Relevant Case Law*

1. *SHAW V. DELTA AIRLINES, INC.*[64]

In 1983, the United States Supreme Court interpreted the scope of the preemption clause of the federal Employee Retirement Income Security Act of 1974 (ERISA).[65] The Court, relying on both the plain language of the statute[66] and its legislative history,[67] held that the phrase "relating to" should be broadly interpreted to mean a law that "has a connection or reference to" an employee benefit plan.[68]

Paradoxically, although the Court interpreted the scope of the pre-

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1995); Costa v. American Airlines, Inc., 892 F. Supp. 237 (C.D. Cal. 1995); Christoph v. Northwest Airlines, Inc., No. Civ. A. 94-1148, 1995 WL 422147 (E.D. La. July 17, 1995); Rodriguez v. American Airlines, Inc., 886 F. Supp. 967 (D.P.R. 1995); Sedigh v. Delta Airlines, Inc., 850 F. Supp. 197 (E.D.N.Y. 1994); Kay v. USAir, Inc., No. 93-4856, 1994 WL 406548 (E.D. Pa. July 28, 1994); Curley v. American Airlines, Inc., 846 F. Supp. 280 (S.D.N.Y. 1994); Doricent V. American Airlines, Inc., No. Civ. A. 91-12084Y, 1993 WL 437670 (D. Mass. Oct. 19, 1993); O'Hern v. Delta Airlines, Inc., 838 F. Supp. 1264 (N.D. Ill. 1993); Margolis v. United Airlines, Inc., 811 F. Supp. 318 (E.D. Mich. 1993); Continental Airlines, Inc. v. Kiefer, 920 S.W.2d 274 (Tex. 1996); Knopp v. American Airlines, Inc., 1996 WL 676701 (Tenn. Nov. 25, 1996); Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc., No. 95CA0307, 1996 WL 714501 (Colo. Ct. App. Dec. 12, 1996); Romano v. American Trans Air, 48 Cal. App. 4th 1637 (Cal. Ct. App. 1996); Johnson v. American Airlines, Inc., 663 N.E.2d 54 (Ill. App. Ct. 1996); Vine v. Continental Airlines, Inc., No. CV 950375030S, 1996 WL 168049 (Conn. Super. Ct. Mar. 4, 1996).

61. *See* 49 U.S.C. app. § 1551 (1988). The Civil Aeronautics Board "shall cease to be in effect on December 31, 1981." *Id.*

62. *See* Pub. L. No. 98-443, 98 Stat. 1703 (1984).

63. *See* 49 U.S.C. app. § 1551(b) (1988).

64. 463 U.S. 85 (1983).

65. *Id.* at 96-97.

66. Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1976). The clause preempts any state laws "insofar as they may now or hereafter *relate to* any employee benefit plan." *Id.* at § 1144(a) (emphasis added).

67. *See Shaw v. Delta Airlines, Inc.*, 463 U.S., at 98-100. Given that the statute was ambiguous enough to warrant an examination of its legislative history, it is logical to conclude that the legislative history of the ADA also should be examined with respect to the same ambiguous statements found in the ERISA statute.

68. *Id.* at 96-97.

emption clause broadly,[69] it reduced the potential all-encompassing application of the clause by establishing certain circumstances in which a state law would not be preempted even though the law "related to" an employee benefit.[70] This decision proved significant because the relevant language of ERISA's and the ADA's preemption clauses are identical, and the Court eventually adopted the ERISA standard in interpreting the scope of the ADA's preemption clause.[71]

2. *WEST v. NORTHWEST AIRLINES, INC.*[72]

On September 3, 1986, William D. West, wanting to travel from Great Falls, Montana to Arlington, Virginia on October 7, 1986, purchased a non-refundable, non-changeable ticket from Northwest Airlines.[73] However, prior to the date of West's departure, Northwest, without notifying either West or any of the Northwest Airlines sales agents, changed the type of aircraft for West's flight from a Boeing 727, which has a capacity of 146 passengers, to a DC-9, which has a capacity of 78 passengers.[74]

As a result, West, upon attempting to check-in at the gate, was informed that the flight was overbooked and that his confirmed seat had been given away.[75] Northwest's attempts to alleviate the situation were unsuccessful,[76] forcing West to reschedule his trip for "approximately two weeks later."[77]

Dissatisfied with Northwest's actions, West filed a two-count complaint in Montana state court, seeking compensatory and punitive damages.[78] West alleged that Northwest's actions constituted a breach of the covenant of good faith and fair dealing and was a violation of the Federal Aviation Act (FAA) for unjust discrimination.[79]

Northwest removed the case to the U.S. District Court and subse-

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69. *See id.*

70. *See id.* at 100 n.21 (1983). The Court stated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." *Id.*

71. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992).

72. 923 F.2d 657 (9th Cir. 1990).

73. *See id.* at 658.

74. *See id.*

75. *See id.*

76. Northwest attempted to make room for West and others by asking for volunteers to give up their seats in return for consideration. However, only three people volunteered and West was still left without a seat on the flight. Northwest also attempted to place West on a later flight but he declined because it did not have the same final destination and would arrive late at night. *See id.*

77. *Id.*

78. *See id.* at 658-59.

79. *See id.*

quently filed a motion for summary judgment.[80] Northwest contended that West's unjust discrimination claim was barred by the statute of limitations and his state breach of covenant claim was preempted by the FAA.[81] The district court agreed and granted Northwest's motion for summary judgment on both grounds.[82] West subsequently appealed the dismissal of his state law claim.[83]

The Ninth Circuit analyzed the issue of whether West's claim was preempted either expressly, impliedly, or due to a conflict with federal law.[84] The court concluded that the process of boarding passengers falls within the scope of "services" as contained within the ADA.[85] However, the court interpreted the scope of the ADA narrowly, holding that West's state law claim was not preempted entirely because it merely had "an effect on airline services."[86] As a result, the Ninth Circuit affirmed the district court's conclusion that West's claim for punitive damages was preempted but reversed and remanded the district court's conclusion regarding West's state law claim for compensatory damages.[87]

Although the court limited its holding to West's claim for compensatory damages, the decision was significant because it demonstrated that the federal courts were attempting to narrow the scope of the ADA's preemption clause following *Shaw v. Delta Airlines, Inc.*[88] However, this attempt to narrow the scope of the ADA's preemption clause was short-lived due to *Morales v. Trans World Airlines, Inc.*[89]

3. *MORALES V. TRANS WORLD AIRLINES, INC.*

While the federal courts were attempting to narrow the scope of the

80. *See id.* at 659.

81. *See id.*

82. *See id.*

83. *See id.*

84. *See id.* at 659-61.

85. *See id.* at 660.

86. *Id.* at 660-61. The court stated that to conclude that the ADA preempted West's state law claims "would unduly expand preemption and ignore our presumption against federal preemption in this traditional state law area." *Id.* at 660. This conclusion was based on previous Ninth Circuit precedent.

87. *See id.* at 661.

88. *See* Air Transport Ass'n v. Pub. Util. Comm., 833 F.2d 200 (9th Cir. 1987) (concluding that the preemption clause was narrow and that in order for a state law to be preempted, the law must not only affect airlines but also be directly related to their services); Hingson v. Pacific Southwest Airlines, Inc., 743 F.2d 1408 (9th Cir. 1984) (defining services to include seating of passengers); New York v. Trans World Airlines, Inc., 728 F. Supp. 162 (S.D.N.Y. 1989) (concluding that the preemption clause was so broad that it could become all-encompassing).

89. 504 U.S. 374 (1992). *Morales* resulted in the *West* decision being vacated. *See* West v. Northwest Airlines, Inc., 505 U.S. 1201 (1992). On remand, the Ninth Circuit concluded that West's claims were preempted. *See* West v. Northwest Airlines, Inc., 995 F.2d 148 (9th Cir. 1993).

interpretation of the ADA's preemption clause, Justice Scalia, in 1992, reversed the trend by writing the majority opinion in *Morales v. Trans World Airlines, Inc.*[90]

In *Morales*, the National Association of Attorneys General (NAAG) promulgated a set of guidelines, based on state consumer protection statutes, that states could use to sue the airlines for the allegedly deceptive advertising techniques used in the advertising of air fares and frequent flyer programs.[91] Seven attorney generals sent a memorandum to the major airlines establishing an intent to sue based on the guidelines and state consumer protection statutes.[92] In response, the airlines filed suit in federal court seeking a declaratory judgment and an injunction.[93]

The district court, finding that the ADA preempted the guidelines, ruled in favor of the airlines and issued a preliminary injunction.[94] Subsequently, the Fifth Circuit affirmed.[95] The Fifth Circuit also affirmed the district court's subsequent order permanently enjoining the states from taking action under the guidelines and state consumer protection statutes.[96] Soon thereafter, the United States Supreme Court granted certiorari.[97] The Court thus was called upon to decide whether the ADA preempts the states from "prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes."[98]

The Court, relied on the plain language of the ADA[99] as well as *Shaw v. Delta Airlines, Inc.*[100] The Court articulated a broad standard to be used in determining whether enforcement of the NAAG guidelines through the state consumer protection statutes would be preempted by the ADA.[101] Similar to *Shaw,* the analysis consisted of determining whether state actions have a *connection with, or reference to,* airline rates, routes, or services.[102] Thus, the Court adopted a broad interpreta-

90. 504 U.S. 374 (1992).

91. *Id.* at 379.

92. *See id.* The states represented by the seven attorney generals are: Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin. *See id.* at 380.

93. *See id.*

94. *See* Trans World Airlines, Inc. v. Mattox, 712 F. Supp. 99, 101-02 (W.D. Tex. 1989).

95. *See* Trans World Airlines, Inc. v. Mattox, 897 F.2d 773, 783-84 (5th Cir. 1990).

96. *See* Trans World Airlines, Inc. v. Mattox, 949 F.2d 141 (5th Cir. 1991).

97. *See* Morales v. Trans World Airlines, Inc., 502 U.S. 976 (1991).

98. *See id.* at 378.

99. *See id.* at 383.

100. 463 U.S. 85 (1983); *see also supra* notes 64-71.

101. *See Morales*, 504 U.S. at 384 (1995). The Court, utilizing Black's Law Dictionary's definition of "relating to," concluded that the ADA's definition of the phrase would require state action to be preempted anytime the action had some relation, bearing, or concern with, rates, routes, or services of the airlines. *See id.* at 383.

102. *See id.* at 384.

tion of the scope of the ADA's "relating to" phrase.[103]

Applying this broad interpretation, the Court held that the NAAG guidelines were preempted by the ADA because the guidelines would compel or restrict price advertising and therefore related to airline prices.[104] The Court did, however, limit the holding in subsequent dicta.[105] The Court stated that not all state actions that relate to rates, routes or services are preempted,[106] emphasizing that some actions have too tenuous an effect on rates, routes, or services to conclude that they are preempted.[107] Additionally, Justice Scalia concluded, however, that the guidelines should be preempted by the ADA because they had a "*significant impact*" on "the airlines' ability to market their product."[108] Thus, although articulating a potential broad preemption standard, the Court's language evidences an intent to lessen its scope. This intent was further established in the Court's subsequent decision interpreting the ADA.[109]

4. *AMERICAN AIRLINES, INC. V. WOLENS*[110]

In 1994, the Court revisited the ADA's preemption clause.[111] The plaintiffs in *Wolens* were participants in American Airlines' frequent flyer program.[112] American Airlines changed the terms of the program which reduced the use and value of the plaintiffs' accrued frequent flyer mileage.[113] In response, the plaintiffs, seeking an injunction,[114] brought suit based on the Illinois Consumer Fraud and Deceptive Business Practices Act.[115]

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103. *See id.* at 383-84.

104. *See id.* at 390.

105. *See id.*

106. *See id.* at 390-91.

107. *See id.* at 390. Additionally, Justice Stevens, writing for the dissent, argued that a broad interpretation of the majority's decision would be inconsistent with Congress' intent as established by the ADA's "language, structure, and history." *See id.* at 419. He further contested the soundness of adopting the ERISA standard interpreting the "relating to" phrase. *See id.* Although Justice Stevens did not elaborate on an alternative analogy that the Court could have turned to, there are other areas relating to the aviation industry that require federal preemption. *See, e.g.*, Railway Labor Act, 45 U.S.C. §§ 151-63, 181-85, 187-88 (1994).

108. *Id.* at 390 (emphasis added). For more commentary on the *Morales* decision, see Laynie Giles, Note, *Interpreting the Airline Deregulation Act of 1978: Federal Preemption Over State Deceptive Advertising Laws*, 22 TRANSP. L.J. 87 (1994); Eric W. Maclure, Note, *Morales v. Trans World Airlines, Inc.: Federal Preemption Provision Clips States' Wings on Regulation of Air Fare Advertising*, 71 N.C. L. REV. 905 (1993).

109. *See* American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995).

110. *Id.*

111. *See id.*

112. *Id.* at 822.

113. *See id.*

114. *See id.*

115. 815 ILL. COMP. STAT. § 505 (1992).

Although the Court in *Wolens* held that the ADA preempted claims based on the Illinois consumer statute,[116] the Court nevertheless established a narrower interpretation of the scope of the ADA preemption clause.[117] Specifically, the Court suggested that private tort actions based on common law negligence and contract claims that the airline voluntarily entered into would not be preempted.[118] The Court reached these conclusions by reading the ADA's preemption clause and the FAA's savings clause together.[119] Thus, *Wolens* reinforces a more limited interpretation of the ADA's preemption clause.

III. ANALYSIS

Harris v. American Airlines, Inc. represents a departure from established ADA preemption principles. This departure increases the uncertainty pertaining to preemption under the ADA.[120] There are three primary reasons for this result. First, the Ninth Circuit failed to adequately address Congress' intent. Second, the court misconstrued and misapplied existing precedent, thereby ignoring the principle of *stare decisis*.[121] Finally, the court ignored the textual implications of its decision.

In determining whether a state claim will be preempted by a federal statute, courts must first ascertain Congress' intent in enacting the statute, especially if the language is ambiguous as it is here.[122] Although such analysis must include a consideration of the plain meaning of the

116. 115 S. Ct. 817, 823 (1995).

117. *Id.* at 824. The Court emphasized that the ADA's preemption clause should not be read "to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.*

118. *See id.* at 824-25.

119. *See id.* at 826. The Court stated that "[t]he ADA's preemption clause, § 1305(a)(1), read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." *Id.* For discussions regarding the *Wolens* decision, see John T. Delacourt, *Federal Preemption of State Consumer Fraud Regulations: American Airlines, Inc. v. Wolens*, 115 S. Ct. 817 (1995), 18 HARV. J.L. & PUB. POL'Y 903 (1995); Sue Haverkos, *Crash and Burn-The Airlines' Preemption Defense Goes Down in Flames*, 64 U. CIN. L. REV. 1141 (1996).

120. The decision conflicts with the Fifth and Seventh Circuit's interpretation of the scope of the ADA's preemption clause thereby causing a split among the circuits. *See* Travel All Over The World, Inc. v. The Kingdom of Saudi Arabia, 73 F.3d 1423 (7th Cir. 1996); Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995) (en banc); Smith v. America West Airlines, Inc., 44 F.3d 344 (5th Cir. 1995) (en banc). In addition to causing this split among the circuits, the decision, in large part, has either created confusion or has not been followed in other jurisdictions. *See supra* note 27.

121. *See*, e.g., American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).

122. *See* Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 738 (1985) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

ADA's text, the words should not be examined alone. Instead, the text should be read within the context of "the purposes of the pre-emption provision, and the regulatory focus of [the statute] as a whole."[123] Additionally, the analysis must be approached with a presumption that "the historic police powers of the States [are] not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress."[124] Therefore, Congress' intent, as revealed by the legislative history of the ADA, is significant in determining the scope of the ADA's preemption clause. This is especially true given that the Supreme Court previously has interpreted "relating to" to be sufficiently ambiguous to warrant such analysis.[125]

The scope of the ADA's preemption clause should first begin with an analysis of Congress' intent behind the "relating to" phrase with respect to "rates, routes, or services." Such an examination of the relevant House and Senate bills reveals that the preemption clause should be interpreted narrowly.[126]

For example, in the House bill, the "relating to" phrase was described in narrow terms.[127] The House Report established this intent by stating that the phrase "provid[ed] that when a carrier operates under authority granted pursuant to title IV of the Federal Aviation Act, no State may regulate that carrier's routes, rates or services."[128] In contrast, the Senate bill did not contain the "relating to" phrase.[129] Instead, it stated "[n]o State shall enact any law, establish any standard determining routes, schedules, or rates, fares, or charges in tariffs of, or otherwise promulgate economic regulations for any carrier."[130] It was the narrower House bill that was eventually adopted.[131] Thus, the legislative history focused on the effects of economic regulations and established an intent that the ADA should only preempt state laws that had the effect of *regulating* or *significantly impacting* rates, routes, or services. Therefore, in analyzing the facts in *Harris*, the Ninth Circuit should have con-

123. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 19 (1987).

124. Doricent v. American Airlines, Inc., No. 91-12084Y, 1993 WL 437670 (D. Mass. Oct. 19, 1993) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

125. *See*, e.g., Shaw v. Delta Airlines, Inc., 463 U.S. 85 (1983); *see also supra* notes 65-71 and accompanying text.

126. *See* H.R. Rep. No. 95-1211, at 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3751-52; S. Rep. No. 95-631, at 39 (1978).

127. *See* H.R. Rep. No. 95-1211, at 16 (1978), *reprinted in* 1978 U.S.C.C.A.N. 3737, 3751-52.

128. *Id.* at 16, *reprinted in*, 1978 U.S.C.C.A.N. 3737, 3752.

129. *See* Morales v. Trans World Airlines, Inc., 504 U.S. 374, 425 (1992) (Stevens, J., dissenting).

130. S. 2493, 95th Cong., 2d Sess. § 423(a)(1) (1978), *reprinted in* S. Rep. No. 95-631, 95th Cong., 2d Sess. 39 (1978). The report further stated that the section "prohibits States from exercising economic regulatory control over interstate airlines." *Id.* at 98.

131. *See* H.R. CONF. REP. No. 1779, 95th Cong., at 94-95 (1978).

sidered this intent of preempting only those state actions having a significant impact on rates, routes, or services.

Although the *Harris* court seemingly embraced recent ADA preemption precedents, the court only facially relied upon that precedent in rendering its decision. The court recognized that *Morales* established the standard to be used in interpreting the scope of the "relating to" phrase.[132] However, although the court also recognized that some actions will affect services in too tenuous a manner and will therefore not be preempted,[133] the court failed to consider this limitation in its analysis.

While American Airlines' actions arguably revolved around services within the scope of the ADA,[134] "*Morales* does not compel a conclusion that the state claims of intentional torts" relate to services.[135]

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132. *See* Harris v. American Airlines, 55 F.3d 1472, 1474 (9th Cir. 1995).

133. *See id.*

134. The CAB has stated that services include the "quid pro quo for passenger's [sic] fare, including flight frequency and timing, liability of limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, [and bonding and corporate financing]." 44 Fed.Reg. 9948, 9951 (Feb. 15, 1979). Thus, the CAB was concerned with economic deregulation and not with preempting existing state tort law.

135. Doricent v. American Airlines, No. 91-12084Y, 1993 WL 437670, at *5 (D. Mass. Oct. 19, 1993). The scope of services should not be interpreted broadly enough to immunize airlines from liability resulting from their own negligence. Several courts since *Harris* have recognized that Congress did not intend for this result. *See* Meinhold v. Trans World Airlines, Inc., No. CV 96-6077 DDP (VAPX), 1996 WL 731899, at *5 (C.D. Cal. Dec. 6, 1996) (holding that the ADA was not intended to preempt personal injury claims sounding in state tort law); Chrissafis v. Continental Airlines, Inc., 940 F. Supp. 1292, 1299 (N.D. Ill. 1996) (finding that false arrest and false imprisonment claims were not related to "services" within the meaning of the ADA, and thus not preempted); Ducombs v. Trans World Airlines, Inc., 937 F. Supp. 897, 902 (N.D. Cal. 1996) (holding personal injury claim not preempted); Manning v. Skywest Airlines, Inc., No. CV 95-4567-WMB, 1996 WL 407847, at *6 (C.D. Cal. June 16, 1996) (concluding that negligent operations of aircraft are not related to "services" and thus are not preempted); Trinidad v. American Airlines, Inc., 932 F. Supp. 521, 527 (S.D.N.Y. 1996) (holding personal injury lawsuits based on traditional elements of tort law are not preempted); Von Hundertmark v. Boston Professional Hockey Assoc., Inc., No. CV-93-1369 (CPS), 1996 WL 118538, at *6 (E.D.N.Y. Mar. 7, 1996) (recognizing that *Harris*' expansive reading of the meaning of "service" has not been adopted in other jurisdictions); Torraco v. American Airlines, Inc., No. 94 C 1852, 1996 WL 6560, at *5 (N.D. Ill. Jan. 4, 1996) (holding state common law negligence claims are not preempted); Knopp v. American Airlines, Inc., 1996 WL 676701, at *6-7 (Tenn. Nov. 25, 1996) (holding that contract and negligence claims are not preempted); Continental Airlines, Inc., v. Kiefer, 920 S.W.2d 274, 284 (Tex. 1996) (concluding that claims for simple negligence are not preempted); Romano v. American Trans Air, 48 Cal. App. 4th 1637, 1646 (Cal. App. Ct. 1996) (concluding that negligence and other torts which do not intrude upon or affect the Department of Transportation's or the airline's self regulation of rates, routes, or services are not preempted); Johnson v. American Airlines, Inc., 663 N.E.2d 54, 57 (Ill. App. Dist. 1996) (concluding that breach of contract claims are not preempted); *but cf.* Arapahoe County Public Airport Auth. v. Centennial Express Airlines, Inc., No. 95CA0307, 1996 WL 714501, at *6 (Colo. Ct. App. Dec. 12, 1996) (holding that regulation restricting scheduled passenger traffic relates to "services" and therefore is preempted); Vieira v. United Parcel Service, Inc., No. C-95-04697 CAL ARB, 1996 WL 478686, at *1 (N.D. Cal. Aug. 5, 1996) (holding that claims for negligence, conversion, and

The Ninth Circuit should have focused on the gravamen of the complaint and specifically analyzed whether the flight crew's negligence in failing to provide for Ms. Harris' safety by not protecting her from Doe's abusive behavior would have a significant impact on airline rates, routes, or services.[136] Given American Airlines has procedures for handling abusive passengers,[137] and the fact that the airlines are required to maintain insurance that covers "amounts for which . . . air carriers may become liable for bodily injuries to or the death of any person, or for loss of or damage to property of others"[138] it is evident, therefore, that Ms. Harris' claims would not have a significant impact on rates, routes, or services. After all, but for the flight crew's abandonment of their standard procedures, the incident would not have occurred. If airlines follow their procedures, similar instances are less likely to occur and, with the requirement of insurance, such incidents that do occur would have a negligible impact on rates, routes, or services. This conclusion is consistent with the *Morales* decision.[139] In any event, the *Harris* court's

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breach of contract for allegedly losing the items shipped are preempted); Abdu-Brisson v. Delta Airlines, Inc., 927 F. Supp. 109, 112 (S.D.N.Y. 1996) (concluding that airline's former employees' claims of age discrimination based on state law are preempted); Vine v. Continental Airlines, Inc., No. CV 950375030S, 1996 WL 168049, at *3, *5 (Conn. Super. Ct. Mar. 4, 1996) (concluding that state unfair trade practice and consumer fraud claims are preempted).

"Congress did not intend services to be interpreted so broadly as to encompass matters of airplane safety or to exclude state common law personal injury claims." *Torraco*, at *2-3. The court concluded that the "word 'services,'" as employed in [the ADA], must be interpreted more narrowly to refer only to the distinctive services airlines provide to the public that significantly relate to their ability to compete against other carriers." *Torraco*, at *4. However, California district courts, some recognizing the inconsistency with Congressional intent, continue to follow *Harris* because they are bound by the Ninth Circuit's decisions. *See* Manning v. Skywest Airlines, Inc., No. CV 95-4567-WMB, 1996 WL 407847 (C.D. Cal. June 16, 1996); Gee v. Southwest Airlines Co., No. C 94-03983, 1995 WL 652463 (N.D.Cal. Oct. 31, 1995); Costa v. American Airlines, Inc., 892 F. Supp. 237 (D. Cal. 1995).

136. The court should have applied *Morales* and *Wolens*, thus recognizing that for a claim to be preempted by the ADA, the following elements must be met: "(1) the claim must derive from the enactment or enforcement of state law, and (2) the claim must relate to airline rates, routes, or services, either by expressly referring to them or by having a significant economic effect on them." Chrissafis v. Continental Airlines, Inc., 940 F. Supp. 1292, 1297 (N.D. Ill. 1996).

137. *See supra* note 9.

138. 49 U.S.C. app. 1371(q) (1988). This further establishes Congress' intent that the ADA not preempt all state tort claims. The 1994 amendments to the ADA did not change this result. *See* 49 U.S.C. section 41112 (1994).

139. The preemption clause was included in the ADA to "ensure that the States would not undo federal deregulation with regulation of their own." Morales v. Trans World Airlines, Inc., 504 U.S. 374, 378 (1992). As a result, state common law claims which do not threaten to "undo federal regulation," thereby having a significant impact on federal regulation, should not be found to sufficiently relate to rates, routes, or services in order to warrant preemption. *Id.* at 378. In fact, several courts have already adopted this "significant impact approach." *See* Hodges v. Delta Airlines, Inc., 44 F.3d 334, 336 (5th Cir. 1993) (state tort claims did not have a significant impact on services); Doricent v. American Airlines, Inc., No. 91-12084Y, 1993 WL 437670, *5-7 (D. Mass. Oct. 19, 1993) (intentional infliction of emotional distress and violations of civil rights do

decision is flawed because it failed to establish that imposing liability would in any way significantly impact rates, routes, or services.[140]

Although the court's analysis failed to apply the *Morales* standard to the *Harris* facts, the court's misapplication of precedent did not stop there. As Judge Norris recognized,[141] the majority's reliance on *Wolens* is misplaced. As previously discussed,[142] the *Wolens* Court indicated that the ADA is not intended to preempt either breach of contract claims that the airlines enter into on its own accord,[143] or for personal injury claims against the airlines.[144] The court, therefore, should have analyzed Ms. Harris' claims in accordance with this limitation on preemption.

Applying *Morales* and *Wolens*, together with the Fifth Circuit's analysis in *Smith v. America West Airlines, Inc.*,[145] the court should have determined that the effects of Ms. Harris' claims would not require preemption.[146] Such application reveals that the gravamen of Ms. Harris' complaint was for negligence "based upon the flight crew's failure to protect her from Doe's abusive behavior and for exacerbating the known risk of emotional and physical injury" by continuing to serve Doe drinks following the initial incident.[147] The *Morales* Court established, by declining to fashion a bright-line rule, that courts must make a factual determination as to whether the claims are too tenuously connected to rates, routes, or services or whether the claims threaten to undo federal regulation. Given that the goal of the ADA is economic deregulation,[148]

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not significantly impact services such that preemption would be warranted); *see also* cases cited *supra* note 27.

140. The court could have achieved the same result if it had adjudicated the case on the merits. This only would have required the court to affirm the district court's decision and, therefore, it would not have created a conflict among the circuits.

141. *See* Harris v. American Airlines, Inc., 55 F.3d 1472, 1478 (9th Cir. 1995) (Norris, J., dissenting).

142. *See supra* notes 110-119 and accompanying text.

143. American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 824 (1995).

144. *Id.* at 825 n.7; *see also id.* at 827 (Stevens, J., concurring in part and dissenting in part). Justice O'Connor stated that, in her opinion, "private tort actions based on common-law negligence or fraud, or on a statutory prohibition against fraud, are not preempted, and that her view of *Morales* "does not mean that personal injury claims against airlines are always preempted." *Id.* at 830 (O'Connor, J., concurring in the judgment in part and dissenting in part). *Id.*

145. 44 F.3d 344 (5th Cir. 1995).

146. In *Smith*, the Fifth Circuit, "[n]oting that economic deregulation was the key to the ADA," held that boarding "services" were limited to economic decisions concerning boarding. As a result, the court concluded that if liability was imposed, it could remotely affect ticket prices but "it would not regulate the economic or contractual aspects of boarding." Harris v. American Airlines, Inc., 55 F.3d 1472, 1477-78 (1995) (Norris, J., dissenting) (citing Smith v. America West Airlines, Inc., 44 F.3d 344, 346-47 (1995)).

147. *See* Harris v. American Airlines, Inc., 55 F.3d 1472, 1478 (1995) (Norris, J., dissenting).

148. *See supra* notes 49-63 and accompanying text.

it is logical to conclude that in *Harris*, only those issues which significantly impact the economic decisions regarding the service of beverages would be preempted.[149] Although Ms. Harris' claim may affect the airlines' procedures regarding the protection of passengers if liability was imposed, it would not result in either regulating the "economic or contractual aspects of the airline's provision of beverages,"[150] or forcing the state to impose its "own substantive standards with respect to rates[,] routes, or services."[151] As a result, the court should have concluded that Ms. Harris' complaint was not preempted by the ADA. Instead, the court increased the uncertainty surrounding ADA preemption issues by creating a split among the circuits. In addition, one wonders whether a change in facts would have resulted in a different outcome.[152]

Failing to follow the established ADA precedent was not the only aspect of *Harris* that leaves the future of ADA preemption uncertain.

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149. Harris v. American Airlines, Inc., 55 F.3d 1472, 1478 (1995) (Norris, J., dissenting).

150. *Id.*

151. American Airlines v. Wolens, 115 S. Ct. 817, 826 (1995).

152. For example, would the court have rendered the same decision if there had been physical injuries? In similar circumstances, various courts have suggested that state tort claims involving physical injuries are not preempted. *See* Hodges v. Delta Airlines, Inc., 44 F.3d 334 (5th Cir. 1995); Doricent v. American Airlines, Inc., No. Civ. A. 91-12084Y, 1993 WL 437670 (D.Mass. Oct. 19, 1993). In *Rombom v. United Airlines, Inc.*, 867 F. Supp. 214, 222 (S.D.N.Y. 1994), the court stated that if the tortious conduct does not further the provision of service in a reasonable manner, the state tort claim will continue. The court analogized a situation where a flight attendant shoots a passenger who refuses to remain quiet during in-flight safety instructions. The court concluded that it would be "illogical to assume that Congress intended to preempt a subsequent tort suit where a flight or crew member performs a service in an unreasonable and unnecessary manner." *Id.* at 222. Similarly, at least one court has concluded that emotional damages resulting from an airline's negligence would not be preempted. *See* Smith v. America West Airlines, Inc., 44 F.3d 344 (5th Cir. 1995) (holding that passengers' claims that their safety had been jeopardized by allowing a deranged hijacker to board the aircraft were not preempted because a judgment in favor of the plaintiffs would not regulate economic or contractual aspects of boarding).

Any change in the facts with respect to the physical versus emotional injuries should not render different results. In each case, state tort claims should not be preempted as long as they do not attempt to regulate rates, routes, or services. Similarly, one wonders if the court would have concluded that the action was preempted if Harris' complaint had been based solely on state common law. However, given that Harris' claims involved both common law and statutory allegations, it seems logical to conclude that the Ninth Circuit would ignore the savings clause and find both cases preempted. Additionally, it is questionable whether the Ninth Circuit would have concluded that the action was preempted if John Doe had been an identifiable real party to the suit and a jury had awarded Harris at least nominal damages. This would have required the appellate court to overturn a jury verdict, which may not have been as easily accomplished. These distinctions deprive Harris and future litigants of a legal remedy because there are few alternatives in pursuing factually similar causes of action in federal court (assuming that the passenger could have been identified and evidence taken, a claim for boarding or serving intoxicated passengers in violation of 14 C.F.R. §§ 121.575(c) and (b)(1) could be brought). This further supports the conclusion that such claims should not be preempted.

The court also added to this uncertainty by ignoring the textual implications of its decision.

The *Harris* decision expands the previous interpretation of the scope of the ADA's preemption clause to the extent that all state law or common law causes of action would be preempted. While this would immediately reduce the number of lawsuits brought against the airlines,[153] it also presents difficulties in cases involving negligent airline maintenance or pilot error. For example, if the court's interpretation of the scope of the preemption clause were correct, then anytime a passenger is injured or killed in an air crash due to the negligence of the airlines the passenger would not be able to recover. Similarly, anytime an airline advertised in any media, they would not have to pay for the advertisement because any claim for breach of contract would be preempted.[154] This chain of denied claims is endless because virtually any activity that an airline is associated with can be *connected* to the airlines' rates, routes or services. In light of this relationship, numerous courts have held that such claims are not preempted absent a significant impact to regulation.[155] As a result, *Harris*' broad implication not only runs contrary to the language and purpose of the ADA and the Supreme Court's interpretations thereof,[156] but it is also inconsistent with how the CAB handled similar claims prior to the Sunset Provisions.[157] In addition, it suggests a complete preemption of state claims, a result which the ADA clearly is not intended to encompass.

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153. One wonders how far the airlines will be willing to exploit this decision in order to shield themselves from liability. At a minimum, the decision will reduce the number of suits against the airlines. *See American Airlines*, WORLD AIRLINE NEWS, June 26, 1995, *available in* Westlaw, 1995 WL 6155379.

154. For a discussion of the contractual implications of federal preemption under the ADA, see Brief for Respondents, American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995) (No. 93-1286), *reprinted in* 1994 WL 381834. For another example of factual scenarios where preemption would be illogical, see *supra* note 152.

155. *See* Air Crash Disaster at John F. Kennedy Int'l Airport, 635 F.2d 67, 74 (2d Cir. 1980); Stewart v. American Airlines, Inc., 776 F. Supp. 1194, 1198 (S.D. Tex. 1991); Air Crash Disaster at Sioux City, Iowa, 734 F. Supp. 1425, 1428 (N.D. Ill. 1990).

156. *See* American Airlines v. Wolens, 115 S. Ct. 817, 826 (1995); Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992).

157. Section 411 in Title IV of the Federal Aviation Act of 1958 provided the CAB with the power to investigate the practices of the airlines in order to protect the public. *See* 49 U.S.C. § 1381 (1988). However, it did not provide jurisdiction for private individuals to challenge alleged wrong acts by the airlines. The CAB and its inherent powers were meant to supplement rather than displace state laws. This is evidenced by the savings clause and by the Supreme Court's interpretations of the savings clause. *See* Nader v. Allegheny Airlines, 426 U.S. 290, 303 (1976) (section 411 is meant to protect the public from injuries caused by the airlines). As a result, prior to deregulation, consumers were protected by both section 411 and the existing state common law and statutory provisions. Since the ADA incorporated the savings clause and did not manifest an intent to alter private remedies, it should not be interpreted to preempt state law claims which do not regulate rates, routes, or services.

IV. CONCLUSION

By itself, *Harris* is a victory for the airlines who wish to reduce the potential liability that could be placed on their shoulders as a result of a breach of state or common law. However, its short-term significance rests on the impact that it will have on the other circuits and on the lower courts which must initially resolve the ADA preemption issues in the future. In the struggle to apply a now murky ADA preemption jurisprudence,[158] the courts should not adopt *Harris*, but turn instead to other more sound decisions.[159] Given that the statutory language of the ADA manifests Congress' intent that preemption should not be so broad, as well as the textual implications of the *Harris* decision, one can only conclude that the *Harris* decision creates turbulence in an otherwise clear sky.

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158. The significance of the case is not limited even though Congress repealed § 1305(a) because in 1994, Congress' reenactment of Title 49 revised the clause to read: "[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 . . . ." 49 U.S.C. 41713(b)(1) (1994). The intent of Congress was that the revision would not substantively change the ADA's preemption jurisprudence. *See* Pub.L. 103-272, § 1(a), 108 Stat. 745; *see also* cases following *Harris* which evidence this intent cited *supra* note 135. Thus, the Congressional intent remains the same and the potential for the courts to apply preemption is still a threat to state court litigation.

159. *See supra* note 135.