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Eleventh Circuit: putative class action may proceed against airline that did not disclose fee in its customer contracts

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Takeaway: Adhesion contracts have become ubiquitous in modern internet commerce, and we have written a number of articles about how businesses prepare their on-line contracts to shield themselves from liability generally and class action liability in particular. See, e.g., Ninth Circuit upholds arbitration provision testing the "outer limits" of what constitutes an enforceable arbitration agreement (June 17, 2019). In *Cavalieri v. Avior Airlines C.A.*, --- F.4th ----, No. 19-11330, 2022 WL 325242 (11th Cir. Feb. 3, 2022), the Eleventh Circuit recently reversed the dismissal of a putative class action against an airline under circumstances where it was clear that the issue of contractual liability could have been eliminated through the use of the right contractual language.

In 1978, Congress passed the Airline Deregulation Act (ADA), which eliminated the regulation of air carrier prices. The ADA contains a preemption provision, which provides that "a State, political subdivision of a State, or political authority of at least 2 States 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." 2022 WL 325242, at *5 (quoting 49 U.S.C. § 41713(b)(1)). While ADA preemption is broad, it does not preempt voluntary contractual commitments made by airlines or airline passengers. As the Eleventh Circuit observed in 2018, "an air carrier may bring a state action to enforce the terms of a contract, whether express or implied, or the person with whom an air carrier has contracted may bring a breach-of-contract action … so long as the action concerns voluntary commitments and not state-imposed obligations." *Id. (quoting Bailey v. Rocky Mountain Holdings, LLC,* 889 F.3d 1259, 1262 (11th Cir. 2018)).

Roberto Hung Cavalieri and Sergio Enrique Isea were passengers on flights operated by Avior Airlines, C.A., a Venezuelan airline. They filed a putative class action claiming that Avior Airlines breached its "Contract of Carriage" by requiring passengers to pay a fee that was not disclosed in that contract. *Id.* at *1. According to the plaintiffs, passengers were forced to pay an additional fee – an $80 "Exit Fee" – before they were permitted to board their departing flights from Miami to Venezuela. The Southern District of Florida (by adopting the report and recommendation of a magistrate judge) dismissed plaintiffs' breach of contract claims, concluding that the ADA preempted those claims because they related to the price of airline tickets. On appeal, the Eleventh Circuit reversed, holding that "Plaintiffs' breach of contract claim seeks merely to enforce the parties' private agreements regarding the cost of passage and does not invoke state laws or regulations to alter the agreed-upon price." *Id.* The claims therefore fit within the types of cases exempted from preemption by the United States Supreme Court's decision in *American Airlines, Inc. v. Wolens,* 513 U.S. 219 (1995), which the Eleventh Circuit followed in its

prior decision in *Bailey. Id*.

Plaintiffs' class allegations demonstrated that the airline's alleged contractual liability could have been addressed in the language of its customer contracts. Indeed, they defined their national class as "all persons that Avior charged an Exit Fee, from five years prior to the filing of the initial complaint through the earlier of: (i) ***the date, if any, Avior changes its contract to expressly include Exit Fees***; and (ii) the date of class certification." *Id*. at *3 (emphasis added).

Avior argued on appeal that the terms of its website did in fact refer to the exit fees and that, therefore, the plaintiffs' breach of contract claims failed as a matter of law. The district court did not address that issue, and the Eleventh Circuit also declined to address it, explaining that Avior did not adequately develop this "incorporation by reference" argument on appeal, but it did say that "those pivotal questions of contract interpretation remain open for adjudication on remand." *Id*. at *7.