AN ALTERNATIVE CONSUMER COMPLAINT AGAINST FREQUENT FLYER PROGRAMS AFTER *AMERICAN AIRLINES, INC. v. WOLENS* 115 S. Ct. 817 (1995)

I. INTRODUCTION

You have worked for a number of years to build up those "frequent flyer" miles on your favorite airline. You resisted the urge to cash them in earlier because you wanted to hold out for your dream vacation to Europe.[1] When you traveled on a business trip or holiday, you stayed with your carrier[2] to rack up more miles. You realize that there are some rules with the frequent flyer programs, but you have never read the fifty or more pages of minuscule type.

Now is the big day. You have two weeks off in August. You call your carrier to cash in your miles and get the "Award Ticket" you have earned. But, after five minutes of phone mail navigation and ten minutes on hold, the friendly agent on the other end says, "I'm sorry we've changed that program: You need 15,000 more miles for that trip"; or "Your miles have expired because you didn't use them within two

1. This introduction is loosely based on an introduction appearing in Katherine A. Braden, *Frequent Flyer Coupon Brokering: A Valid Trade?*, 55 J. AIR. L. & COM. 727 (1990).

2. For the purpose of this Note, the terms "carrier" and "airline" are used interchangeably.

years"; or, "The month of August is blacked-out." In the worst-case scenario, the agent says, "I'm sorry. We have discontinued that program."

Frequent flyer programs (FFPs) emerged from the atmosphere of freedom created by the deregulation of the airline industry in 1978.[3] The first FFP began in 1981 as a short-term promotion to capture more business travelers.[4] Shortly thereafter, every airline in America had a similar program or was affiliated with one.[5] Ten years later, twenty-eight million people were members of at least one program.[6] For the airline companies, the FFPs had become "important keys to competitive viability."[7] Despite the flying public's overwhelming acceptance of

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3. Airline Deregulation Act of 1978 (ADA), Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C. app.). *See generally* Russell A. Klingaman, *Predatory Pricing and Other Exclusionary Conduct in the Airline Industry: Is Antitrust Law the Solution?*, 4 DEPAUL BUS. L.J. 281, 282-84 (1992) (outlining the climate of the deregulated airline industry).

Congress re-enacted Title 49 of the United States Code in 1994. Pub. L. No. 103-272, 108 Stat. 745 (1994). Presently, the ADA is codified at various sections of 49 U.S.C.A. §§ 40101-49105. Congress intended to make no "substantive change" to the Title. § 1(a), 108 Stat. 745. This Note will follow the Supreme Court's method of citation and refer to the pre-revision section numbers (*i.e.*, 49 U.S.C. app. (1988)). *See* American Airlines, Inc. v. Wolens, 115 S. Ct. 817, 828 n.1 (1995).

4. *See* Michael E. Levine, *Airline Competition in Deregulated Markets: Theory, Firm Strategy, and Public Policy*, 4 YALE J. ON REG. 393, 414 (1987) (noting that American Airlines (American) was the first carrier to offer an FFP, but incorrectly identifying the starting date as 1980); *Travel/Aviation Editor*, PR NEWSWIRE, May 1, 1981, *available in* LEXIS, News Library, Arcnws File (American Airlines press release about FFP) [hereinafter American-PR 5/1/81].

5. Levine, *supra* note 4, at 414. The other airlines reacted immediately to American's move. United Airlines (United) introduced the second FFP only five days after American's announcement. *See Travel/Aviation Editor*, PR NEWSWIRE, May 6, 1981, *available in* LEXIS, News Library, Arcnws File (announcing United's new FFP) [hereinafter United-PR 5/6/81]. Other airlines also quickly followed. *See Travel/Aviation Editor*, PR NEWSWIRE, May 11, 1981, *available in* LEXIS, News Library, Arcnws File (announcing TWA's new FFP) [hereinafter TWA-PR 5/11/81]; *Travel/Aviation Editor*, PR NEWSWIRE, Aug. 4, 1981, *available in* LEXIS, News Library, Arcnws File (announcing Delta's new FFP which based credit on flight segments) [hereinafter Delta-PR 8/4/81]. Within five months of American's introduction of the FFP, the airline industry supported at least 10 separate programs. *See* Carole Shifrin, *Rewarding Frequent Flyers: The Ins & Outs of Airline Bonuses*, WASH. POST, Oct. 25, 1981, at E1.

6. Charles Lockwood, *How to Manage Your Frequent Flyer Programs*, S.F. EXAMINER, Jan. 15, 1995, at T3. By the end of 1994, total FFP membership had grown to 32 million members. *Id.*

7. Levine, *supra* note 4, at 414.

these programs, courts are still struggling to define the scope of the relationship among the airlines, FFPs, and passengers.[8]

On February 1, 1995, most major American airlines raised the amount of credits or "miles"[9] an FFP member needs to receive a free ticket.[10] This change "devalued" members' credit anywhere from seventeen to fifty percent.[11] A similar "restructuring" in 1988 resulted in a number of class action lawsuits by consumers who felt cheated by the unexpected changes.[12] Those actions are not yet settled.[13] In fact, only thirteen days before the carriers enacted the 1995 restructuring, the

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8. The confusion was immediate. *See* Paul Grimes, *Practical Traveler: Coupons and Other Bonuses for the Airborne*, N.Y. TIMES, Oct. 11, 1981, § 10, at 3 (noting in a dated reference that FFPs "seem as confusing and as complicated as Rubik's cube"); Eugene J. McCarthy, *From Here to Perplexity*, N.Y. TIMES, Dec. 26, 1982, § 10, at 17 (noting that FFPs are so confusing that it is easier not to use them). Consumer confusion continues today. *See, e.g., How Frequent Fliers Can Beat the Clock*, BUS. WK., Jan. 23, 1995, at 104 (noting passengers' perplexity with recent FFP changes and developments) [hereinafter *Beat the Clock*].

9. While the type of FFP credit differs by airline, the most common is "miles." Generally, the FFP awards one credit "mile" for every mile flown over a certain minimum distance. Flights under the minimum distance receive a set amount, usually 500 miles. *See* various FFPs' program rules (on file with author). Some airlines, most prominently Southwest Airlines, award one credit for each "segment" flown. Early programs were divided between mileage programs, segment programs, point programs, and direct cash rebates. *See* Shifrin, *supra* note 5. This Note will use the terms "credit" and "miles" interchangeably.

10. *See Beat the Clock*, *supra* note 8, at 104. Alaska, American, American West, Continental, Northwest, United, and USAir raised the domestic FFP award-ticket exchange rate from 20,000 to 25,000 miles. *Id.* Delta lowered the amount of miles needed by 17% from 30,000 to 25,000, but it correspondingly decreased the minimum mileage award from 1000 to 500 miles. *Id. See also Frequent Flyers?*, TIME, Jan. 30, 1995, at 15.

11. *Beat the Clock*, *supra* note 8, at 104. American, Continental, Northwest, and United increased the number of miles needed for international and Hawaii tickets between 17% and 50%. *Id.*

12. *See, e.g.*, Wolens v. American Airlines, Inc., No. 88-C8158, 1988 U.S. Dist. LEXIS 12026, at *7 n.2 (N.D. Ill. Oct. 24, 1988), *aff'd*, 565 N.E.2d 258 (Ill. App. Ct. 1990), *aff'd*, 589 N.E.2d 533 (Ill. 1992), *vacated*, 113 S. Ct. 32 (1992), *cert. granted*, 114 S. Ct. 1396 (1994), *aff'd in part and rev'd in part*, 115 S. Ct. 817 (1995), *aff'd in part and rev'd in part*, 646 N.E.2d 1218 (Ill. 1995) [hereinafter *Wolens I*]. *See also infra* notes 76-128 and accompanying text (discussing pre-emption).

13. Consideration of these cases has been postponed pending resolution of the pre-emption issue. *See infra* text accompanying notes 76-128 (exploring the pre-emption issue).

Supreme Court ruled that the 1988 suits may proceed on the facts despite airline deregulation statutes.[14]

Courts across the country have reached inconsistent results in suits arising from FFPs. The confusion is due, in part, to the problem of placing a value on frequent-flyer miles. For example, the airlines use draconian measures to enforce the FFP rules,[15] citing the great costs they incur in providing award tickets.[16] Simultaneously, however, the airlines plead to their accountants[17] and to the Internal Revenue Service (IRS)[18] that the tickets represent empty seats and thus have little value, if any. Consumers similarly place great value on award tickets when seeking to protect them,[19] yet later downplay their worth to the IRS.[20]

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14. American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995) [hereinafter *Wolens VII*]. *See infra* notes 82-134 and accompanying text (discussing the disposition of the *Wolens* case in greater detail).

15. For example, the airlines have deleted all accumulated mileage and barred further participation to members caught violating the program rules. *See* Charles Boisseau, *Buying Tickets From Frequent-Flier Brokers Could Land You in Trouble*, CHI. TRIB., Jan. 11, 1995, at C1 (quoting Continental Airlines spokesperson saying, "We actively seek and pursue any infractions of our [FFP] rules and file suits and close accounts when fraud is discovered."). In addition, airlines have encouraged the criminal prosecution of persons found "stealing" miles. *See, e.g.*, United States v. Mullins, 992 F.2d 1472 (9th Cir.) (wire fraud theft), *cert. denied*, 113 S. Ct. 2997, *cert. denied*, 114 S. Ct. 556 (1993); United States v. Loney, 959 F.2d 1332 (5th Cir. 1992) (affirming defendant's conviction of wire fraud for stealing FFP credits); United States v. Schreier, 908 F.2d 645 (10th Cir. 1990) (wire fraud theft), *cert. denied*, 498 U.S. 1069 (1991).

16. *See* Boisseau, *supra* note 15, at C1 (quoting an American Airlines spokesperson as saying selling frequent flyer awards cost his company "millions").

17. Terry Lloyd, *Financial Language In Legal Documents, in* ACCOUNTING FOR LAWYERS 1993, at 359, 407-08 (PLI Corp. Law & Practice Course Handbook Series No. B-830, 1993) (noting that most airlines do not list outstanding miles and corresponding awards as liabilities on their balance sheets, in part because the real cost of awards is minimal). *See Major Airlines Said to be Developing Uniform Worldwide Accounting Guidelines*, BNA DAILY REPORT FOR EXECUTIVES, Oct. 29, 1992, at 209, *available in* LEXIS, News Library, Arcnws File (noting that 25 of the world's largest airlines agreed to develop accounting guidelines for reporting frequent-flyer mileage as a liability).

18. *See* Charley v. Commissioner, 66 Tax Ct. Mem. Dec. (CCH) 1429 (1993) (holding that FFP awards earned on business travel are taxable income under I.R.C. § 61); Thomas J. St. Ville, *Final Regs. on Fringe Benefits Fail to Resolve Many Substantive Issues*, 72 J. TAX'N 210, 213 (1990) (noting the difficulty of valuing FFP awards for tax purposes).

19. Frequent flyer credits are often a hotly contested item in divorce settlements, indicating the value consumers place on "their" miles. *See, e.g.*, Lockett v. Lockett, No. FA93-0130043S, 1994 Conn. Super. LEXIS 1751, at *14 (Conn. Super. Ct. July 12, 1994) (allowing defendant to keep all of his FFP miles); Ward v. Ward, No. 30 39 27, 1994 WL 118947, at *2 (Conn. Super. Ct. Mar. 31, 1994) (dividing all the FFP miles equally);

This Note analyzes the rights consumers have in relation to the airlines' frequent flyer programs and how they can assert those rights. Part II traces the development of FFPs within the deregulated airline industry. Part III examines which state-based claims remain after deregulation. Part IV suggests a federal claim that consumers may assert against FFPs. Part V evaluates the impact of both deregulation and the subsequent FFP cases on the claims consumers can bring. Finally, Part VI recommends a judicial approach which would protect consumers' rights without re-regulating the airline industry.

II. DEVELOPMENT OF FFPS IN THE DEREGULATED AIRLINE INDUSTRY

On October 24, 1978, after a decades-long debate, Congress withdrew the American airline industry from the protection of the U.S. government and it became an unregulated industry.[21] Since 1938, the federal government had heavily regulated air carriers in an effort to protect the general consumer from an overly competitive industry.[22] During this era of regulation, the Civil Aeronautics Board (CAB)

Horowitz v. Horowitz, No. FA90-0274070S, 1992 Conn. Super. LEXIS 467, *13 (Conn. Super. Ct. Feb. 19, 1992) (allowing both parties to keep their own FFP credits); George v. George, CPI No. 1320-90, 1992 Del. Fam. Ct., LEXIS 52, at *33 (Del. Fam. Ct. Nov. 24, 1992) (dividing miles according to husband's suggestion); Hakkila v. Hakkila, 812 P.2d 1320, 1327 (N.M. Ct. App. 1991) (dividing FFP "points" equally and refusing to place value on such). *See also In re* Ellis, 149 B.R. 927, 932 (Bankr. E.D. Mo. 1993) (holding in bankruptcy proceeding that, because there was a property settlement to debtor's wife for half of the husband's mileage, the frequent flyer mileage was not dischargeable). Airlines are well aware of the value passengers place on these frequent-flyer miles. *See More Mileage For Your Money*, L.A. TIMES, Jan. 12, 1995, at D4 (quoting Delta FFP manager stating "[c]onsumers place a very high value on free miles").

20. *See supra* note 18.

21. Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C. app.) *See also* Levine, *supra* note 4, at 393-408 (discussing the years of debate leading up to deregulation).

22. *See* Amy Hunt, *Assault on the Airline Industry: Private Antitrust Litigation and the Problem of Settlement*, 59 J. AIR L. & COM. 983, 987 (1994) (stating regulation was a result of "destructive competition"). *See also* Levine, *supra* note 4, at 393. Regulation first began in 1925 with the passage of the Kelly Airmail Act to control the airmail system. Pub. L. No. 68-359, 43 Stat. 805 (1925). However, comprehensive and systematic regulation of the airline industry did not begin until 1938. *Levine, supra* note 4, at 397-98. *See generally* Michael E. Levine, *Revisionism Revised? Airline Deregulation and the Public Interest*, 44 LAW & CONTEMP. PROBS., Winter 1981, at 179 (reviewing the "public interest" theory of regulation).

controlled interstate air-fares and protected the consumer from the airlines' deceptive practices.[23] The CAB oversaw most aspects of the airline industry through a tariff system[24] which required airlines to file[25] "all classifications, rules, regulations, practices, and services in connection with [their] air transportation."[26] Additionally, the CAB had primary jurisdiction over cases relating to tariff violations, including unjust practices by the airlines.[27]

In 1978, Congress determined that competitive market forces would better shape the airline industry.[28] It asserted that competition among airlines would produce a consumers' market characterized by "efficiency, innovation, . . . low prices, [and] variety [and] quality . . . of air transportation services."[29] The Airline Deregulation Act of 1978[30] (ADA) eliminated, *inter alia*, the interstate tariff system, the CAB's review of just and reasonable practices, and the CAB's primary jurisdiction over cases involving airlines and consumers.[31]

Deregulation sparked a short-term surge in airline profitability and lower consumer prices.[32] However, after the initial tide ebbed, fierce competition drove airlines to be more creative in their sales and

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23. Civil Aeronautics Act of 1938, ch. 601, § 201, 52 Stat. 973, *repealed by* Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, § 3, 98 Stat. 1703.

24. The third definition of "tariff" in *Black's Law Dictionary* states, "A public document setting forth services of common carrier being offered, rates and charges with respect to services and governing rules, regulations and practices relating to those services." BLACK'S LAW DICTIONARY 1456-57 (6th ed. 1990) (citation omitted).

25. Federal Aviation Act of 1958 (FAA), 49 U.S.C. app. § 1373 (1982) (repealed 1994). *See also infra* notes 137-46 and accompanying text (discussing the filing requirement for tariffs).

26. 14 C.F.R. § 221.3(a) (1995).

27. FAA, 49 U.S.C. app. § 1482, *repealed by* 49 U.S.C. app. § 1551 (1988). *See also* Braden, *supra* note 1, at 729 n.12 (discussing the CAB's primary jurisdiction).

28. *See* Hunt, *supra* note 22, at 988-89 (noting that despite concerns over mergers Congress believed that the industry could sustain workable competition).

29. ADA, 49 U.S.C. app. § 1302(a)(4), (a)(9) (1988).

30. Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C. app.).

31. Braden, *supra* note 1, at 729 n.12 (citing Calvin Davidson & David H. Solomon, *Air Carrier Liability Under Deregulation*, 49 J. AIR. L. & COM. 31, 32-33 (1983)). In 1985, Congress eliminated the CAB and transferred its remaining duties to the Department of Transportation (DOT). Civil Aeronautics Board Sunset Act, § 3, *amended by* 49 U.S.C. app. § 1551 (1988).

32. *See* Levine, *supra* note 4, at 480.

marketing techniques.[33] One outgrowth of this rivalry was the development of FFPs,[34] which promote airline "brand loyalty" by providing passengers with credits or miles that passengers could accumulate and redeem for gifts after attaining certain levels.[35] American Airlines first introduced the concept to the industry on May 1, 1981 as a short-term promotion.[36] However, due to consumers' overwhelming acceptance, the programs developed into an extremely powerful marketing tool and spread to all major airlines.[37]

The airlines run their respective programs according to a set of "program rules."[38] While these rules differ by airline, they are similar in many major respects.[39] Common among all programs are rules which prohibit any sale or barter of awards, limit mileage earning only to the member, and reserve for the airlines the unilateral right to change

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33. *See* Klingaman, *supra* note 3, at 336. Predictions of fluctuations in industry size, routes, prices, and concentration proved true. *Id.* at 282.

34. *See* Levine, *supra* note 4, at 414. The competition produced many other unanticipated effects, including mergers, vertical integration, hub domination, complex fare structures, changed roles for travel agents, and computer reservation systems (CRS). *Id.* at 408. *See also* Klingaman, *supra* note 3, at 325-410 (discussing similar non-price developments of deregulation).

35. *See* Klingaman, *supra* note 3, at 336. *See also* Braden, *supra* note 1, at 731.

36. *See* Klingaman, *supra* note 3, at 336; Levine, *supra* note 4, at 414. *See also* American-PR 5/1/81, *supra* note 4 (citing the correct date for the beginning of the program). American began the program as a one-year promotion. *See id.* United Airlines challenged American and began with a 19-month program. *See* United-PR 5/6/81, *supra* note 5.

37. Klingaman, *supra* note 3, at 336; Levine, *supra* note 4, at 414. Professor Levine states that the programs were so popular with consumers that they spread to airlines that, because they already enjoyed price and route monopolies, theoretically would not benefit from this added marketing power. *Id.* Another result of the original FFPs' success was that the airlines quietly removed the one-year time limit. *See* N.R. Kleinfield, *The Frequent Flyer Bonuses*, N.Y. TIMES, Nov. 25, 1982, at D1, D2 (noting airlines were reluctant to identify a termination date for their programs, and stating that airlines claimed the programs would continue "as long as they produce results").

38. *See* various FFPs' program rules (on file with author).

39. The FFPs generally send the "program rules" to new members with their membership packets. Significant rules also appear on mileage statements and award coupons. The airlines may publish updated versions of the rules and program changes. *See* Association of Discount Travel Brokers v. Continental/Eastern Tariff, DOT Order 92-5-60, May 29, 1992, at *9 n.5, *available in* WESTLAW, 1992 WL 133179 [hereinafter DOT Order 5/29/92]. The program rules are also contained in the various Computer Reservation Systems (CRS) used by the airlines.

and cancel the program at anytime.[40] The airlines have also tended to act in concert regarding significant rule changes: the airlines have enacted major revisions in 1982,[41] 1988,[42] and 1995.[43]

Originally, the programs only credited miles for trips with the sponsoring airline.[44] However, the programs quickly expanded earning opportunities by providing credits to members using FFP "partners."[45] These FFP partners typically included other travel-related companies such as additional airlines, car rental agencies, cruise lines, and hotels.[46] In time, the airlines also formed partnerships in the non-travel arena with businesses such as credit card companies and long distance telephone carriers.[47]

The expanded partner programs allowed members to earn more mileage credits.[48] As a result, a greater percentage of airline passengers

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40. *See* examples of various program rules (on file with author).

41. *See* Gay N. Myers, *Airlines Bolster Bonus Programs, Aim at Building Brand Loyalty*, TRAVEL WKLY., Apr. 30, 1983, at 30 (alluding that rule changes to the 1982 programs were frequent, but not well publicized).

42. *See supra* note 12 and accompanying text (discussing the number of class action suits filed after FFP changes in 1988).

43. *See Beat the Clock, supra* note 8, at 104; Lockwood, *supra* note 6, at T3 (discussing 1995 FFP changes).

44. *See* American-PR 5/1/81, *supra* note 4; United-PR 5/6/81, *supra* note 5, TWA-PR 5/11/81, *supra* note 5; Delta-PR 8/4/81, *supra* note 5.

45. Delta initiated the first expansion into FFP airline partners. *See To Travel Editor*, PR NEWSERVICE, Oct. 23, 1981, *available in* LEXIS, News Library, Arcnws File (announcing 11 new commuter air-carriers offering Delta FFP credit).

46. Hotel, car rental, and cruise line partners did not develop until 1983. *See* Gay N. Myers, *More Bonuses for Frequent Flyers*, TRAVEL WKLY., May 30, 1984, at 58 (covering program developments in 1983-1984).

47. The first affinity credit cards, which gave one part of mileage credit for each dollar spent, began in 1986. *See* Dennis P. O'Connell, *Trends: Using Affinity Marketing to Lure New Credit Card Customers*, AM. BANKER, Sept. 15, 1986, at 18. Telephone company partnerships, which award one mile for each dollar spent on long distance service, began September 1, 1988, between Northwest Airlines and MCI. *See Northwest Airlines, MCI Communications Corporation*, PR NEWSWIRE, June 14, 1988, *available in* LEXIS, News Library, Arcnws File. These partnerships operate as follows: The partners offer FFP miles to their customers to generate customer loyalty; after a customer uses a partner, the partner issues the mileage and pays the airline for such. *See* Thornton Clark, *Big Airlines Hold Winning Ticket in Frequent Flyer Sweepstakes*, TRAVEL WKLY., Aug. 9, 1984, at 1, 4. The partners may also offer FFP awards which utilize their services, such as miles for free cruises. *Id.* The airlines may or may not pay the partner for these awards.

48. Airline officials argue that the new partners and earning options create more opportunities to earn mileage, thus overcoming any disappointment members might have

flew on "free" tickets, theoretically displacing passengers willing to pay for seats.[49] Furthermore, through the new partnerships, members earned miles without flying, thereby diluting the direct marketing impact of the programs.[50] This objectively predictable, but unforeseen, result spurred the first major revision of the program rules in 1988.[51] Airlines instituted "black-out" date restrictions,[52] capacity limits on seat availability,[53] and, for some airlines, time-dated miles that expired after two or three years.[54]

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regarding devaluation of their current mileage credit by retrospective program changes. *See More Mileage For Your Money*, L.A. TIMES, Jan. 12, 1995, at D4 (noting new earning opportunities "by shopping, eating out or talking on the telephone").

The increase in award tickets may also be due to the natural aging of the programs. For example, less frequent flyers do not earn many miles per year and can only redeem awards after significant time has passed. Other travelers will not redeem their miles frequently, choosing to build miles over a long period in order to redeem them for higher level awards.

49. *See* Transworld Airlines, Inc. v. American Coupon Exch., Inc., 913 F.2d 676, 691 n.12 (9th Cir. 1990) [hereinafter *Transworld II*]; *but see* Lockwood, *supra* note 6, at T3 (noting that "[t]hrough their computerized capacity control systems, the airlines rarely give away a seat that would otherwise have been occupied by a paying passenger").

50. Some observers estimate that 40% of all frequent-flyer credit earned in 1994 came from non-airline partners. *See* Lockwood, *supra* note 6, at T3.

51. *See* Wolens v. American Airlines, Inc., 589 N.E.2d 533, 534 (Ill. App. 1992), *vacated*, 113 S. Ct. 32 (1992), *cert. granted*, 114 S. Ct. 1396 (1994), *aff'd in part and rev'd in part*, 115 S. Ct. 817 (1995) [hereinafter *Wolens III*].

52. "Black-out" dates are dates on which the award tickets may not be used due to anticipated high passenger traffic. *See* Leonard Sloane, *Free-Flight Programs Shift Course*, N.Y. TIMES, Dec. 24, 1988, at 48 (reviewing the major FFP changes in 1988).

53. Airlines are able to limit the availability of certain types of tickets through their computer reservation systems (CRS). This allows airlines to maximize price elasticity. For example, airlines can keep seats open for those travelers who book reservations at the last minute and are willing to pay higher prices. The airlines place FFP-award tickets at the lowest priority because these tickets generate no revenue. Therefore, those traveling on FFP award-tickets often find that they cannot make reservations for the day they want to travel, despite the fact that the flights may not be fully booked. Most programs offer "unlimited" award tickets which are not restricted by black-out dates or capacity limitations; however, these tickets normally require 50% more miles to be redeemed. *Id.*

54. Mounting levels of unclaimed miles increased the airlines' liability. Airlines instituted the "use it or lose it" rule, in order to maintain a constant level of liability. Most airlines added this rule to their FFPs in the 1995 changes. *See Beat the Clock*, *supra* note 8, at 104.

The increase in ways to accumulate program miles also unexpectedly spawned a "gray market" for frequent-flyer award tickets.[55] Frequent travelers found themselves with more "free"[56] tickets than they could use.[57] Enterprising travel agencies began acting as "brokers," buying frequent flyer award tickets from mileage-rich members and selling them to other travelers at discounted rates.[58] In response, the airlines began to police this market.[59] The airlines ultimately took two actions: they completely disqualified members who sold their award tickets[60] and they filed lawsuits against the brokers for tortious interference with business relations and unfair competition.[61]

Subsequently, the airlines made a number of changes in the way they administered the FFPs. Some airlines transferred responsibility for the programs from marketing departments to separate divisions established solely for the administration of FFPs.[62] Other airlines contracted out the programs and created an independent "frequency marketing" service industry.[63] The culmination of this independent organizational

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55. *See* Paul Grimes, *Practical Traveler: Air Fares for Bargain Hunters*, N.Y. TIMES, July 11, 1982, § 10, at 3. *See generally* Braden, *supra* note 1 (presenting history of FFP-ticket brokering and the legal ramifications of such activity).

56. Many consumers view these award tickets as "free." However, as the Chief Executive Officer of Kiwi International—the only airline not offering a frequent-flyer program—recently said: "Frequent travelers are fooling themselves into thinking they are getting something for nothing when they unnecessarily spend thousands of dollars to get one free trip." One low-priced airline suggested that corporations should force carriers to drop their FFPs and correspondingly lower their prices. Joel Sleed, *Business Muscles in on Frequent Flyer Bonuses*, ST. LOUIS POST-DISPATCH, Jan. 8, 1995, at 7T.

57. *See* Kleinfield, *supra* note 37, at D2.

58. *Id.*

59. *See* Boisseau, *supra* note 15, at C1. The IRS has also begun to police the selling of award tickets. *The Wall Street Journal* reported that the Central Florida IRS office audited and gave tax bills to employees who tried to profit by selling the FFP credits they received while traveling on company business. Ironically, the IRS set the value of the tickets by using the gray-market rate of 1.5 cents per mile. James S. Hirsch, *IRS Office in Florida Begins a Crackdown on Frequent Fliers*, WALL ST. J., Mar. 23, 1993, at A10.

60. Boisseau, *supra* note 15, at C1.

61. *See, e.g.*, American Airlines, Inc. v. Christensen, 967 F.2d 410 (10th Cir. 1992); *Transworld II*, 913 F.2d 676 (9th Cir. 1990); Northwest Airlines, Inc. v. Ticket Exch., Inc., 793 F. Supp. 976 (W.D. Wash. 1992).

62. *See, e.g.*, various program rules listing separate independent departments as responsible for the FFPs (on file with author).

63. *See* Len Egol, *Rewarding Loyalty: Identifying, Then Holding on to Loyal Customers is Database Marketing's Challenge for the '90s*, DIRECT, June 1991, at 23

movement was Air Miles International, which operated a frequent flyer program without an affiliated airline.[64]

Today, FFPs have further expanded the opportunities for their customers to earn miles.[65] Consequently, the programs have come to resemble the ubiquitous "green stamp."[66] This has resulted in a further dilution of the programs' marketing strength and an increase in the number of award travelers. In response to this development, the airlines again revised and strengthened the program rules effective February 1, 1995.[67] It is unclear what all the changes were, but some were obvious. For example, the number of miles needed for a domestic ticket award was increased by twenty-five percent.[68]

Most FFP members do not complain about the prospective changes to the programs; rather they protest the retroactive application of the new rules to miles earned under the old programs.[69] This retroactive application in effect "devalues" the credits that members have already accumulated in their mileage "bank accounts."[70] The members contend that these devaluations are unfair because they were unilaterally imposed

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(discussing consulting and services for frequency programs such as FFPs and hotel frequent-stay programs); *Frequency Marketing: How to Motivate Consumer Loyalty*, SALES & MKTG. MGMT., Sept. 1990, at 132 (discussing the frequency marketing industry).

64. Air Miles sought to replicate in the United States its successful programs in Canada and Great Britain, where miles are awarded for everything from groceries to eye glasses. *See* Eve Tahmincioglu, *Consumers Get Free Air Miles For Everyday Products*, UPI, Apr. 2, 1992, *available in* LEXIS, News Library, Arcnws File. This evolution shows the degree to which FFPs have strayed from their original purpose of creating *airline* brand loyalty.

65. For example, some pharmaceutical companies offer mileage to doctors who prescribe their drugs. Susan H. Fisher, *The Economic Wisdom of Regulating Pharmaceutical "Freebies,"* 1991 DUKE L.J. 206, 211 (1991).

66. *See* Sleed, *supra* note 56, at 7T.

67. *See Beat the Clock*, *supra* note 8, at 104. Some changes did not take place until April 1, 1995, such as the increase in the redemption rate for award travel to Hawaii. The airlines also delayed the increase in the redemption rate for international travel until April 1, 1995. *Id.*

68. Ed Perkins, *Tough Year For Frequent Fliers Coming Up*, SACRAMENTO BEE, Jan. 15, 1995, at TR3. Perkins notes that the "published cutbacks are bad enough—more miles [needed] for most free trips." *Id.* However, he sees the "hidden" cutbacks, such as reduced seat availability for award tickets, as the most damaging change for members. *Id.*

69. *See, e.g.*, Wolens v. American Airlines, Inc. 565 N.E.2d 258, 260 (Ill. App. Ct. 1990) [hereinafter *Wolens II*].

70. *See Beat the Clock*, *supra* note 8, at 104.

after the relationship or "deal" was established.[71] The frustration aroused by the 1988 devaluation spurred a number of lawsuits[72] and the recent rule changes have the potential to do the same.

III. CONSUMER CLAIMS UNDER STATE LAW

Throughout the era of regulation, federal tariffs governed the relationship between consumers and air carriers.[73] Thus, most problems concerning an airline fell under federal jurisdiction, while state law had only limited application to airlines.[74] When deregulation partially eliminated the tariff system,[75] some ambiguity developed regarding consumers' access to relief under state law.

A. *The ADA's Pre-emption Clause*

Congress anticipated the resulting confusion over the applicability of state and federal law. In drafting the ADA, Congress included provisions which prevented the states from re-regulating the industry.[76] The ADA's pre-emption clause, § 1305(a),[77] prohibits states from

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71. *Wolens II*, 565 N.E.2d at 260. Some airlines avoided the litigation problem following the 1988 revisions by continuing to honor previously earned credits according to the old program rules. *See* Greenberg v. United Airlines, 563 N.E.2d 1031 (Ill. App. Ct. 1990), *appeal denied*, 571 N.E.2d 148 (Ill. 1991). By adopting this logical and fair approach in conjunction with the current FFP modifications, the airlines could have avoided cumbersome litigation and limited the number of members' complaints. However, there is no evidence that any of the airlines are opting to pursue this approach with the 1995 changes.

72. *See, e.g., supra* note 12 (citing case resulting from the 1988 revisions).

73. United States v. Edwards, 602 F.2d 458, 462 (1st Cir. 1979). *See supra* note 24 (defining "tariffs").

74. Before deregulation, state law determined intrastate fares and violations of deceptive practices laws. Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 298-300 (1976). The dichotomy evident between courts that rule on FFP problems as contractual issues, *see infra* notes 82-134 and accompanying text, and those that rule on these problems as tariff issues, *see infra* notes 135-74 and accompanying text, demonstrates the inconsistent approaches taken by courts.

75. Congress implemented deregulation gradually during a five-year period, culminating in 1985 with the transfer of responsibility for the airline industry from the CAB to the DOT. *See* Klingaman, *supra* note 3, at 286.

76. Morales v. Trans World Airlines, Inc., 504 U.S. 374, *cert. denied*, 504 U.S. 979 (1992).

77. ADA, 49 U.S.C. app. § 1305(a) (1988).

directly or indirectly regulating the airline industry.[78] The clause expressly prohibits states from enacting or enforcing "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."[79]

The airlines assert that the ADA's pre-emption clause invalidates all consumer state-based causes of action.[80] Consumer advocates, including several state attorneys general, concede that Congress pre-empted direct regulation; however, they argue that airlines are still subject to state consumer-protection, tort, and contract laws.[81]

B. American Airlines, Inc. v. Wolens: *The First Round*

On January 18, 1995, the Supreme Court in *American Airlines, Inc. v. Wolens*,[82] began to clarify which state laws the ADA pre-empts and which laws consumers may still utilize.[83] In *Wolens*, consumers brought a class action suit against American Airlines for changing its frequent flyer program—AAdvantage.[84] The consumers brought the action under both the Illinois state consumer-protection statute[85] and common law contract theories.[86] The plaintiffs originally sought an

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78. *See infra* notes 82-134 and accompanying text (discussing pre-emption of state airline regulations).

79. 49 U.S.C. app. § 1305(a)(1) (1988). Congress re-enacted Title 49 of the U.S. Code in 1994 without intending to make substantive changes. Pub. L. No. 103-272, § 1(a), 108 Stat. 745 (1994). The new provision reads: "[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.A. § 41713(b)(1) (1995).

Of course, the pre-emption clause had no effect on federal statutes that still applied to airlines. *See, e.g.*, 49 U.S.C. app. § 1373(b)(1) (requiring airlines to observe their filed tariffs).

80. *Wolens II*, 565 N.E.2d at 261.

81. *See* Eric W. Maclure, *Morales v. Trans World Airlines, Inc.: Federal Preemption Provision Clips States' Wings on Regulation of Air Fare Advertising*, 71 N.C. L. REV. 905, 907 (1993) (citing *Morales*, 112 S. Ct. at 2041).

82. 115 S. Ct. 817 (1995).

83. *Id.* at 822-23.

84. *Id.* at 822. In 1988, American Airlines introduced a number of changes to the AAdvantage program. While American did not raise the award redemption levels, it added new restrictions on the award tickets, such as black-out dates and limits on seat availability. *Id. See* Michael Briggs, *Frequent Flier Suit OK'd*, CHI. SUN-TIMES, Jan. 18, 1995, at 1.

85. *Wolens VII*, 115 S. Ct. at 822.

86. *Id.*

injunction to prohibit the frequent flyer changes, as well as monetary and punitive damages.[87]

During the era of regulation the CAB would have had primary jurisdiction over this case.[88] However, deregulation had removed primary jurisdiction to the judicial system.[89] Thus, it was unclear whether any federal issues remained.[90] The U.S. district court held that it lacked jurisdiction, asserting that the plaintiff's well-pleaded complaint did not raise any federal issues.[91] The Illinois trial court accepted jurisdiction, but the pre-emption issue forestalled a hearing on the facts of the case.[92]

The Appellate Court of Illinois heard the pre-emption issue in an interlocutory appeal.[93] The court ruled that to provide the plaintiffs with any form of injunctive relief against the AAdvantage program would violate the ADA's pre-emption clause.[94] The court reasoned that an injunction would force the airline to act in a certain manner and thus would be tantamount to state regulation.[95] The court, however, allowed the contract and consumer fraud actions to proceed, holding that the FFP was not an "air service."[96] It found that the FFP program had "only a tangential relation to defendant's rates and services" and therefore was

87. *Id.* at 822 n.3; *Wolens II*, 565 N.E.2d at 260.

88. *See* Braden, *supra* note 1, at 729-30.

89. First Pennsylvania Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1122 (3d Cir. 1984) (holding that the validity of limited-liability terms in shipping contract became a purely judicial issue after deregulation).

90. *Wolens I*, No. 88-C8158, 1988 U.S. Dist. LEXIS 12026 at *3 (N.D. Ill. Oct. 24, 1988). There is no indication why the plaintiffs did not bring a federal tariff-based action. *See infra* notes 135-74 and accompanying text (discussing the tariff system and subsequent cases). One may speculate that the decision was a strategic move to avoid the federal court. *See infra* text accompanying notes 179-81 (discussing forum-shopping issues arising in FFP litigation).

91. *Wolens I*, 1988 U.S. Dist. LEXIS 12026 at *2. The airlines had removed the action to the federal district court on the ground that the complaint raised a federal question. *Wolens II*, 565 N.E.2d at 260.

92. *Wolens II*, 565 N.E.2d at 260. Once the case was remanded to state court, the airlines moved for dismissal arguing that 49 U.S.C. § 1305(a) pre-empted the plaintiffs' state-law claims. After denying its motion to dismiss, the court permitted the airline to file an interlocutory appeal. *Id.*

93. *Id.*

94. *Id.* at 261.

95. *Id.*

96. *Wolens II*, 565 N.E.2D at 262. *See also infra* note 97 (discussing "air services").

not expressly pre-empted by § 1305.[97] American appealed to the Supreme Court of Illinois,[98] which affirmed and allowed the consumer-fraud and contract claims to survive.[99]

American then sought a writ of certiorari from the United States Supreme Court.[100] While the case was *sub judice*, the Court decided *Morales v. Trans World Airlines, Inc.*,[101] which also concerned the pre-

97. *Wolens II*, 565 N.E.2d at 262. The court found that FFPs did not sufficiently impact what an airline did—flying—to be considered an "air service." *Id.* The Supreme Court subsequently overruled this finding. *See infra* notes 117-20 and accompanying text. There is an alternative argument that an FFP is not an air service because an FFP is not an "air carrier" under 49 U.S.C. § 1301(3) (1988). Proponents of this approach argue that FFPs have lost their uniquely airline nature through partnership expansion, and have become generic frequency-marketing services, much like Air Miles International. Accordingly, if an FFP were not an "air carrier," Title 49 would not apply and all state remedies would be available. Ironically, American Airlines made this argument to the DOT when it pleaded that FFP-program rules should not become part of the required federal tariff. The DOT stated:

> [F]requent flyer programs are broad-based marketing programs which extend far beyond air transportation. Members can earn mileage awards by renting cars or making credit card or catalogue purchases as well as by flying; the awards may be used to obtain discounts for hotels, cars, and merchandise as well as for air fares. . . . In these circumstances, [tariffs should not apply].

See American Ass'n of Discount Travel Brokers, DOT Order 89-9-25, Sept. 13, 1989, *available in* WESTLAW, 1989 WL 256037, at *2-*3 [hereinafter DOT Order 9/13/89]. This rationale seems even more compelling, whether used as a sword or a shield, as credit-earning opportunities have expanded. *See supra* notes 45-48 and accompanying text (discussing partnership and mileage-earning opportunities).

98. *Wolens III*, 589 N.E.2d 533 (Ill. 1992).

99. *Id.* at 536. The court also addressed the airline's contention that the state-law claims were implicitly pre-empted by the FAA § 102(a)(7), "which states that the prevention of unfair, deceptive, predatory, or anticompetitive practices in air transportation shall be considered in the public interest and in accordance with the public convenience." *Id.* at 535. The court noted that there was no evidence that Congress intended to give federal law exclusive authority. *Id.* Thus, the remaining actions were not implicitly pre-empted by FAA. *Id.* The court found it unnecessary to rule on American's argument that the Commerce Clause barred injunctive relief, because it held that § 1305(a) pre-empted injunctive relief. *Wolens III*, 589 N.E.2d at 536.

100. Wolens v. American Airline, Inc., 626 N.E.2d 205, 206 (Ill. 1993), *cert. granted*, 114 S. Ct. 1396 (1994), *aff'd in part and rev'd in part*, 115 S. Ct. 817 (1995) [hereinafter *Wolens V*].

101. 504 U.S. 374 (1992).

emption clause. As a result, the Court remanded *Wolens* back to the Illinois Supreme Court for further consideration in light of *Morales*.[102]

C. Morales *and Consumer Protection Laws*

Morales dealt with the issue of whether states could use consumer-protection laws to prohibit allegedly deceptive advertising by the airlines.[103] The Supreme Court ruled that § 1305's "relating to rates, routes, or services of any air carrier" language was to be interpreted broadly.[104] The Court analogized the ADA to the Employee Retirement Income Security Act of 1974 (ERISA) in which the relevant provision declares that all state laws are pre-empted "insofar as they . . . relate to any employee benefit plan."[105] Interpreting the ERISA pre-emption clause, the Supreme Court had held that any state law "relates to" an employee benefit plan where "it has a connection with or reference to such."[106]

The *Morales* Court applied this broad reading of the pre-emptory language and found that, because the states' advertising guidelines have a "significant impact" on air fares, § 1305 pre-empted the states' actions.[107] The Court also noted and agreed with the Department of Transportation (DOT) and Federal Trade Commission (FTC), who objected to the proposed use of the state consumer-protection laws because of their regulatory nature.[108] Thus, the Court ruled the consumer protection laws pre-empted.[109] The Court noted, however, that not all state laws would be pre-empted because some would have "too tenuous, remote, or peripheral" an impact on airline fares.[110]

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102. American Airlines, Inc. v. Wolens, 113 S. Ct. 32 (1992), *cert. granted*, 114 S. Ct. 1396 (1994), *aff'd in part and rev'd in part*, 115 S. Ct. 817 (1995) [hereinafter *Wolens IV*].

103. *Morales*, 504 U.S. at 378.

104. *Id.* at 383-84.

105. *Id.* at 383. *See also* ERISA, 29 U.S.C. § 1144(a) (1974).

106. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983), *rev'd in part and vacated in part sub nom.*, Delta Air Lines, Inc. v. Kramarsky, 650 F.2d 1287 (2d Cir. 1981).

107. *Morales*, 504 U.S. at 391.

108. *Id.* at 374.

109. *Id.* at 391.

110. *Id.* at 390 (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 100 n.21 (1983)).

D. Wolens v. American Airlines, Inc.: *The Second Round*

On their second hearing of *Wolens*, the Illinois Supreme Court maintained its earlier position and denied pre-emption of the consumer-fraud and contract claims under § 1305 despite the *Morales* decision.[111] The court seized upon the Supreme Court's language and ruled that FFPs were not an essential element of an airline.[112] Thus, the court held that the state law claims against FFPs related too tenuously or remotely to an airlines' rates, routes, or service to be pre-empted.[113]

American again sought a writ of certiorari from the United States Supreme Court.[114] The Court granted the writ and heard the case in the October 1994 term.[115] The Court also received an *amicus curiae* brief for the United States, by the DOT.[116] The Court, in a split decision on its second reading of the scope of § 1305, closely followed the reasoning of the United States' *amicus* brief and held that the ADA did, in fact, pre-empt state consumer-protection laws.[117] The majority reasoned that the consumer-protection laws were an intrusive form of regulation of an airline's business and were thus pre-empted.[118] However, the Court also held that the ADA did not pre-empt common law contract actions because Congress did not intend to block traditional remedies available at state law.[119]

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111. *Wolens V*, 626 N.E.2d 205, 208-09 (Ill. 1993).

112. *Id.* at 208. Specifically, the court stated: "Indeed, the airline industry functioned successfully for decades prior to providing incentives to its travelers in the form of frequent flyer programs." *Id.*

113. *Id.* at 208-09.

114. American Airlines, Inc. v. Wolens, 114 S. Ct. 1396 (1994), *aff'd in part and rev'd in part*, 115 S. Ct. 817 (1995) [hereinafter *Wolens VI*].

115. *See Aeronautics: Federal Pre-emption; State Law Challenges to Airline Frequent Flyer Programs*, 63 U.S.L.W. 3361 (Nov. 8, 1994).

116. Brief for the United States as Amicus Curiae in Support of Reversal, American Airlines, Inc. v. Wolens, 115 S. Ct. 817 (1995) (No. 93-1286), *available in* LEXIS, Genfed Library, Briefs File. The Court also received amicus curiae briefs supporting American's position from United Airlines, Air Transport Association of America, and the Chamber of Commerce of the United States. *Id.*

117. *Wolens VII*, 115 S. Ct. at 823-25.

118. *Id.* at 823.

119. *Id.* at 824.

The Court did not rule on the issue as defined by the Illinois Supreme Court, stating simply that the plaintiffs' claims *did* relate to rates as defined by *Morales*, regardless of whether an FFP was "essential" or not.[120] Instead, the majority focused on the "enact or enforce any law" language of § 1305.[121] The Court stated that the Illinois Consumer Fraud Act[122] is prescriptive, serving as a means to guide and police marketing practices.[123] Furthermore, by controlling marketing practices, the consumer statute does not simply give effect to agreements made by the airlines, but tries to control what the airlines may do in the promotion of their business.[124] Thus, by enforcing the consumer law, the state was treading upon regulatory ground that Congress specifically removed from state control.[125]

Though it barred the state consumer-protection claim, the Court allowed the contract claim to proceed.[126] The Court reasoned that Congress did not intend the ADA's pre-emption clause to be used as a shield against self-created contractual agreements.[127] The Supreme Court held, however, that the ADA's pre-emption clause will not allow courts to apply public policy considerations.[128] Instead, the courts must strictly confine their interpretations of the FFP rules to their language; the language represents the parties' bargain.[129] The dissenting justices argued that this restriction effectively prevents courts from using most of

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120. *Id.* at 823. The Court held that FFPs affected "rates" because the changes in FFPs essentially altered what American charged in miles for free tickets and upgrades. *Id.*

121. *Wolens VII*, 115 S. Ct. at 823. *See also* 49 U.S.C. app. § 1305(a)(1) ("[N]o state . . . *shall enact or enforce any law* . . . relating to . . . rates, routes, or services.") (emphasis added).

122. 815 ILL. COMP. STAT. § 505/2 (1992).

123. *Wolens VII*, 115 S. Ct. at 823.

124. *Id.*

125. *Id.* at 823-24. The Court noted that the DOT retains the authority to order an airline to cease and desist from unfair and deceptive practices. *Id.* at 824 n.4. *See also* 49 U.S.C. app. § 1381(a) (DOT's deceptive practice statute).

126. *Wolens VII*, 115 S. Ct. at 824.

127. *Id.* at 824. The court also noted that ruling in this manner gave effect to the FAA savings clause, which preserves "the remedies now existing at common law or by statute." *Id.* at 826.

128. *Id.* The Court read the ADA pre-emption clause and the FAA savings clause together to limit state regulation of airlines. *Id.*

129. *Wolens VII*, 115 S. Ct. at 826.

the modern tools for interpreting "unconscionable" or "adhesive" contracts.[130]

The case will now return to the Illinois trial court on the surviving contract claim. In the aftermath of their seven-year struggle on the pre-emption issue, the plaintiffs in *Wolens* and other FFP suits are still only beginning their legal battle against the airlines over unbargained-for changes in their FFPs.[131] It remains unclear how the courts will view these purely contractual issues. Claims against an airline's FFP still present many unresolved issues, including: (1) when the parties formed the FFP agreement; (2) what the terms of the contract are; and (3) what the damages are in the case of breach. This Note does not investigate the likelihood of consumer success under the state-law theory, but suggests that American Airlines will litigate the matter fully and will raise a number of sound defenses.[132] Therefore, it appears that a successful outcome for FFP members will be time consuming[133] and remains doubtful.[134]

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130. *Id.* at 833-34 (O'Connor, J., dissenting). The majority approach has the potential to defeat most frequent flyer claims because, without public-policy-based arguments, state courts cannot hold contracts or clauses "unreasonable" or "unconscion-able." Thus, because courts are only permitted to strictly interpret contract language, consumers will not have access to the consumer-protection laws that have developed over the past 50 years (*e.g.*, the theory of adhesion contracts). *Id.*

131. American Airlines has stated, "We. . . will vigorously defend on the [contractual] merits in state court." *Briggs*, *supra* note 84, at 1.

132. *See infra* note 134 (discussing plaintiffs' possible arguments and the defense's likely response). In *Wolens VII* the Court noted an argument which could prevail under the state contract-law claim. *Wolens VII*, 115 S. Ct. 817 at 826-27. This argument asserted that retroactive changes to FFPs should not be allowed despite an airline's reservation of the right to change the program because the reservation only applies to prospective changes. *Id.* While this interpretation seems plausible, it is a matter for the lower court to decide after a full hearing of the case.

133. Both parties have already fought for seven years on the pre-emption issue and there is no indication that the remaining contractual issues will be solved quickly or easily. *See* Briggs, *supra* note 84, at 1.

134. There are several precedent-backed arguments that American can be expected to make in litigating the contract-law claim. For example, American may argue that the contract at issue was not formed until the FFP issued an award certificate. This position is supported by *Transworld Airlines II*, 913 F.2d at 688 (implying that the courts assumed that the frequent-flyer contract was formed when the consumer received the award ticket). *See infra* notes 147-66 and accompanying text (discussing *Transworld II*). *But see* DOT Order 5/29/92, *supra* note 39, at *5-*6 (stating DOT view that the contract between the FFP and the consumer is formed when the consumer accepts by flying on the carrier). The airline may also argue that miles have no value. *See Transworld II*, 913 F.2d at 691-

In sum, the result of the series of *Wolens* cases to date is as follows: (1) The ADA pre-emption clause, § 1305, prevents courts from applying state consumer-protection laws to resolve a dispute between an airline and an FFP member, and (2) courts may adjudicate such a claim using state contract law. However, (3) courts may not resort to recent innovations in contractual interpretation and construction, such as public-policy-based consumer-protection laws.

IV. AN ALTERNATIVE FEDERAL CLAIM

Consumers may have a second means to challenge unreasonable changes in airlines' FFPs. Prior to deregulation, claims against airlines were resolved primarily by the CAB.[135] However, after exhausting administrative channels, parties turned to the federal courts and federal common law.[136] Before deregulation, issues involving airlines were linked inseparably with the mandated tariffs which governed every aspect of an airline's relationship with the flying public.[137]

The tariff system, administered initially by the CAB, and subsequently by the DOT, was Congress' primary means to control the airline industry.[138] Under the tariff system, airlines were required to have their consumer agreements, "tariffs," pre-approved by the agency.[139] After administrative review and approval, the tariffs became the sole basis of the airline-passenger relationship.[140] The approved tariffs had the force of law; airlines were not allowed to make agreements with

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93 (holding that award tickets have no value, because they only represent unsold seats). *But see* American Airlines, Inc. v. Christensen, 967 F.2d 410, 416-17 (10th Cir. 1992) (holding that despite an inability to assess the direct damage of a misused award ticket, some value does exist); United States v. Loney, 959 F.2d 1332 (5th Cir. 1992) (holding that frequent flyer credits are items of value).

135. *See also* Maclure, *supra* note 81, at 906.

136. *See, e.g.,* Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, 1313 (9th Cir. 1977).

137. 49 U.S.C. app. § 1373 (1982) (requiring airlines, under FAA § 403, to file with the CAB all rules and regulations in connection with their air service).

138. *See* Braden, *supra* note 1, at 729-30.

139. 49 U.S.C. app. § 1373 (1988).

140. United States v. Edwards, 602 F.2d 458, 462 (1st Cir. 1979) (citing Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401, 1403 (2d Cir. 1969) for the holding that tariffs are the exclusive basis of the airline-passenger relationship).

passengers inconsistent with the tariffs.[141] Passengers could challenge the administrative determination that the tariffs were valid in federal court.[142] If a court found that a tariff was "unreasonable or unjustly discriminatory or unduly preferential or prejudicial,"[143] the tariff was declared void and unenforceable.[144]

In the post-regulation era, Congress continues to require the airlines to file tariffs for many aspects of their relationship with consumers.[145] As a result of the ADA, jurisdiction to review the tariffs has fallen to the federal courts.[146] A disgruntled FFP member may have an alternative basis for a suit against an airline by bringing a federal claim based on the reasonableness of the airline's filed tariff.

In *Transworld Airlines, Inc., v. American Coupon Exchange, Inc.*,[147] the Ninth Circuit addressed an FFP question based on the airline's tariff and, thus, applied federal law.[148] *Transworld* involved a suit brought by the airline against American Coupon Exchange, a

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141. *Id.* at 462 n.2.

142. Klicker v. Northwest Airlines, Inc., 563 F.2d 1310, 1313 (9th Cir. 1977) (noting that the determination of a tariff's validity is a judicial question requiring the application of federal common law). *See also* Braden, *supra* note 1, at 729.

143. First Pennsylvania Bank v. Eastern Airlines, Inc., 731 F.2d 1113, 1120 (3d Cir. 1984).

144. *See, e.g.*, Klicker, 563 F.2d at 1312 (citing Hughes Air Corp., CAB Order No. 74-12-124, 40 Fed. Reg. 1121, 1122 n.5 (1975), for the holding that a tariff which exempts an airline from liability for negligence is against public policy and void).

145. *See, e.g.*, 49 U.S.C.A. § 41504(a) (1995). *See also* 14 C.F.R. § 221.3(a) (1995) (requiring airlines to file tariffs).

146. *First Pennsylvania Bank*, 731 F.2d at 1120 (noting that the CAB no longer has primary jurisdiction in validity of tariff cases). The elimination of CAB's jurisdiction "merely eliminated the need to exhaust administrative remedies before resorting to the judicial remedies at common law." *Id.* at 1121.

147. 913 F.2d 676 (9th Cir. 1990). The lower court reported the underlying case as "*Trans World Airlines, Inc. v. American Coupon Exchange, Inc.*" Trans World Airlines, Inc. v. American Coupon Exchange, Inc., 682 F. Supp. 1476 (C.D. Cal. 1989), *aff'd in part and vacated in part*, 913 F.2d 676 (9th Cir. 1990) [hereinafter *Transworld I*]. For consistency, this Note will follow the Ninth Circuit and refer to the plaintiff as "*Transworld*," not "*Trans World*."

148. Transworld Airlines, Inc. v. American Coupon Exchange, Inc., 913 F.2d 676, 680-81 (9th Cir. 1990) [hereinafter *Transworld II*]. While the variety of allegations, ranging from fraud to antitrust, complicated the jurisdiction issue, the court considered the determination of the legal effect of a federal tariff restricting the transfer of awards to be an independent matter of federal jurisdiction. *Id.*

broker in frequent flyer award tickets.[149] Specifically, the court focused on whether an inalienability clause within the FFP rules was against public policy.[150] The Ninth Circuit found that the FFP inalienability or "no-sale" rule was both a properly filed tariff and a part of the FFP's program rules.[151]

The circuit court began its analysis in agreement with the court below.[152] The Ninth Circuit noted that deregulation of the airline industry had no effect on the legal force of a properly filed tariff.[153] The court further noted that federal regulations continued to require the airlines to file tariffs[154] and also continued to prohibit the airlines from forming contracts inconsistent with their published tariffs.[155] The court thus concluded that because deregulation did not alter the legal force of a validly filed tariff, courts should continue to read the tariffs strictly and narrowly.[156] The court stated that, "[A] tariff. . . is not a mere contract. It is the law."[157]

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149. *Id.* at 679. See *supra* notes 55-61 and accompanying text for a discussion of frequent flyer award ticket brokers. The broker filed a counterclaim alleging tortious interference with business relations and antitrust violations. *Transworld II*, 913 F.2d at 678, 697-98.

150. *Id.* at 685.

151. *Id.* at 689. The airline filed the rules with the DOT pursuant to 14 C.F.R. § 221.3 (1982). *Transworld II*, 913 F.2d, at 678. After this case, the DOT clarified that airlines do not need to file their general program rules. They must, however, file FFP-award-redemption rates as a fare tariff. See *infra* notes 168-71 and accompanying text for a discussion of the DOT's order and its ramifications.

152. *Transworld II*, 913 F.2d at 681.

153. *Id.*

154. *Id. See also* 14 C.F.R. § 221.3(a) (1995) (stating that a carrier has a duty to file tariffs).

155. *Transworld II*, 913 F.2d at 681 (citing 14 C.F.R. § 221.3(b), which provides that, "[n]o air carrier . . . shall . . . receive a greater or less or different compensation for air transportation or for any service in connection therewith, than the rates, fares and charges specified in its currently effective tariffs"). The court assumed that the DOT required airlines to file all their FFP program rules as tariffs. *See Transworld I*, 682 F. Supp. at 1476.

156. *Transworld II*, 913 F.2d at 681.

157. *Id.* (quoting Carter v. American Telephone & Telegraph Co., 365 F.2d 486, 496 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008 (1967)). *But see* 49 U.S.C. app. § 1381(b) (1988) (allowing airlines to "incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage" to the extent authorized by the DOT and consistent with the filed tariff).

Having agreed with the district court on these basic issues, the Ninth Circuit turned to address the greater question in a fundamentally different way.[158] The Ninth Circuit first noted that the lower court began its discussion with the assumption that the frequent flyer award tickets were property; thus, the policy against restraints on alienation applied.[159] The circuit court challenged this assumption and asserted that the award tickets were not "property," but rather "rights of contract."[160] Consequently, the presumption against inalienability restraints did not apply and no investigation into the tariff's validity was necessary.[161]

The Ninth Circuit did not investigate whether these restraints, *as contractual limitations*, were reasonable.[162] It noted that within the realm of contract law there is a public policy against agreements that unreasonably restrain trade.[163] However, the Ninth Circuit did not delve into whether this unreasonableness theory would suffice to make the no-sale clause invalid, because the parties had neither raised nor argued it.[164] The court thus concluded its analysis and held that,

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158. 913 F.2d at 685-89. The Ninth Circuit first dismissed the district court's finding that the restraints were reasonable. *Id.* at 685. The circuit court held that the district court lacked the factual development necessary to make the conclusion, as a matter of law, that the no-sale restraints were reasonable. *Id.* The Ninth Circuit, however, proceeded to affirm the lower court's ruling on different grounds. *Id.* (citing Fidelity Fin. Corp. v. Federal Home Loan Bank, 792 F.2d 1432, 1437 (9th Cir. 1986), *cert. denied*, 479 U.S. 1064 (1987)).

The court theorized that the FFP had to balance the cost of the awards against the marketing benefit of the program. The court found that if the restraint on alienation were removed, the value of the award tickets would differ from the value on which the airline based its original cost-benefit calculation. Thus, the court held that the airline had reasonable justification for the restraint. 913 F.2d at 685.

159. *Transworld II*, 913 F.2d at 682, 685 (citing *Transworld I*, 682 F. Supp. at 1481). *See also* RESTATEMENT (SECOND) OF PROPERTY § 4.1(1) (1983) (noting that the common law of property condemns disabling restraints on donative transfers for any period of time).

160. *Transworld II*, 913 F.2d at 688-89. The court analogized to old discount railroad tickets and found that the award tickets were more appropriately categorized as "contracts." *Id.* at 686 (citing Bitterman v. Louisville & Nashville Ry., 207 U.S. 205 (1907) (holding that non-transferable discount railroad tickets were contracts; thus restraints against alienation were not repugnant to public policy)).

161. *Id.* at 688.

162. *Id.* at 689.

163. *Id.* (noting RESTATEMENT (SECOND) OF CONTRACTS §§ 186-188 (1981) (stating a general public-policy argument against contracts that directly or unreasonably restrain trade)).

164. *Id.* Some commentators have severely criticized the court's unwillingness to rule on the validity of the contractual inalienability. *See* Klingaman, *supra* note 3, at 338 ("By

because the instruments at issue were contractual in nature, the airline's tariff was not a per se violation of public policy.[165] The airline was free to enforce its tariffs against holders of brokered award tickets.[166]

Courts subsequently faced with this issue have followed the Ninth Circuit's decision and rationale.[167] However, the DOT, as the regulating agency, mooted a large portion of *Transworld* in September 1989.[168] The DOT issued an order which stated that it would no longer require the airlines to file FFP rules for approval as tariffs.[169] In effect, this order removed the program rules from classification as a tariff and thus avoided its strict binding nature.[170] However, the DOT still required the airlines to file, as a tariff, the rates at which consumers

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deciding the case in that manner, the court avoided the question of whether or not the restrictions on transferability are 'reasonable.' It is uncertain whether another hearing on this issue before a different tribunal would follow this hollow precedent."). However, subsequent courts have completed the analysis left unfinished in *Transworld II* and have ruled that the restraints, as contractual limitations, are not against public policy. *See* American Airlines, Inc. v. Christensen, 967 F.2d 410, 414-15 (10th Cir. 1992) (examining the reasonableness of a no-sale rule as a contractual limitation and finding no violation of public policy).

165. *Transworld II*, 913 F.2d at 689.

166. *Id.*

167. *See, e.g., Christensen*, 967 F.2d at 415 (citing *Transworld II* favorably and also ruling on the validity of the tariff as contractual restraint).

168. *See* American Airlines, Inc. v. Platinum World Travel, 737 F. Supp. 627, 628 (D. Utah 1990) (modifying earlier decision in response to the DOT's clarification), *modifying* 717 F. Supp. 1454 (D. Utah 1989), *aff'd* 769 F. Supp. 1203 (D. Utah 1990), *aff'd sub nom.* American Airlines, Inc. v. Christensen, 967 F.2d 410 (10th Cir. 1992). *See also* DOT Order 9/13/89, *supra* note 97. Though the DOT issued the order in September, 1989, the first case to recognize its impact was not confirmed until 1992. *Christensen*, 967 F.2d at 418.

169. DOT Order 9/13/89, *supra* note 97, at *1.

170. *Platinum World Travel*, 737 F. Supp. at 628. Airlines are required to file "all rates, fares, and charges for air transportation," but this is limited to the "rules, regulations, practices, and services" *required by the DOT's regulations.* 49 U.S.C. app. § 1373(a) (1988) (emphasis added). Because the DOT does not require airlines to file FFP rules, the rules remain part of a private contract between the carrier and passenger. *See* DOT Order 9/13/89, *supra* note 97, at *2. The DOT's primary rationale for not requiring airlines to file rules as a tariff was that FFPs are "broad based marketing programs which extend far beyond air transportation." *Id.* This rationale, promoted by the airline, seems to contradict the finding in *Wolens* that FFPs are closely related to "air rates and service." *See supra* note 97 and accompanying text (noting airlines' belief that FFPs are closely related to air rates and services). Because FFPs are not filed as tariffs, determining the validity of the "program rules" falls to the states.

may "buy" FFP awards with their accumulated miles.[171] Therefore, as a federal tariff concerning interstate air rates, the cost of FFP awards in FFP miles remains a justiciable federal issue. *Transworld's* rationale remains applicable for this smaller issue.

For current FFP members upset with program changes, *Transworld* and the DOT order leave a small area within federal law for a suit based on an airline's tariff. While consumers may no longer challenge the propriety of specific program rules utilizing a tariff-based argument, they may still challenge the reasonableness of the mileage cost of award bonuses in this manner.

It does not appear that the courts will be amenable to these tariff-based challenges.[172] However, if the issue ever arises in a context distinct from the questionable business practices of the defendants in *Transworld*[173] and is combined with the mounting public outrage at "devalued" credits,[174] the possibility of judicial activity increases.

V. THE SCOPE OF CONSUMER CLAIMS AGAINST FFPS IN THE SHADOW OF *WOLENS* AND *TRANSWORLD*

A consumer feeling cheated by the recent changes to her FFP has limited options. Because Congress[175] and the DOT[176] thus far have

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171. *See* DOT Order 9/13/89, *supra* note 97, at *3.

172. *See Transworld II*, 913 F.2d at 689 (refusing to find an inalienability clause "unreasonable"); *Christensen*, 967 F.2d at 415 (holding in accordance with *Transworld II*); Northwest Airlines, Inc. v. Ticket Exchange, Inc., 793 F. Supp. 976, 978 (W.D. Wash. 1992) (basing its holding on *Transworld*).

173. The defendants in *Transworld* were coupon brokers found to be tortiously interfering with the business relationship. *Transworld II*, 913 F.2d at 689-93. According to the court, the defendants' conduct, if not criminal, rose at least to the "unclean hands" level. *Id.*

174. *See supra* notes 10-11 and accompanying text.

175. Congress also refused to control any part of FFPs. In 1987, a legislative proposal by Senator Lautenberg added an amendment to the Airline Passenger Protection Act of 1987, S. 1485, 100th Cong., 1st Sess. (1987), that prevented changes to FFPs that would injure the value of members' credit. *See* 133 CONG. REC. S15,525 (1987). However, due to pressure from the airline industry, Congress did not enact the legislation. *See* Perry Flint, *Fine Print Fares; Airline Advertising of Fares,* AIR TRANSP. WORLD, Oct. 1989, at 2, *available in* LEXIS, News Library, Arcnws File. Congress subsequently dealt with the issue in a peripheral and personal manner. In 1995, as part of the *Contract with America* legislation, the Senate banned its members from using frequent-flyer credit earned on official business for personal travel. However, the House refused to implement similar rules. *See* Becky Beyers, *Frequent-Flier Perks Divide Congress*, USA TODAY, Jan. 20, 1995, at 2B.

been unwilling to exert control over the programs,[177] a disgruntled member is left to pursue immediate relief within the court system.[178]

While the litigation climate is not particularly receptive to these challenges, small doors of opportunity remain open. Adhering to principles discussed in *Wolens*, a party may bring a state-law contract action.[179] In addition, a party may bring a federal-law tariff claim, similar to the one approved in *Transworld*.[180] Furthermore, these claims may be brought simultaneously. Thus, the FFP member must first decide which forum will be most sympathetic to consumer causes.[181]

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176. *See* DOT Order 5/29/92, *supra* note 39 (discussing the DOT's refusal to use its authority under deceptive practices rules to restrict changes to FFPs); DOT Order 9/13/89, *supra* note 97 (discussing the DOT's refusal to require airlines to file program rules as part of the tariff). Observers have criticized the DOT's unwillingness to act on behalf of consumers and its tendency to bow to industry demands in this area. *See* Flint, *supra* note 175, at 2.

177. The executive branch has also failed to provide controls. In 1993, the report from the National Commission to Insure a Strong Competitive Airline Industry, convened by President Bill Clinton, did not contain recommendations on FFP legislation despite early suggestions for such. *See Airline Commission Begins Work, Two Weeks of Meetings Announced,* DAILY REPORT FOR EXECUTIVES, May 24, 1993, at 98, *available in* LEXIS, News Library, Arcnws File (announcing FFPs as item to be reviewed); *Airline Panel's Recommendation Not Likely to Advance as One Bill*, DAILY REPORT FOR EXECUTIVES, Sept. 10, 1993, at A-174, *available in* LEXIS, News Library, Arcnws File (noting disappointment by observers that the Commission failed to address FFPs in its report to the President and recommended legislation).

178. Perhaps the most effective action a consumer may take is to switch to a carrier offering a more lucrative plan. Because a number of carriers are not implementing all of the 1995 changes, there is some indication that carriers may use FFP membership as a means to compete. *See* Perkins, *supra* note 68, at TR-3 (noting that American West, TWA, and Northwest are not changing their FFP award levels). However, the carriers making the fewest changes in the rules are either in bankruptcy protection or are immediately out of bankruptcy. Thus, a consumer may be forced to choose between a stable carrier with a stingy program or an unstable carrier with a generous program. *Id.* Among the larger carriers there are no significant differences in the FFP changes. *Id.* Thus, a consumer has limited options to change to preferred carriers. Furthermore, most members have miles in one program and the transaction cost of switching to a new program would negate any advantage.

179. *See supra* notes 73-134 and accompanying text (discussing the ADA's pre-emption clause and various courts' treatment of state claims).

180. *See supra* text accompanying notes 135-74 (discussing various courts' treatment of federal tariff claims).

181. A discussion of which forum may be the most advantageous to consumer claims is beyond the scope of this Note. The appropriate choice of forum varies greatly with a number of factors and is better predicted by local counsel.

The FFP member must next consider, given the deregulation statutes and court decisions, what claims still theoretically remain. The ADA pre-emption clause,[182] interpreted in light of the policies behind deregulation,[183] effectively limits any suit brought to retrospective breach of contract actions. Claims which seek to limit future changes in FFPs will not succeed in state or federal courts.

FFP members may initiate state contract claims.[184] However, because the state courts may not apply public policy arguments,[185] they may only enforce the strict terms of the program rules. All FFP rules contain a clause that reserves the airlines' right to change the program at any time.[186] Therefore, strict interpretation of this clause will most likely defeat the majority of contract suits.

Federal courts may rule on the validity of an airline's tariff.[187] However, because the DOT does not require FFPs to file program rules,[188] the courts may not hear cases on the propriety of FFP program rules. Nevertheless, the DOT does require the airlines to file the FFP-award-redemption rates as tariffs[189] and the courts may rule on the validity of these tariffs.

The cumulative effect of deregulation and the subsequent FFP cases is essentially to limit consumers to small retrospective suits that challenge the validity of an airline's award-redemption-rate tariff.

VI. DEVALUATION OF FFP CREDIT IS AGAINST PUBLIC POLICY

182. *See supra* notes 76-134 and accompanying text.

183. *See supra* text accompanying notes 28-29 (discussing the theoretical and historic reasons for deregulating the airline industry).

184. *See supra* text accompanying notes 114-27 (discussing *Wolens VII* and the Supreme Court's holding that allowed the case to proceed on the state contract claims).

185. *See supra* notes 128-29 and accompanying text (discussing the Court's holding that the ADA's pre-emption clause prevents courts from applying state public-policy-based arguments in interpreting FFP contracts). Furthermore, a number of other contractual problems also exist that make these claims very problematic, despite the inability to use public-policy-grounded interpretative tools. *See supra* text accompanying notes 131-32.

186. *See supra* text accompanying note 40.

187. *See supra* notes 135-74 and accompanying text (discussing the judicial review of a tariff's propriety by the court system).

188. *See supra* text accompanying notes 167-70.

189. *See supra* text accompanying note 171.

FFPs represent sources of real value to both consumers and airlines.[190] Consumers, in essence, buy "free" tickets by paying higher standard fares and airlines obtain consumer loyalty for an otherwise indistinguishable product.[191] FFP rules, as contracts, are adhesive in nature: the weaker party is forced to accept the unseen terms, and the stronger party reserves all the rights.[192] Retroactive changes to FFPs unfairly devalue the credits that consumers have paid for and that the airlines have agreed to give.[193] This is not the reasonable expectation of an FFP member, and thus, is unfair.

Furthermore, paying for a ticket with one's earned mileage differs from paying for a ticket with cash. When using cash, a consumer holds the money and can shop the competitive market. If an airline raises its rates, the consumer may move to another carrier offering a lower price. This is the essence of competition and represents the goal of airline deregulation. However, when using FFP credit to "buy" a ticket, the airline holds the "money" and the member can only shop at a single store. Thus, if an airline raises its FFP award-redemption rates, the consumer is forced to buy at the higher "price" or do without. In essence, this is a monopoly and against the public policy of free markets.

Courts encountering lawsuits over changes to FFPs should base their rulings on public policy. This would limit the cases courts could hear because the Supreme Court has effectively pre-empted public-policy-based state claims, and the DOT has narrowed the application of the federal tariff system to FFPs. Thus, the courts may apply a public-policy rationale only to federal claims against the validity of the airline's tariff that governs the redemption rate of FFP awards. Changes which devalue FFP member credits are repugnant to public policy, because they frustrate members' reasonable expectations of the bargain, and do not allow competitive forces to shape the market. Thus, courts should hold that changes which depreciate the value of previously earned credits are "unreasonable."

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190. *See supra* notes 15-19 and accompanying text (discussing the valuation of FFP awards by the IRS and the courts in criminal trials and divorce settlements).

191. *See supra* text accompanying notes 7 and 35 (discussing the importance of FFPs in the post-deregulation era as a means of differentiating products and establishing loyalty).

192. *See supra* notes 52-54 and accompanying text (discussing airlines' initial changes that adversely impact consumers by diminishing the value of their miles and limiting the availability of seats and flying dates).

193. *See supra* notes 10-11 and accompanying text.

Pursuant to this approach, airlines would still be allowed to change their programs prospectively to ensure that their operations remain competitive and profitable. Furthermore, passengers would be able to enjoy that which they bargained and paid for. By following this course, courts would protect consumers' real interest in FFPs while avoiding re-regulating the industry and driving airlines into unprofitable ventures.

VII. CONCLUSION

Since 1978, Congress has taken a hands-off approach to the airline industry and has passed what little power remains to the DOT. The DOT, in turn, has refused to regulate FFPs directly[194] or indirectly.[195] Thus far, courts have handled FFP cases inconsistently. State courts may enforce the strict terms of the FFP agreements, but are prohibited from reading in any policy-based consumer-protection considerations. Federal courts, fearing re-regulation, have exercised wide discretion and allowed pure market forces to shape the contours of the airline industry.

After fifty years of tight federal regulation, Congress cut the airline industry loose. The legislative, administrative, and judicial branches have tried to make up for the years of close control by allowing completely unchecked competition. One positive outgrowth of this era was the development of frequent flyer programs, which allow airlines to distinguish their services. However, the unrestrained competition has also left many consumers unprotected in an overly competitive industry. Now, nearly twenty years after deregulation, it is time to begin to protect consumers again. By ruling against the validity of retrospective changes to frequent flyer award levels, the federal courts can begin to realign the balance between competition and consumers.

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194. *See supra* note 176 (noting the DOT's refusal to place direct controls on FFPs through use of deceptive measures statutes).

195. *See supra* text accompanying notes 168-70 (discussing the DOT Order clarifying that airlines do not need to file FFP rules as tariffs).

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