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High Court Gives Airlines An Out With Frequent-Flier Ruling

By **Juan Carlos Rodriguez**

Law360, New York (April 02, 2014, 7:45 PM ET) -- Though the U.S. Supreme Court disagreed Wednesday with a Delta Air Lines Inc. subsidiary's contention that all implied covenant claims are preempted by the Airline Deregulation Act, attorneys see a relatively simple way for airlines to get around that.

The high court said plaintiff S. Binyomin Ginsberg, who sued because he was terminated from the rewards program after making some complaints, could not bring a claim for breach of the implied covenant of good faith and fair dealing against Northwest Inc. because, under Minnesota law, the implied covenant is a state-imposed obligation.

"Minnesota law does not permit parties to contract out of the covenant. And when a state's law does not authorize parties to free themselves from the covenant, a breach of covenant claim is preempted under [American Airlines Inc. v. Wolens]," the high court said.

Northwest had asked the court to rule that all state implied-covenant claims are preempted, arguing that if preemption depends on state law, airlines will be faced with a patchwork of rules. But the court said airlines have other ways to deal with that issue.

Jonathan F. Cohn, a partner in Sidley Austin LLP's appellate practice group, who argued successfully for an airline in another Supreme Court case that was decided earlier this year, said the ruling probably wouldn't pose a challenge for airlines.

"I think the airlines would have preferred a blanket ruling. But at the end of the day, it's just transactions costs. What the airlines have to do is just word their contracts with the consumers differently and opt out of those states that permit the opt-out," he said.

While the revision of existing contracts may take some time and money, and airlines may face a reputational disadvantage in making this type of a change, it's not the end of the world, Cohn said.

Baker McKenzie LLP partner Colin Murray, who chairs the northern California litigation practice group, said the court's ruling was intended to comply with Congress's intent that airlines compete in a free marketplace, which they may do by accepting whatever risks may be associated with changing frequent-flier program contracts as they see fit. He also said the airlines had caught a break in the case that the justices heard.

"It's a pretty limited ruling because the court makes it clear Ginsberg could have attempted to pursue

his separately asserted breach of contract claim under the theory that terminating his frequent flier program membership breached the terms of the agreement itself or was done for an ulterior motive," Murray said.

Seth P. Waxman, a partner at WilmerHale and chair of the firm's appellate and Supreme Court litigation practice group, worked on a brief for the Air Transport Association of America Inc., an industry group that includes Delta and other major carriers.

"The fact that the court's reassurance to airline travelers is that their remedy is in the competitive marketplace ... suggests this is not likely to present an enduring problem for the airlines," he said.

Donald M. Falk, a partner at Mayer Brown LLP with extensive appellate experience, said that while the ruling is definitely good news for the airline industry, there is a chance of a "boomlet" of bad-faith actions brought under the existing agreements and seeking to apply the law of a state where contracting out of the covenant is permitted.

"Until the agreements are changed, to the extent that someone has a claim where they can invoke the laws of one of the states that permits parties to contract out, we could see something with statewide classes," Falk said.

For instance, California and Idaho permit a party to contract out of the duties imposed by the implied covenant. But Falk said plaintiffs' attorneys would have a hard time getting the law of a single state imposed nationwide, even if it were the carrier's headquarters.

"Although the legal door is open, I wonder if there are actually going to be cases that really have a plausible, classwide bad-faith claim," he said.

Meanwhile, Steven J. Burton, law professor at the University of Iowa and author of an amicus brief on the plaintiff's behalf, called the decision "unfortunate" because he said it makes other common-law claims, such as unconscionability, vulnerable.

"I think that an airline now can enter into an agreement with the passenger and say, 'We are not bound to act in good faith, nor shall this agreement be left unenforced because it is unconscionable,'" Burton said. "I think it leaves passengers in the lurch."

--Editing by Elizabeth Bowen and Philip Shea.
