District Court Dismisses Statewide Consumer Protection Class Action

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Class Action Update

The New Jersey federal district court has granted our client DHL Express (USA) Inc.'s (DHLE's) motion to dismiss the First Amended Complaint (FAC) in a putative statewide class action and denied leave for further amendment. *Martin v. DHL Express (USA), Inc.*, Civ. Action No. 3:21-cv-13363 (D.N.J. 2022).

Plaintiff Martin purchased goods from an overseas merchant in Holland. The merchant contracted DHLE to ship the goods to Martin, who resides in New Jersey. The goods are subject to United States import duty, which DHLE charges the recipient after sending a notification email stating that the goods will be returned if the duty is not paid. The notification further directs the recipient to DHLE's website for additional information. However, DHLE also allegedly includes an additional "undisclosed uniform $17 service charge" as part of the duty charge. According to the FAC, the $17 charge is "an additional, undisclosed, and totally unauthorized source of profit." The "service charge" is what DHLE calls an "Advance Payment Surcharge," which is applied whenever DHLE prepays any customs duty, excise duty and/or import tax on imports and neither the importer nor receiver of the goods has a DHLE account. Once the recipient pays the cost of the duty—including the service charge—DHLE sends a second email confirming the payment and delivers the goods.

Plaintiff's initial complaint, which DHLE removed from state court, included claims for violations of consumer protection statutes, common law fraud, breach of the implied covenant of fair dealing, and unjust enrichment and sought treble damages, injunctive relief, statutory attorneys' fee and costs. We moved to dismiss, arguing these claims are preempted by the Airline Deregulation Act, 49 U.S.C. § 41713(b)(4)(A) (ADA), and the Federal Aviation Administration Authorization Act, 49 U.S.C. § 14501(c)(1) (FAAAA). These federal statutes preempt state laws "related to a price, route, or service" of any air or motor carrier like DHLE. Congress intended these preemption provisions to prevent a pastiche of state laws undoing federal deregulation with regulation of their own. The Supreme Court has held that claims sounding in fraud or misrepresentation that have a "connection with or reference to airlines routes and services" are barred.

In response, plaintiff filed the FAC, dismissing these claims, and instead pleading a single cause of action for breach of contract. Plaintiff alleged that DHLE's emails and website constituted a contract, which the carrier breached by charging recipients more than the import duty. Plaintiff relied on the Supreme Court's decision in *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 228-29 (1995), which held that terms of a contract are "privately ordered obligations" that do not amount to a State's enactment or enforcement of any law, rule, regulation, standard, or other provision and thus do not implicate preemption.

In its short, well-reasoned opinion, the district court essentially adopted all of our arguments, and rejected plaintiff's claim that imposing the service charge created a contract and an exception to the preemption doctrine. The court noted that the issue was whether the remaining cause of action sounded in breach of contract or fraud. The court determined that a

"sensible reading" of the FAC shows DHLE at most misrepresented the duty by including the allegedly undisclosed service fee. The court found implausible that "the hidden service fee" breached DHLE's agreement to deliver plaintiff's package. The court noted that the FAC essentially alleged that "DHLE made a false representation about the nature of the duty for which it demanded payment; Martin relied on that false representation in paying the fee; and Martin suffered damages, specifically the $17 service charge." Viewing DHLE's conduct as "more akin" to fraud, misrepresentation or unjust enrichment, the court held:

In sum, Martin's claim boils down to DHLE's alleged misrepresentation of the nature of its "duty" charge which one would deem to be a tax imposed by the United States; and instead of a tax and service fee. The service fee charged as part of the duty is plainly "related to a price, route, or service of" DHLE. 49 U.S.C. § 41713(b)(4)(A); 49 U.S.C. § 14501(c)(1). Likewise, state common law claims of fraud and unjust enrichment are barred by the "broad pre-emptive purpose" of the ADA and FAAAA, and with Congress' intent to deregulate the airline and trucking industries.

Relying on our post-argument submission, the court noted that, despite what it deemed the "draconian preemptive provision," plaintiff can obtain "some relief" before the Department of Transportation, which Congress gave general authority over common carriers. However, this is limited to civil penalties up to $1,000 per violation, but does not include class relief.

The court's opinion leaves little room for an appeal.

It is common knowledge that motions to dismiss are rarely granted outright in class actions, as courts are remiss to deny plaintiffs discovery, especially where the claims appear meritorious. This hesitancy was evident during the oral argument, when the district court noted that DHLE could be imposing the fee on millions of consumers, who might otherwise be remediless without a class action. Here, our deep strategic analysis, meticulous research, and compelling advocacy gave the court no recourse but to reject the remaining claim.

Companies are well advised to have experienced consumer protection counsel conduct a liability assessment of their consumer-facing communications and websites, especially regarding "hidden" fees.