



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Skycaps' Claims Revived In United, US Airways Suits

By **Melissa Lipman**

Law360, New York (September 09, 2010) -- A federal judge has reopened a proposed wage-and-hour class action against United Airlines Inc. over the carrier's bag-checking fee and reinstated part of a similar suit against US Airways Inc., vacating previous rulings that the skycaps' state claims were preempted by federal aviation law.

Judge Nancy Gertner of the U.S. District Court for the District of Massachusetts on Wednesday granted requests from plaintiffs in both suits to reconsider her September 2009 decisions dismissing the claims as preempted under the Airline Deregulation Act. The judge had dismissed the United case in its entirety and had axed a portion of the US Airways suit.

The dispute arises from their airlines' institution of a \$2 fee on customers who use the curbside baggage checking services at airports nationwide without paying that charge to the skycaps. The plaintiffs argue that doing so discourages customers — many of whom allegedly do not know the fee does not go to the workers — from giving the baggage handlers the tips that constitute the bulk of their earnings.

Since the skycaps launched the cases in early 2008 on the heels of a victory in a similar suit against American Airlines Inc., the judge has twice reconsidered the preemption issue at the dismissal stage in the United suit.

She rejected United's original request in April 2009 based on a decision in the American case from another judge in the same district. That judge held that the federal law did not preempt identical tips claims.

United, however, asked Judge Gertner to reconsider that ruling based on other cases that have come down since the American ruling that the airline claims have cast doubt on the precedent.

In her second review of the dismissal bid, the judge agreed that the claims, brought under

the Massachusetts Tips Law, are barred by the federal law, citing a recent U.S. Supreme Court decision holding that the ADA preempts state laws that have a "significant impact" on prices and services.

At the time, the judge noted that the plaintiffs had rejected a solution to their claims that would require the airline to post signs informing passengers that the \$2 fee is not a tip. Instead, the plaintiffs sought to require customers to either pay the check-in fee online before reaching the airport or with a credit card at the curb, according to the 2009 opinion.

The judge ruled that either option would significantly alter the current curbside check-in service, making the plaintiffs' claims preempted under the federal law.

In agreeing to reconsider the United decision Wednesday, Judge Gertner took issue with some of the skycaps' claims. They argued her ruling improperly gave the impression that they had refused to consider posting informational signs to deal with the alleged tips law violations.

"Although it is absolutely clear that plaintiffs have changed their position on this issue, notwithstanding their disingenuous claims to the contrary, I will not invoke judicial estoppel to prevent them from arguing that notification would be sufficient," the judge wrote.

In the US Airways case, however, the judge conceded that the skycaps had never rejected the signage remedy and in both suits found it was premature to find the claims were preempted because they would have a significant impact on prices or services.

Noting that an appeal of the preemption decision in the American case is still pending, the judge agreed to allow the plaintiffs in both suits to proceed with discovery.

Judge Gertner has already rejected both airlines' claims that the state law claims are preempted based on their effects on prices and refused to deal with the question of field preemption. She pointed out that the latter issue has not been fully briefed and that any ruling on field preemption would probably not bar the plaintiffs from proceedings on their tortious interference claims, among others.

In both suits, the judge refused to look at any future motions for reconsideration of the dismissal issue.

Attorney Shannon Liss-Riordan of Lichten & Liss-Riordan PC, who represents the skycaps in both suits, said her clients were "extremely pleased" with the decisions.

"Now I believe every judge to look at this issue, other than one judge in the Jetblue case, has rejected the preemption argument," Liss-Riordan said.

While all of the cases will go forward for the time being, the U.S. Court of Appeals for the First Circuit may have the final word on the preemption issue when it rules on the American case. Both sides have submitted preliminary briefs in that appeal but oral arguments have not yet been scheduled, according to Liss-Riordan.

A spokeswoman for United said the company believed the suit was without merit and that the state claims were preempted by federal law, noting that the airline expects the court to deal with the issue again "at the appropriate stage in the proceedings."

US Airways declined to comment on the matter through an attorney.

The plaintiffs are represented in this matter by Lichten & Liss-Riordan PC.

United is represented by attorneys from Seyfarth Shaw LLP. US Airways is represented by attorneys from Constangy Brooks & Smith LLP

The cases are Brown et al. v. United Airlines Inc., case number 1:08-cv-10689, and Mitchell et al. v. US Airways Inc. et al., case number 1:08-cv-10629, both in the U.S. District Court for the District of Massachusetts.