

DOT Implements New Legal Paradigm for Regulating Airlines

The U.S. Department of Transportation (DOT) recently issued new regulations codifying specific criteria for interpreting its fundamental regulatory authority under 49 U.S.C. section 41712 to prohibit airlines from engaging in “unfair or deceptive practices.” DOT’s purpose in adopting these regulations is to provide “greater clarity and certainty about [DOT’s] interpretation of unfair or deceptive practices and process for making such determinations in the context of aviation consumer protection rulemaking and enforcement actions.” DOT Final Rule at 78707. DOT’s new regulations become effective on January 6, 2021.

Although DOT has enjoyed the statutory authority at issue in this proceeding since the early 1980s, this is the first time that DOT has formally articulated how it interprets the terms “unfair” and “deceptive.” This is important because DOT has relied on this statutory authority as the legal basis for adopting a broad swath of regulations and pursuing hundreds of enforcement actions against airlines, yet the statute does not define the terms “unfair” and “deceptive” and, until now, neither has DOT. For decades, DOT essentially has decided whether airlines have engaged in an “unfair or deceptive practice” by applying Justice Potter Stewart’s notorious definition of pornography: they know it when they see it. Airlines have long chafed at such a subjective approach, arguing that DOT has adopted a multitude of rules and pursued enforcement actions without identifying objective evidence of unfairness or deception or specifying how DOT interprets those statutory terms.

DOT’s New Three-Part Tests for “Unfairness” and “Deception”

DOT’s new regulations align DOT’s interpretive approach with longstanding Federal Trade Commission (FTC) practice. DOT adopted the three-part tests that the FTC has long used to interpret its essentially identical statutory authority to prohibit unfair or deceptive practices by many types of businesses other than airlines. Under DOT’s new regulations, a practice is “unfair” to consumers if it:

1. causes or is likely to cause substantial injury,
2. which is not reasonably avoidable, and
3. the harm is not outweighed by benefits to consumers or competition.

A practice is “deceptive” to consumers if it:

1. is likely to mislead a consumer,
2. acting reasonably in the circumstances,
3. with respect to a material matter. A matter is material if it is likely to have affected the consumer’s conduct or decision with respect to a product or service.

While generally aligning itself with the FTC’s approach, DOT noted a potentially significant distinction underlying its view of how “unfair” and “deceptive” are defined. DOT noted that under FTC practice, public policy is deemphasized in the agency’s assessment of unfairness, but that Congress has directed the opposite for DOT. Instead, DOT must take into account a variety of public policy priorities in the economic regulation of airlines. These include “safety, ensuring economic competition, and preventing unfair and deceptive practices.” DOT Final Rule at 78710 & n.21-22. Notably, however, DOT did not reference the specific congressional policy directive that is intended to inhibit broader DOT regulation of the deregulated U.S. airline industry: to “plac[e] maximum reliance on competitive market forces and on actual and potential competition.” 49 U.S.C. § 40101(a)(6) (emphasis added). Airlines have argued that the congressional policy of requiring for maximum reliance on market forces implies that DOT should not regulate absent



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evidence of market failure. At a minimum, DOT's policy directives from Congress serve as an additional filter through which DOT must pass any decision to regulate, even if DOT otherwise believes that a practice is unfair or deceptive under its new tests.

Role of Intent in Determining Whether an Airline Practice is “Unfair” or “Deceptive”

Airlines argued that in order for DOT to establish that a practice is “unfair” or “deceptive,” it must show that an airline intended to deceive consumers. DOT rejected this proposition, specifically declining to include an intent element in its unfairness and deception tests. Thus, DOT may be able to establish a statutory violation based solely on the subject matter and effect on consumers of an airline's conduct without regard to the airline's knowledge or intent. In the alternative, airlines argued that DOT should give “significant weight” to an airline's intent. DOT also rejected this request, but noted that, in exercising its broad enforcement discretion, DOT may take into account a variety of factors, including an airline's knowledge and intent. Such discretion could apply both to a DOT decision whether to pursue enforcement action and, if DOT brings an enforcement case, to the amount of any proposed civil penalty. Thus, although airlines did not prevail in foreclosing their liability for mistakes and unintended consequences, the Final Rule affords an opportunity for airlines to persuade DOT that enforcement is not warranted (or at least that any penalty amount should be limited).

What Constitutes an Airline “Practice”?

During the rulemaking, airlines urged DOT to define the term “practice” and in doing so to make clear that a single act would be insufficient to establish a statutory violation. DOT rejected this request, but indicated that it would not seek to punish isolated or individual acts unless “indicative of” a wider “practice,” as reflected in “company policy, training, or lack of training.” DOT stated that it focuses on whether “the conduct in question reflects a practice or policy affecting multiple consumers, rather than an isolated incident.” DOT Final Rule at 78710-11.

The Reasonable Consumer Standard

The concept of reasonableness is integral to both the “unfairness” and “deception” tests. Under the “unfairness” test, only substantial consumer injuries that are “not *reasonably* avoidable” (and not outweighed by consumer or competition benefits) would violate the statute. A “deceptive practice,” meanwhile, is likely to mislead a consumer “acting *reasonably* in the circumstances” regarding a matter that is material to the consumer's purchasing decision or other conduct. 14 C.F.R. § 399.79(b)(1),(2) (emphasis added). Airlines requested that DOT confirm that the phrase “not reasonably avoidable” in the unfairness test excludes “circumstances where a consumer's willful, intentional or reckless conduct leads to harm (for example, by intentionally taking advantage of a mistakenly published fare).” In response, DOT noted that “the term ‘not reasonably avoided’ would necessarily exclude the types of self-imposed harms” the airlines described. Similarly, DOT confirmed that the deception test's reference to consumers “acting reasonably in the circumstances” implies reference to “reasonable consumers as a whole, and that a single consumer's unreasonable interpretation of [an airline] statement does not make it deceptive. We agree that deception is judged in reference to a reasonable consumer.” DOT Final Rule at 78710 n.25. For airlines, this was a welcome confirmation that DOT would not rely on a complaint from a single consumer as a basis for a “deceptive practice” enforcement action absent evidence that the practice at issue was likely to mislead reasonable consumers more generally (in addition to meeting the other elements of the “deception” test).

DOT's Loophole for Enforcement of Regulations Previously Adopted Under Section 41712

DOT carved out a substantial exception in its Final Rule for enforcement of existing DOT regulations adopted pursuant to its statutory authority to prohibit unfair or deceptive practices. 14 C.F.R. § 399.79(d). Under this exception, DOT states that “where an existing regulation applies to the practice of an air carrier, foreign air carrier, or ticket agent, the terms of that regulation apply rather than the general definitions set forth” in the new unfair and deceptive regulation. This exception is troubling because it may enable DOT to establish a violation of a regulation that is intended to prohibit an unfair or deceptive practice, even if DOT could not (and would not have to)

demonstrate under its new tests that the airline practice at issue was “unfair” or “deceptive.” This exception could apply broadly because DOT, over decades, has used section 41712 as a basis for adopting an extensive body of highly detailed consumer protection regulations.” This is concerning because when DOT adopted those regulations, it never explained how the airlines’ practices at issue were “unfair” or “deceptive” by reference to any formal definition of those statutory terms.

Unresolved Ambiguities in the New DOT Regulation

While the new DOT regulation achieves DOT’s purpose of providing “greater clarity and certainty about [DOT’s] interpretation of unfair or deceptive practices and [DOT’s] process for making such determinations in the context of aviation consumer protection rulemaking and enforcement actions,” DOT left open for future interpretation key elements of its “unfairness” and “deception” standards. DOT Final Rule at 78707. These include how to define “substantial harm,” “likely to mislead,” and the concept of reasonableness (e.g., “reasonably avoidable,” and “acting reasonably under the circumstances”). Greater clarity as to DOT’s understanding of these terms may emerge from future DOT rulemakings and enforcement actions. Airlines, meanwhile, will have the opportunity to advocate for their interpretation of these terms, including by reference to FTC policy and case law.
