The Good, the Bad and the Ugly in Texas Duel Between Lufthansa and Sabre

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The high plains of Texas set the stage for a dramatic standoff between Lufthansa German Airlines and global distribution service (GDS) giant Sabre Travel over Lufthansa’s decision to impose an $18 surcharge on every ticket sold through a GDS, and Sabre’s alleged tortious interference with Lufthansa’s travel agent relationships in response. Sabre, like other GDSs (such as Amadeus and Travelport), acts as a computerized conduit between airlines and travel agencies through which airlines distribute information about available services and fares. Each time a consumer books a flight from a travel agent using a GDS, the airline must pay a fee to the GDS. To avoid these costs, some airlines use “direct connection” technology platforms to market airfares directly to travel agents—bypassing GDSs.

The Texas case arose after Lufthansa, tired of losing $18 on every ticket sold through a GDS, imposed the same amount as a surcharge on GDS sales, but exempted tickets bought through “direct connection” platforms or the Lufthansa website. In response to the surcharge, Sabre allegedly encouraged travel agents to breach their contracts with Lufthansa by directing them to book travel through Lufthansa’s direct connections, and then enter the itineraries into Sabre’s GDS. Under this scheme, travel agents avoided the surcharge and Sabre collected its booking fee. This prompted Lufthansa to file its claim alleging that Sabre was unlawfully interfering with Lufthansa’s contractual relationships with travel agents.

On February 1, the Texas Supreme Court tossed out Sabre’s argument that the Airline Deregulation Act (ADA), 49 U.S.C. 41713(b), preempted Lufthansa’s tortious interference claim. Sabre Travel Int’l v. Deutsche Lufthansa AG, 2019 WL 406062 (Tex. 2019). The ADA preempts any state “law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier.” The Texas high court ruled that Lufthansa’s tortious interference claim did not relate to a price, route or service offered by Lufthansa. This was because, according to the court, “the dispute involve[d] only booking fees
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Sabre improperly collected through ‘passive bookings,’ not the surcharge.” As a result, “the alleged tortious interference occurred because of conduct after tickets are sold.” Any relationship to airline prices was too remote because increasing “an airline's cost [did] not automatically lead to a corresponding increase in airline ticket prices.” Furthermore, because the “tortious interference claim [was] based on business dealings between two non-carriers—Sabre and the travel agents,” any “connection to Lufthansa’s ticket prices [was] likely too peripheral to be preempted.” The court also reasoned that Lufthansa was not seeking to use its claim to “enlarge any contractual obligation that it voluntarily adopted with its respective travel agents.”

The result is undeniably a good result for airlines in their long-running dispute with the GDS industry. However, it could complicate future efforts by airlines to use the ADA to defend against tortious interference claims, and it will not dissipate the economic pressure on GDSs to find new and increasingly aggressive ways to charge airlines for services that airlines increasingly no longer need from GDSs.

The Good

The decision is a victory for airlines in their battle with Sabre and other GDSs over how much money the GDSs receive from airline bookings. In recent years, this battle has become more complicated with the advent of separate charges for ancillary services, such as checked-bag fees, priority boarding and economy seats with greater legroom. The decision upholds airlines’ use of new technology to avoid having to pay the $18 GDS fee to a “middleman” whose importance in the transaction has grown obsolete. It also affirms airlines’ rights to use existing laws to combat overly aggressive GDS efforts to circumvent airlines’ cost reduction efforts.

The outcome is also good given that rejection of Sabre’s preemption defense was not a slam-dunk merely because the party seeking to use it is not an airline. Previously, Sabre and other GDSs have successfully used ADA preemption to dismiss claims against them. For example, in Gordon v. Amadeus IT Group, SA, 194 F. Supp. 3d 236 (S.D.N.Y. 2016), the court held that the ADA preempted state law claims against Sabre, Amadeus and Travelport for allegedly conspiring to prevent airlines from paying less for GDS services. The court ruled that the claims, although not leveled against any airline, were “directly related to airline pricing” because the alleged conspiracy purportedly stymied airline efforts to secure lower GDS fees, thereby increasing airline costs which ultimately translated into higher airfares.

The Bad

Sabre’s ill-fated decision to argue the preemption defense for a claim by an airline against Sabre could complicate future cases where an airline seeks to use the ADA to preempt tortious interference claims against the airline. In future cases, airlines will want to draft their preemption arguments carefully to avoid
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the result that Sabre could not. For example, Sabre was unable to demonstrate that the tortious interference claim would cause an increase in airfares, or that state law was being used to enlarge the contractual obligation owed by the airline to its travel agents. When an airline is sued for tortious interference, the carrier will want to show that the claim could impact prices, routes or services, and, if needed, that state tort law is being used to expand the carrier’s contractual promises.

The Ugly

This case is not the final chapter on standoffs between airlines and the GDS industry. Technological advances in how consumers purchase air travel and ancillary services threaten to make the GDSs go the way of the horse-drawn carriage. GDSs have made some commendable efforts to evolve in order to remain relevant for some airlines, but the dark clouds of obsolescence are growing larger. Airlines will need to continue to challenge any GDS efforts that resort to economically coercive tactics to maintain, if not increase, their share of airline ticket revenues.

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