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CONSERVATION FORCE ET AL. v. DELTA AIR LINES: THE LEGALITY OF AN AIRLINE BAN ON BIG GAME HUNTING TROPHIES

Daniel Spivey*

I. INTRODUCTION

Big game hunting is a sport that has been around for hundreds of years. In today’s day and age, hunters are willing to pay exorbitant amounts of money in order to obtain hunting permits to legally hunt in Africa. For the most part, this is a practice that has existed peacefully for many of years. However, the practice was brought to light in July 2015 when a hunter, from Minnesota, shot and killed one of Zimbabwe's most celebrated lions.\(^1\) In response, the sport was made very well known and the public was outraged, not only with the hunter, but also, with the sport in general.\(^2\) Soon enough, pressure was applied on large corporations to try and curtail the practice in any way that they could.\(^3\) The public began to look to airlines for a response because the airlines were the ones who were transporting the trophies back to the U.S. As a result, all three of the U.S. legacy carriers – American, Delta, and United – decided to ban the transport of big game hunting trophies aboard their airplanes.\(^4\)

Ever since the airlines were deregulated with the Aviation Deregulation Act of 1978, it has become much harder to challenge an airline on one of its services or lack thereof.\(^5\) However, a group of Plaintiffs are attempting to challenge the Delta Airlines ban on big game hunting trophies in the Northern District of Texas. This is an issue of first impression for the court because there are no cases that challenge the legality of an airline's embargo on a specific piece of

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\(^2\) Id.

\(^3\) Id.

\(^4\) Id.

cargo in the modern era. This Article will discuss the various hurdles that the Plaintiffs will have to overcome in order to convince the Court that Delta acted unlawfully.6

II. BACKGROUND

Cecil the Lion was a male Southwest African lion that lived primarily in the Hwange National Park in Matabeleland North, Zimbabwe.7 The lion was a major attraction at the park and was being tracked by the University of Oxford as part of a larger study.8 On July 2, 2015, Cecil the Lion was hunted and killed by Dr. Walter Palmer.9 In the days after news broke of the killing, there was large public outcry over the sport-hunting industry as a whole.10 One of the industries that felt pressure from the public was the aviation industry because the airlines would commonly transport the hunting trophies back to the United States.

In response to this public pressure, on August 4, 2015, all three major U.S. airline carriers decided to ban the transport of lions, leopards, elephants, rhinoceros’ and buffalo killed by trophy hunters.11 Delta Airlines’ ban was the most significant because it is the only American airline to fly directly between the United States and South Africa.12 Shortly after the Cecil the Lion incident, but prior to any U.S. airline ban, South African Airways had placed its own embargo; however, this ban was lifted two weeks later after agreeing to tighter inspections.13 In the international community, airlines such as British Airways, KLM, Singapore Airways, Lufthansa, Air Emirates, Iberia Airlines, IAG Cargo, and Qantas had already implemented bans by the time that Delta decided to institute its ban.14

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6 This Article does not address standing or damages.
8 Id.
9 Id.
10 Loki, supra note 1.
12 Id.
13 Id.
There is little question that Delta Airlines is a “common carrier.” A common carrier is one that holds itself out to the public as being willing to transport persons or property for compensation, to the extent that its facilities permit.\textsuperscript{15} Commercial airline companies flying passengers for hire on regular schedules over definite routes have ordinarily been deemed common carriers.\textsuperscript{16} The controlling factor when determining whether a carrier is a “common carrier” is whether the carrier holds out its profession to the public generally, by words or by course of conduct, as to the services offered or performed for compensation, and undertakes to carry for all people indifferently.\textsuperscript{17}

As a common carrier, there are two ways in which Delta Airlines is regulated: through federal statute, such as the Airline Deregulation Act of 1978 (“ADA”) or the Federal Aviation Act of 1958 (“FAA”), and via federal common law. In order for a plaintiff to bring a claim against a common carrier, they must have a right under federal statute or federal common law. The Supreme Court has made it clear that federal common law causes of action continue to exist when a federal rule of decision is “necessary to protect uniquely federal interests.”\textsuperscript{18} The court in \textit{Sam L. Majors Jewelers v. ABX, Incorporated}, found that when deregulating the airlines under the ADA, Congress chose not only to repeal federal common law in “clear” and “explicit” language but that it chose the opposite course.\textsuperscript{19} The ADA includes an express provision that preserves common law remedies.\textsuperscript{20} In enacting the ADA, Congress included a savings clause that provided “[n]othing in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Chapter are in addition to such remedies.”\textsuperscript{21} Thus, the court validated the idea that federal common law can apply to common air carriers. The ADA’s preemption provision states that:

\begin{quote}
[e]xcept as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2
\end{quote}

\textsuperscript{16} 73 A.L.R.2d 346, 2 (1978).
\textsuperscript{17} Id. at 3a.
\textsuperscript{18} Id. at 928.
\textsuperscript{19} Id. at 928.
\textsuperscript{20} Id. at 928.
\textsuperscript{21} Id.
States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.\textsuperscript{22}

The Supreme Court concluded that the phrase “other provision having the force and effect of law” includes common-law claims.\textsuperscript{23} The ADA’s preemption clause, §1305(a)(1), read together with the FAA’s saving clause, halts states from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated.\textsuperscript{24} The Supreme Court noted: “[t]his distinction between what the state dictates and what an airline itself undertakes confines courts in breach-of-contract actions to the parties’ bargain, with no enlargement or enhancement based on state laws or policies external to the agreement.”\textsuperscript{25} This means that when an airline has voluntarily chosen to agree to certain terms or conditions, the court must look strictly at the agreement and not outside of it. Additionally, in another case, the Supreme Court held that the key phrase “related to” expresses a “broad pre-emptive purpose.”\textsuperscript{26}

A private plaintiff has the right to bring suit under a federal statute only if Congress created that right.\textsuperscript{27} The FAA does not contain an express private right of action to enforce §41310(a). In \textit{Cort v. Ash}, the Supreme Court created a four factor test to determine whether a statute creates a private cause of action:

1. whether the statute creates a federal right in favor of the plaintiff;
2. whether there is any indication of legislative intent, explicit or implicit, either to create or deny a remedy;
3. whether it is consistent with the underlying purposes of the legislative scheme to imply a remedy;
4. whether the cause of action is one that is traditionally

\begin{footnotes}
\item[23] \textit{Nw., Inc. v. Ginsberg}, 134 S. Ct. 1422, 1430 (2014).
\item[25] \textit{Id.} at 233.
\item[27] \textit{Alexander v Sandoval}, 532 U.S. 275, 286 (2001).
\end{footnotes}
relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law.\textsuperscript{28}

As discussed later in this Article, the Supreme Court's decision in \textit{Alexander v. Sandoval} would make it more difficult for federal courts to recognize an implied right of action.

\textbf{A. Conservation Force v. Delta}

The case that this article focuses on is \textit{Conservation Force et al. v. Delta Airlines, Inc.}\textsuperscript{29} This case was brought in the Northern District of Texas by a group of Plaintiffs claiming various injuries as a result of Delta Airlines’ ban on hunting trophies.

\textbf{1. The Parties}

The first Plaintiff, Conservation Force, is a non-profit 501(c)(3) public foundation formed for purposes of conserving wildlife and wild places.\textsuperscript{30} Conservation Force's member-supporters are hunter-conservationists (both individuals and organizations) who engage in user-pay, regulated, sustainable hunting, and then import trophies back to the U.S.\textsuperscript{31} Conservation Force works closely and represents the safari hunting operators who provide anti-poaching support, and local communities who live with wildlife and benefit from its sustainable use.\textsuperscript{32} It serves the public through support and development of conservation infrastructure locally, nationally, and internationally.\textsuperscript{33} The Plaintiffs, Dallas Safari Club (“DSC”), Houston Safari Club (“HSC”), and Corey Knowlton, are all member supporters of Conservation Force.\textsuperscript{34}

The second Plaintiff, DSC, is a non-profit conservation, education, and hunter advocacy organization based in Dallas, Texas.\textsuperscript{35} It is a membership organization that represents thousands of individual

\textsuperscript{28} Cort v. Ash, 422 U.S. 66, 78 (1975).
\textsuperscript{30} Id. at ¶ 13.
\textsuperscript{31} Id.
\textsuperscript{32} Id.
\textsuperscript{34} Conservation Force Compl., supra note 29, at ¶ 13.
\textsuperscript{35} Id. at ¶ 14.
hunters and service businesses including hunting operators, who support the user-pay, sustainable use-based programs. The group also spends one million dollars, annually, on lobbying efforts and wildlife projects, such as genetic studies of lions. Its mission is to conserve wildlife and wilderness and to promote the interests of hunters worldwide.

The third Plaintiff, HSC, is a 501(c)(4) non-profit, volunteer organization whose mission is to preserve the sport of hunting through education, conservation and protection of hunters’ rights. HSC’s members are largely African safari hunters and related service providers, including hunting operators. Since 1972, HSC has provided millions of dollars for conservation, education, and sporting rights initiatives worldwide to ensure the longevity of the sport and the sustainability of sporting resources.

The fourth Plaintiff, Corey Knowlton, is a hunter-conservationist domiciled in Texas, a life member of DSC, and a supporting member of Conservation Force. In May 2015, he hunted a black rhino in Nambia. To participate in the hunt, he paid $350,000 to Nambia’s Game Products Trust Fund, which is funded exclusively for black rhino protection and recovery. Delta refused to ship Mr. Knowlton’s trophy back from Southern Africa.

The Defendant, Delta Air Lines, Inc., is a Delaware corporation that does business in the Northern District of Texas. It is an international airline that is headquartered and domiciled in Atlanta. Delta flies directly to South Africa and, through its alliance partners,
2. The Allegations

In count one of the Complaint, the Plaintiffs alleged that Delta had violated its duties as a common carrier under federal common law for discriminating against cargo. The Plaintiffs claimed that the principle of a common carrier is made clear in case law, the definitions of “interstate air transportation” and foreign air transportation, and the prohibitions on discriminatory practices.

In count two of the Complaint, the Plaintiffs alleged that before Delta imposed its embargo, there was a reasonable probability that the Plaintiffs and the members they represented would have entered into business relations with third parties. The hunter-conservationists represented here, such as Mr. Knowlton, would have entered into business relationships for hunting safaris; professional hunters and communities would have offered and sold those safaris and conducted them; wildlife ministries would have granted licenses and other hunting permits; and the communities would have benefitted as a result. The Plaintiffs alleged that Delta's embargo is independently tortious and unlawful.

In count three of the Complaint, the Plaintiffs alleged that Delta has failed to comply with federal regulations requiring that it update the FAA about information regarding carriage exclusions, such as the Big Five trophy embargo. Count three further alleged that Delta has violated the conditions of its air carrier certificate by defying national and international law, and that it should cease to operate flights. Every flight that Delta currently operates is in violation of 49 U.S.C. § 44711, which prohibits a person from operating as an air carrier in violation of a term of its air carrier certificate.

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50 Id. at ¶ 62–63.
54 Id.
55 Id. at ¶ 70.
56 Id. at ¶¶ 73–74.
57 Id.
58 Id.
III. ANALYSIS

A. Whether Delta Violated Its Duties As A Common Carrier

Today, common carriers, especially air carriers, are mostly governed by a statutory scheme. The Aviation Deregulation Act of 1978 substantially deregulated the industry and statutorily prescribed certain aspects of the industry that were not to be regulated. In order for Delta to violate its duty as a common carrier, it must have violated either federal common law or a statute prohibiting discrimination against cargo. Further, in order for this duty to be challenged, the Plaintiffs must have had a recognized cause of action either through statute or common law. Therefore, there must have been a common law remedy under the ADA for a cause of action to arise. The first part of this section will examine federal common-law as it pertains to air carriers and the second part of this section will examine the relevant statutes.

1. Common Carrier Duties Under Federal Common Law

This section will discuss the duties that are imposed on airlines, under federal common-law, as they relate to shipping cargo. Commercial airlines flying passengers for hire on regular schedules over definite routes ordinarily have been deemed to be common carriers. Common carriers are bound to receive all goods offered by the owners or their agents for transportation and to carry them for a just compensation to the agreed destination or place of delivery on the carrier's line or route. This duty only applies when the goods are such as the airline undertakes to carry for the public, or of a kind coming within the class which they usually carry in the course of their employment.

A common carrier of goods is not obliged to receive and

59 See Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 925 (5th Cir. 1997) (The court found that the plaintiff's action did not arise under a federal statute so it looked to federal common law.).
60 See id.
61 See id.
62 See id. at 928.
65 Id.
transport all kinds of goods that may be offered for carriage. Its obligation to carry is coextensive with and limited by its public profession as to the kinds of goods it is carrying. Accordingly, a common carrier of goods may refuse to receive and transport goods that are not of the kind it undertakes or is accustomed to carry for the public. The obligation to transport property of which the carrier usually carries, if offered with reasonable compensation, comes from the circumstance that a common carrier is a public servant offering a service, not just for revenue, but also for the convenience and accommodation of the community. A carrier may adopt reasonable rules and regulations by giving notice to shippers, who must then comply with the rules and regulations, before they can hold the carrier responsible for a refusal to transport. A carrier may determine whatever terms and conditions it chooses upon the transportation of property of which it is under no legal obligation to carry. The basic responsibility of a common carrier is to "make no distinction in providing transportation for those who apply for it." It may not accommodate one person and arbitrarily refuse another person. In York Co. v. Central Railroad, the Supreme Court elaborated on the duties of a common carrier:

The law prescribes the duties and responsibilities of the common carrier. He exercises, in one sense, a public employment, and has duties to the public to perform. Though he may limit his services to the carriage of particular kinds of goods, and may prescribe regulations to protect himself against imposition and fraud, and fix a rate of charges proportionate to the magnitude of the risks he may have to encounter, he can make no discrimination between persons, or vary his charges from their condition or character. He is bound to accept all goods offered within the course of his employment, and is liable to an action in case of refusal.

66 Id. § 289.
67 Id.
68 Id. § 277.
69 Id.
70 Id. § 280.
71 Id.
72 13 Am. Jur. 2d § 227 (citations omitted).
73 Id.
74 York Co. v. Cent. R.R., 70 U.S. 107, 112 (U.S. 1866) (Plaintiff filed suit for damages relating to the destruction of his cotton shipment, which was destroyed while in the care of the common carrier
The Supreme Court has also held that “a party engaging in the business of a common carrier is bound to treat all shippers alike and can be compelled to do so.” 75 In American Trucking Ass'ns, Incorporated v. Atchinson, the Supreme Court upheld an Interstate Commerce Commission's (“ICC”) rule that forced railroads to carry trailers for their competitor motor carriers at the going rate. 76 There, the Court recognized that “[f]rom the earliest days, common carriers have had a duty to carry all goods offered for transportation” and that “[r]efusal to carry the goods of some shippers was unlawful.” 77 The Court went on to note that the railroads may not offer services for transporting trailers or for other shippers and then deny that service to motor carriers. 78 Further, the Court noted that the “duty of equal treatment as a common carrier is comprehensive; there are no implied exceptions.” 79 The fact that a person may be a competitor does not allow a common carrier to discriminate. 80

a. Arguments Advanced by the Parties

In its response to the Plaintiffs' Complaint, Delta cited to case law showing that federal common law permits a common carrier by air to adopt a cargo policy under which the carrier can refuse to accept certain types goods. 81 The Seventh Circuit held that if a shipper wanted to ship a package with an actual value of more than $50,000, then UPS was entitled to refuse acceptance of that package as a business decision. 82 The court further held that a common carrier is not “obliged to accept every package” and noted that, according to UPS's tariff, the company also rejects “poorly wrapped packages, human body parts, animals, currency, and negotiable instruments.” 83 Delta also cited B.J. Alan Co. v. ICC, where a group of shippers challenged a UPS tariff that prohibited the transport of common
The court stated that the “key showing for a carrier, when it deletes a class of goods from the scope of its operations is inordinate operational burdens on the carrier’s side, with hardship to the shippers an offsetting consideration.” The court held that UPS could prohibit the transport of fireworks because the transportation of fireworks notably hampered UPS’ efficient operation.

In response to Delta’s Motion for Summary Judgment, the Plaintiffs cited to a Supreme Court case, where a plaintiff challenged a common carrier for discrimination on the basis of goods being shipped. The Court held that “a common carrier not only is obliged to receive and carry such goods as he is able to carry and customarily does carry, but he is required to carry for all patrons alike; in applying an equal right to have their goods transported in the order of their application.” The Court stated that the essential principle of the requirement of common carriers is that they carry the goods of all persons, with no unjust preference, unless they physically cannot carry the goods. The Court also went on to note that the steamship company could stop carrying a particular commodity or become a special carrier, not a common carrier, but as long as it was a common carrier, it must follow common carrier rules.

Both Delta and the Plaintiffs cite to Missouri Pacific Railway Co. v. Larabee Flour Mills Co., in which Missouri Pacific engaged in the business of transferring cars for all companies except the mill company. In that case, the Supreme Court held that “[w]henever one engages in that business the obligation of equal service to all arises, and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts.” The Supreme Court affirmed the notion that common carriers must treat all potential customers the same and that the courts can enforce that right.

It is apparent from the case law that common carriers have a duty

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84 B.J. Alan Co. v. ICC, 897 F.2d 561, 562 (D.C. Cir. 1990) (this case was a challenge to motor carriers not air carriers).
85 Id. at 563.
86 Id. at 565.
88 Id. at 579.
89 Id. at 580.
90 Id.
92 Id. at 619–20.
93 Id.
to treat all shippers equally and to not discriminate against any would be shippers. This federal common law doctrine was well established before the ADA was enacted; thus, according to the ADA’s savings clause, if the Plaintiffs can prove that there was a breach of this duty, then they will have a cause of action that is not pre-empted. The main determination for the court will be to decide whether this is a type of discrimination meant to be protected by federal common law. A full discussion on this question will be addressed later in this Article.

2. Relevant Statutory Provision

As mentioned earlier, much of the obligations imposed on air carriers are done via federal statutes. The relevant statute, as it pertains to this lawsuit, is 49 U.S.C. § 41310(a). This statute states that “an air carrier or foreign air carrier may not subject a person, place, port, or type of traffic in foreign air transportation to unreasonable discrimination.”"94 Accordingly, a plaintiff has the right to bring suit under a federal statute only if Congress created that right.95 Congress can create a private right of action either expressly or by implication.96 The FAA does not contain an express private right of action to enforce §41310(a), thus this section will examine whether there is an implied cause of action.

a. Previous Statute

In order to fully understand §41310(a), it is important to see how §404(b), the provision that §41310(a) was adapted from, of the FAA was handled.97 The federal courts are in agreement that while the FAA does not provide a private remedy for violation by an air carrier of the discrimination provisions, a private civil action may, in an appropriate case, be implied.98 Where the injury caused by the carrier’s conduct appears to fall within the scope of the FAA’s purpose to provide adequate air transportation without unreasonable preferences or unjust discrimination, the courts hold the case

96 Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922, 925 (5th Cir. 1997).
97 § 404(b) was codified as 49 U.S.C §1374(b).
98 Availability of private civil action for violation of § 404(b) of Federal Aviation Act of 1958 (49 U.S.C.A. § 1374(b)), 41 A.L.R. Fed. 532, 3a (prohibiting discrimination by airline).
appropriate for a private remedy.\textsuperscript{99} In determining whether or not private right of action should be implied from 49 U.S.C. § 1374(b), a court should look to the four factors mentioned earlier from \textit{Cort v. Ash}.\textsuperscript{100}

In \textit{Polansky v. TransWorld Airlines, Inc.}, the court considered the \textit{Cort} factors to determine whether there was a private remedy in 49 U.S.C. § 1374.\textsuperscript{101} The court stated that “[a]lthough §1374(b) is silent about private enforcement, courts have implied a private remedy for a variety of acts by the air carrier, including racial discrimination, and bumping in violation of the airline’s own standards.”\textsuperscript{102} In the court’s view, each new category of conduct alleged to violate §1374(b) “must be tested against the standards stated by the Supreme Court in \textit{Cort v. Ash}.”\textsuperscript{103} This court reasoned that the statute was aimed to protect the right of air access to air facilities from discriminatory interference by the air carrier.\textsuperscript{104} The court cited other areas of the FAA to indicate that the purpose of the Act is: “[t]he promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices.”\textsuperscript{105} In this instance, the court found no private right under the circumstances because the plaintiffs only suffered “inferior accommodations” and not “discriminatory denial of access to air facilities.”\textsuperscript{106}

In \textit{Smith v. Piedmont Aviation}, the Fifth Circuit held that the airline violated the discrimination provision of the FAA by unjustly and unreasonably discriminating against a passenger by giving undue and unreasonable preferences to others.\textsuperscript{107} In \textit{Wills v. Trans World Airlines, Inc.}, a California district court found that the plaintiff was unduly prejudiced in that unreasonable preference was given to others, since he was one of two tourist passengers forbidden passage in favor of first-class passengers who were accommodated by being placed in the tourist section of the aircraft.\textsuperscript{108} The court held that by

\textsuperscript{99} Id.
\textsuperscript{100} Id.
\textsuperscript{101} Polansky v. Trans World Airlines, Inc., 523 F.2d 332, 334 (3d Cir. 1975).
\textsuperscript{102} Id. at 335.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id. at 336–37.
\textsuperscript{106} Id. at 338; Conservation Force’s Response to Delta’s Mot., supra note 87, at 12.
\textsuperscript{107} Availability of private civil action for violation of § 404(b) of Federal Aviation Act of 1958 (49 U.S.C.A. § 1374(b)), 41 A.L.R. Fed. 532, 4a (prohibiting discrimination by airline).
disregarding plaintiff’s priority, the airline unjustly and unreasonably discriminated against him.109 The D.C. Circuit Court of Appeals extended protection under §1374 to include non-passengers in Mason v. Belieu.110 The court stated that, “[n]ot only must non-passengers be included within the class of persons covered by the Act, but the injury for which they seek recovery must be an interest protected by the statute.”111 However, the court went on to find that there was no cause of action for the plaintiff because section 404 was not created to assure persons waiting for passengers that they will be assisted courteously at information counters.112 Courts have recognized implied causes of actions in several other instances as well.113

b. Current Statute

Recent cases have shown a split when it comes to deciding whether a private right of action exists under the newer §41310(a). A District Court in New Jersey found that there was a private right of action under §41310(a) and stated, “federal courts have consistently held that persons discriminatorily denied access to travel have an implied right of action under §404(b) of the FAA, the statutory predecessor to 49 U.S.C. § 41310(a).”114 In another recent case, the court in the Western District of Wisconsin found that although §41310 prohibits air carriers from unreasonably discriminating, it did not provide any cause of action for its violation.115

Delta argued that the Supreme Court’s decision in Alexander v. Sandoval116 should be used to rule out any implied right of action under § 41310,117 In Sandoval, the Supreme Court held that private rights of action to enforce federal law must be created by

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109 Id. at 365.
111 Id.
112 Id. at 221.
113 See Nader v. Allegheny Airlines, Inc., 512 F.2d 527, 537 (D.C. 1975) (finding cause of action for airline overbooking); Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14, 17 (9th Cir. 1972) (holding plaintiffs were unjustly and unreasonably discriminated against when they were bumped due to overbooking); Fitzgerald v. Pan Am. World Airways, Inc., 229 F.2d 499, 501-502 (2d Cir. 1956) (finding cause of action for racial discrimination).
115 Williams v. Midwest Express Airlines, Inc., 315 F. Supp. 2d 975, 979 (E.D. Wis. 2004) (passengers brought an action claiming the airline unjustifiably excluded them from a flight).
The Court continued to hold that without statutory intent, no cause of action existed and courts were prohibited from creating a cause of action, regardless of how desirable it might be as a matter of policy or as a matter of compatibility with the statute. The Court stated that “legal context matters only to the extent it clarifies text” and that “the interpretive inquiry begins with the text and structure of the statute.”

3. Right of Action Under the Air Carrier Access Act

Cases decided before Sandoval found that an implied private right of action existed under the Air Carrier Access Act (“ACAA”), a statute that also contains an anti-discrimination provision. The ACAA does not provide for an express private cause of action. In Shinault v. American Airlines, the court discussed the issue of an implied cause of action under the ACAA in depth. The court affirmed the proposition that courts used §404(b) (the predecessor to §41310) of the FAA as a basis for implying private causes of action by handicapped individuals against commercial airlines. Ultimately, the court in Shinault found an implied cause of action under the ACAA. The Eighth circuit also recognized a private cause of action in Tallarico v. Trans World Airlines, Inc.

However, after the Sandoval decision, both the Tenth and Eleventh Circuits ruled against an implied cause of action. In Lopez v. JetBlue Airlines, the court discussed the impact that Sandoval would have on determining an implied cause of action by stating, “after Sandoval, if Congress has manifested no intent to provide a private right of action, we cannot create one.” The court ultimately held:

I find that the ACAA is directed at protecting the rights

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118 Sandoval, 532 U.S. at 286.
119 Id.
120 Id. at 288, 288 n.7.
123 Id.
124 Id. at 801 (citations omitted).
125 Id. at 804.
126 881 F.2d 566, 569–70 (8th Cir. 1989).
127 See Boswell v. Skywest Airlines, Inc., 361 F.3d 1263, 1271 (10th Cir. 2004); Love v. Delta Air Lines, 310 F.3d 1347, 1360 (11th Cir. 2002).
of disabled passengers. However, the text does not refer to a private right to sue. Moreover, the structure of the statutory scheme weighs against the implication of a private right of action, as it provides an alternative means of vindicating the rights of disabled passengers: an administrative enforcement scheme.\footnote{129}

It is important to remember that although the ACAA is a different statute than the FAA, it can still serve as an important guidepost as to how courts are going to decide the issue of implied causes of action as they relate to the airlines. One would also think that if the courts are firm on individuals with disabilities, then they would also be firm for claims of discrimination.

4. Alternative Means to Vindicate Rights

One of the points that Lopez makes is the availability of alternative means to vindicate rights.\footnote{130} This is in line with the second \textit{Cort} factor, which examines a legislative intent to create or deny a remedy.\footnote{131} In a separate Supreme Court decision, the Court found that where a statute contains “elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens.”\footnote{132} Accordingly, it is important to take a look at other remedies that private individuals are provided under the FAA.

First, under §46101(a)(1), “[a] person may file a complaint in writing with the Secretary of Transportation” for a person violating part of Title 49, Subtitle VII, Part A, which includes §41310(a).\footnote{133} The Department of Transportation (“DOT”) is responsible for investigating the complaint if there are reasonable grounds for the investigation.\footnote{134} Additionally, the FAA or DOT may commence an investigation if it reasonably appears that a person is violating the Act.\footnote{135} If the person is found to have violated the Act, the FAA and the DOT may issue an order to compel compliance. Additionally, the FAA and the DOT may impose a general civil penalty of up to

\footnotesize{\textit{Id.} at 6–7.}

\footnotesize{\textit{Id.}}

\footnotesize{Cort v. Ash, 422 U.S. 66, 78 (1975).}

\footnotesize{Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14 (1981).}

\footnotesize{49 U.S.C. § 46101(a)(1) (2001).}

\footnotesize{\textit{Id.}}

\footnotesize{\textit{Id.} § 46101(a)(2).}
$27,500 for statutory violations. This enforcement authority is backstopped by § 46110(a), which states:

a person disclosing a substantial interest in an order issued by the Secretary of Transportation … may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or its principle place of business. The petition must be filed not later than 60 days after the order is issued.

Second, the Secretary of Transportation may bring a civil action against a person to enforce § 41310(a). Further, upon request from the Secretary of Transportation, the Attorney General may bring a civil action to enforce the statute. Violations of § 41310(a) are also punishable by criminal fines. The Supreme Court held in Sandoval that “[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.” Since there are express provisions to enforce the statute, Sandoval shows that Congress intended to preclude any others.

Thus, it would appear that the statutory construction of the FAA weighs strongly in favor of the second Cort factor. It will ultimately be up to the court to decide whether these provisions are adequate to remedy the needs of the Plaintiffs in this particular case. However, it is apparent that Congress carefully thought out the administrative proceedings under the Act. There has yet to be a case deciding whether the remedies provided are enough for a violation of § 41310. However, the court in Love v. Delta Airlines stated that “[t]he fact that Congress has expressly provided private litigants with one right of action – the right to review of administrative action on the courts of appeals – powerfully suggests that Congress did not intend to provide other private rights of action,” when ruling on a private right of action under the ACAA.

136 Id. § 46301(a)(1)(A); see also 14 C.F.R. § 383.2 (2015).
138 Id. § 46107(b)(1)(A).
139 Id. § 46316.
141 Love v. Delta Air Lines, 310 F.3d 1347, 1357 (11th Cir. 2002).
a. Is There an Express Private Remedy?

The next argument that could be made is that Congress provided for an express private remedy under another provision of the statutory scheme.\(^{142}\)

When Congress has established a detailed enforcement scheme which expressly provides a private right of action for violations of specific provisions that is a strong indication that Congress did not intend to provide private litigants with a means of redressing violations of other sections of the Act.\(^{143}\)

Section 46108 provides private plaintiffs a cause of action to enforce the requirement in § 41101(a)(1), that an air carrier hold a DOT-issues certificate of public convenience and necessity.\(^{144}\) Delta argued that the FAA contains an express private right of action that does not authorize suits to enforce § 41310.\(^{145}\) The Plaintiffs will have a difficult time showing that Congress implied a private right of action for one provision when it expressly created one for a different provision under the same statutory scheme.

b. Has There Been Undue Discrimination?

The biggest hurdle that the Plaintiffs will have to face is what constitutes “undue discrimination.” If they cannot carry that burden, then the cause of action issues will be moot. A claim for unreasonable discrimination will survive when it is alleged and proven that the plaintiff’s right to fair, equal, and nondiscriminatory treatment has been violated.\(^{146}\) Once the plaintiff proves discrimination or preference, the burden then shifts to the defendant airline to prove how the discrimination was reasonable.\(^{147}\) In Archibald, the court recognized that the airline must fill the plane in a “reasonable and just manner” in an oversold situation.\(^{148}\) The

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\(^{142}\) Delta’s Mot. to Dismiss, supra note 81, at 22.

\(^{143}\) Casas v. Am. Airlines, Inc., 304 F.3d 517, 523 (5th Cir. 2002) (quoting Diefenthal v. Civil Aeronautics Bd., 681 F.2d 1039, 1049 (5th Cir. 1982)).

\(^{144}\) 49 U.S.C. § 46108.

\(^{145}\) Delta’s Mot. to Dismiss, supra note 81, at 22.


\(^{147}\) Archibald v. Pan Am. World Airways, Inc., 460 F.2d 14, 17 (9th Cir. 1972).

\(^{148}\) Id. at 16.
outwardly and discriminatory act of bumping may be legitimated by proof that the airline adhered to its established policy and that policy is reasonable.\textsuperscript{149} Here, the Complaint alleged that the Plaintiffs have a right to equal treatment.\textsuperscript{150} Delta shipped Big Five trophies from Africa up until August 3\textsuperscript{rd} and even refused to bow to a prior petition to stop shipping trophies.\textsuperscript{151} Further, Delta has stopped shipping some trophies, even though is continues to ship other trophies.\textsuperscript{152} Delta's embargo is aimed at a particular person, place, and type of traffic.\textsuperscript{153} The Plaintiffs also alleged that Delta has continued to carry hunting trophies from animals outside of the Big Five.\textsuperscript{154}

On its face, Delta's embargo treats all shippers alike. As discussed earlier, this would not be violating any common carrier duty. Any would-be shipper that wants to ship a Big Five hunting trophy will not be allowed to do so throughout Delta's fleet. However, it does make things slightly more interesting that the only people that would want to ship these trophies in the first place are already a niche group of people.\textsuperscript{155} Big-game hunters operate in a separate world from weekend deer hunters in the United States.\textsuperscript{156} The $50,000 fee per lion keeps the pastime out of economic reach for most game hunters.\textsuperscript{157} While the ban may apply to any shipper, it is certainly targeted at a select group. Whether this constitutes “unreasonable discrimination” of the kind meant for protection under the statute will be a question for the court to decide.

c. How Are Airlines Allowed to Reject Cargo?

There is an express provision in the FAA that allows airlines to refuse cargo. Section 44902(b) states, “subject to regulations of the Under Secretary, an air carrier, intrastate air carrier, or foreign air carrier may refuse to transport a passenger or property the carrier decides is, or might be, iminical to safety.”\textsuperscript{158} The leading case on

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{149} Id.
\item \textsuperscript{150} Conservation Force’s Response to Delta’s Mot., supra note 87, at 14.
\item \textsuperscript{151} Id.
\item \textsuperscript{152} Id.
\item \textsuperscript{153} Id.
\item \textsuperscript{154} Id. at 21.
\item \textsuperscript{155} “These safari hunts cater to a small but wealthy clientele of big-game hunters, who bring back more than 400 lion trophies.” Liam Stack, Big Game Hunting is Also Big Business for Wealthy Few, N.Y. TIMES (Aug. 10, 2015), http://www.nytimes.com/2015/08/10/travel/big-game-hunting-cecil-lion.html?_r=0.
\item \textsuperscript{156} Id.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} 49 U.S.C. § 44902(b) (2001).
\end{itemize}
\end{footnotesize}
this issue is *Air Line Pilots Assn., Intern. v. Civil Aeronautics Board*. 159 In this case, the Air Lines Pilots Association challenged the Civil Aeronautics Board’s (“CAB”) determination to reject the airline embargoes of hazardous goods. 160 The court stated, “if there is carrier objection to the present regulations, the appropriate remedy is carrier participation in a rule-making procedure.” 161 In one of its orders, the CAB noted that it would abrogate its statutory responsibilities to the shipping and consuming public if it sanctioned “pervasive refusals to carry shipments required by the public.” 162 The preceding statute to §44902(b) was 49 U.S.C. Appx. § 1511(a) and it contained the same language as the present rule. 163 The court in *Air Line Pilots Assn.* found that if § 1511(a) provided such a broad discretion then there would be no need to seek an embargo in the first place. 164 The court further found that the embargoes proposed could not be characterized as constituting ad hoc determinations by carriers. 165 Lastly, the court held,

> [t]here are rules which apply to the carriage of hazardous materials, and it is implicit in these rules that such goods, marked, labeled, packaged and stowed in accordance with such rules, are not inimical to flight safety in the judgment of the agencies charged by the Congress with the responsibility of making these determinations. 166

In *Delta Air Lines, Inc. v. Civil Aeronautics Board*, the D.C. appellate court held that to the extent that airline carriers have the right to choose what they will and will not carry, and for whom, depends not only on common law duties of a common carrier but also on the obligations imposed by the FAA. 167 The court held that former 49 U.S.C.S. Appx. § 1511(a) does not embrace blanket boycott of certain types of hazardous cargo via either embargo or tariff route, but only authorizes ad hoc refusals to carry, such as

159 *Air Line Pilots Assn., Intern. v. Civil Aeronautics Bd.*, 516 F.2d 1269 (2d Cir. 1975).
160 *Id.* at 1273.
161 *Id.* at 1274.
162 *Id.* at 1275.
163 The main difference between the two statutes is that the word “passenger” was substituted for the word “person.” The only other differences are the omission of words as surplus.
164 *Id.* at 1276.
165 *Id.*
166 *Id.* at 1277.
167 *Id.* at 259.
where there has been determination that some particular freight for some specific reason presents peril to safe flight. In other words, airlines cannot refuse to transport various items designated as dangerous articles by the Federal Aviation Administration, based on the statute that gave air carriers permission to refuse to transport property it deems inimical to safety.

d. Does the Airline Deregulation Act of 1978 Preempt Plaintiffs’ Claim for Tortious Interference With Business Relations?

In count two of the Complaint, the Plaintiffs alleged that they have been harmed by Delta in their business relationships. The Plaintiffs essentially claimed that the various organizations have lost out revenue that they otherwise would have made, had Delta’s embargo not been in place. Regardless of the merit of this claim, an examination of the legality in bringing such a claim must be given a closer look. The relevant statute at issue reads,

“[e]xcept as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.”

In 1978, Congress amended the FAA after determining that efficiency, innovation, low prices, variety, and quality would be promoted by reliance on competitive market forces rather than pervasive federal regulation. Congress enacted the ADA to dismantle federal economic regulation. To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision. The Court in Morales stated, “pre-emption may be either express or implied, and is

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168 49 U.S.C. 44902 (case notes).
170 See Conservation Force Compl., supra note 29, at ¶¶ 68–69
171 Id.
173 Hodges v. Delta Airlines, 44 F.3d 334, 335 (5th Cir. Tex. 1995).
174 Id.
The Court went on to hold that State enforcement actions having a connection with, or reference to, airline rates, routes, or services are pre-empted under the statute. The Court in Hodges v. Delta Airlines offered the most widely used definition for what “services” means under the statute. “Services” generally represent a bargained-for or anticipated provision of labor from one party to another. Elements of the air carrier service bargain include items such as ticketing, boarding procedures, provision of food and drink, and baggage handling, in addition to the transportation itself. The Court then went on to hold that while state actions related to airline services were preempted under the statute, it did not displace state tort actions for personal physical injuries or property damage caused by the operation and maintenance of aircraft. In American Airlines v. Wolens, the Court held that state-law-based court adjudication of routine breach-of-contract claims were permitted under the ADA.

e. The Definition of “Services”

The Court of Appeals for the First Circuit further expounded on the definition of “services,” specifically in how they relate to airline shipping in Tobin v. Federal Express Corporation. In that case, the Court found that all of the plaintiffs’ common-law claims depended on FedEx’s “package handling, address verification, and delivery procedures.” The Court found all of these items to “plainly concern the contractual arrangement between FedEx and users of its services (those who send packages)” and stated that the plaintiff’s claims implicated FedEx’s services. While tortiously undertaken conduct may not itself be a service that would be bargained for or anticipated by a consumer, the relevant inquiry is

176 Id. at 383 (citation omitted).
177 Id. at 384.
178 Hodges v. Delta Airlines, 44 F.3d 334 (5th Cir. 1995).
179 Id. at 336.
180 Id.
181 Id. at 338.
183 Tobin v. Fed. Express Corp., 775 F.3d 448 (1st Cir. 2014).
184 Id. at 454.
185 Id.
whether enforcement of the plaintiff’s claims would impose some obligation on an airline-defendant with respect to conduct that, when properly undertaken, is a service.\textsuperscript{186} The most instructive excerpt came at the end of Tobin opinion when the Court stated, “[s]o it is here: where the duty of care alleged drills into the core of an air carrier’s services and liability for a breach of that duty could affect fundamental changes in the carrier’s current or future offerings, the plaintiff’s claims are preempted by the ADA.”\textsuperscript{187} Thus, it is clear that in the context of a shipping company, the service of shipping would qualify under the statute.

f. Is the Shipment of Hunting Trophies Considered a Service?

Through case law, it becomes clear that the Plaintiffs’ state-law claim for tortious interference with business relations is preempted under the ADA. The first determination that must be made is whether Delta’s refusal to ship big game hunting trophies would constitute a service. According to the definition given in Hodges, most courts should have no problem finding that the answer is yes. The “service” being offered or lack thereof is the service of shipping. Delta as an airline offers shipping as a service. Just as Tobin found that shipping constituted a service, any court with this matter before it would also find that shipping is a “service,” offered by Delta Airlines, which would satisfy the definition under the statute.

The next determination that must be made is whether this claim has a “connection to” an airline’s “rates, routes, or services.” The answer to this seems to be clearly, yes. The claim arises out of Delta’s refusal to transport hunting trophies. If the Plaintiffs were to win this suit in court, then Delta would be forced to expand a service that it does not already offer. This is precisely the type of regulation that the statute was designed to prevent. The clear legislative intent behind the creation of the statute was the belief that airlines would be most efficient if they regulated themselves. Furthermore, case law has shown that this would be outside of Congress’ intent when it created the preemption provision.

However, in the Conservation Force’s Response to Delta’s Answer, the Plaintiffs’ alleged that the tortious interference claim does not challenge Delta’s services, but rather “the deceptive and defamatory effect of Delta’s embargo and its negative impact on

\textsuperscript{186} \textit{Id.}
\textsuperscript{187} \textit{Id.} at 456.
Plaintiffs’ business relations.\footnote{188} Plaintiffs’ claimed that they are challenging the implication that Big Five Hunters act unlawfully and that this public broadcast by Delta’s embargo damaged the Plaintiffs' business relationships.\footnote{189} Further, Plaintiffs alleged that both Delta's acts and statements bundled lawful Big Five trophies with unlawful contraband.\footnote{190}

The Fifth Circuit spoke directly to this issue and held that tortious interference with business relationships is expressly preempted under the ADA.\footnote{191} In that case, a travel agency had an agreement with American Airlines in which it was authorized to sell tickets on the airline.\footnote{192} Under a new agreement, the travel agency's commissions were cut significantly.\footnote{193} The travel agency sued American Airlines and claimed that the airlines knew that it was going to reduce commissions and should have disclosed the impending changes.\footnote{194} The court found that the claim involved the airline's dealings with customers and that it sought the application of Texas common law in a way that would regulate the airline’s pricing policies, commission structure and reservation practices.\footnote{195} The court noted that Wolens expressed the ADA's purpose, which was to leave airlines free to choose the selection and design of market mechanisms appropriate to the furnishing of their transportation services.\footnote{196} The court held that “the carrier's relations with travel agents, as intermediaries between carriers and passengers, plainly fall within the ADA's deregulatory concerns” and ultimately preempted the plaintiff’s claim.\footnote{197}

While all of the allegations may very well be true, the case law is clear that any claim relating to an airline's “services” will be preempted. A judge will most likely find in favor of Delta on this claim because the ADA preemption provision is “deliberately expansive.”\footnote{198} Therefore, it is clear that the claim for tortious interference of business relations cannot stand because Congress, under the ADA, expressly preempts it.

\footnote{188} Conservation Force’s Response to Delta’s Mot., supra note 87, at 19.

\footnote{189} \textit{id}.

\footnote{190} \textit{id}.

\footnote{191} Lyn-Lea Travel Corp. v. Am. Airlines, 283 F.3d 282, 289 (5th Cir. 2002).

\footnote{192} \textit{id} at 284.

\footnote{193} \textit{id}.

\footnote{194} \textit{id} at 284–85.

\footnote{195} \textit{id} at 287.

\footnote{196} \textit{id} at 288.

\footnote{197} \textit{id}.

\footnote{198} Morales v. TWA, 504 U.S. 374, 384 (1992).
g. What Are the Public Policy Implications of a Decision?

One of the central focuses of the Complaint is the benefit that Big Game Hunting provides in Africa, and the public policy implications. The Complaint alleged that the benefits include habitat preservation, wildlife management, and anti-poaching.\(^{199}\) It also stated that hunting fees make up the lion’s share of operating budget revenue for national and local wildlife authorities, which dedicate the largest share of their budgets to rangers and equipment.\(^{200}\) Additionally, the Complaint alleges that tourist safari hunting generates funds for remote villages where photo tourists do not travel and where the local people are most affected by crop-raiding elephants and livestock eating lions.\(^{201}\)

It has been estimated that trophy hunting generates revenues of US $200 million annually on the African continent.\(^{202}\) The lion population in Africa is estimated to be in the range of 35,000 animals with about 665 killed as trophies for export every year.\(^{203}\) A report prepared by Economist at Large revealed that very little money goes to community development.\(^{204}\) The report finds that as little as three percent of a Tanzanian hunting company’s income goes to the local communities that support the bulk of the conservation work.\(^{205}\) Instead, most of the money goes to companies, government agencies, and individuals located internationally or in national capitals.\(^{206}\) Even if the Plaintiffs were able to show that the hunting does actually help conservation efforts, there are still several hurdles that the Plaintiffs will have to overcome for public policy to become a relevant consideration in this case.

IV. CONCLUSION

It appears that the legal hurdles that the Plaintiffs will have to overcome will be too great. The ADA was designed to provide

\(^{199}\) Conservation Force Compl., supra note 29, at ¶ 2.

\(^{200}\) Id. at ¶ 3.

\(^{201}\) Id. at ¶ 4.


\(^{204}\) Id.

\(^{205}\) Id.

\(^{206}\) Id.
airlines the freedom to make these types of decisions. It will be interesting to see how the Texas district court chooses to handle the undue discrimination claim, but, because the ban treats all shippers alike, the court will most likely find that Delta was within its rights.