

## Southwest Must Face COVID-19 Refund Class Action

By **Linda Chiem**

Law360 (March 29, 2021, 7:57 PM EDT) -- A Pennsylvania federal judge said Monday that Southwest Airlines must face a proposed class action alleging it broke its contractual promises by denying customer refunds for canceled flights amid the COVID-19 pandemic, saying Southwest's contract of carriage has yet to be interpreted in favor of or against either side.

U.S. District Judge John M. Judge Gallagher denied a motion from Dallas-based Southwest seeking to dismiss the suit outright, to strike the class allegations and to transfer the case to the Northern District of Texas. He determined that "as it currently stands, plaintiffs have met the jurisdictional requirements to bring their breach of contract claims."

He said it's much too early to dump the suit given that the consumers have at least plausibly alleged their claims, declining to take Southwest's word that its terms and conditions contain both a class action waiver and a forum-selection clause that nullify the lawsuit.

Judge Gallagher said plaintiffs Adrian Bombin and Samantha Rood have standing to move forward on their claims that Southwest breached its contract of carriage when it unilaterally offered customers travel credits instead of refunds for flights that were canceled or rescheduled because of the pandemic.

A litigant has standing to sue if he or she suffered an injury-in-fact or an invasion of a legally protected interest that is fairly traceable to the defendant's conduct and is likely to be redressed by a favorable judicial decision, the judge explained.

"Here, plaintiffs have plausibly alleged that they suffered an injury because of a breach of contract that was caused by Southwest's conduct, and their injury is redressable in the form of compensatory damages," Judge Gallagher said in Monday's decision.

The consumers have alleged that Southwest's offer of credits for future travel — rather than a refund — ran afoul of the contract that Southwest passengers get when they buy their tickets, which allow those booked on canceled or delayed flights to request either the next available flight to their destination or a refund.

Southwest countered in a June **dismissal bid** that its terms make no promise of a refund, but rather put the airline in charge of choosing to either give a refund, book the customer on a new flight or give them a credit for a future flight. In other words, its contract is unambiguous, Southwest said.

Southwest argued that the consumers have ignored the plain language of the contract that states the airline will provide refunds for refundable tickets, but not for nonrefundable tickets like the one Bombin bought. Rood was added as a named plaintiff to the consumers' July amended complaint, prompting Southwest to **reassert its dismissal arguments** in August.

Judge Gallagher, however, said Monday that "the labyrinthine nature of the contract of carriage" means the issue is far from settled. In fact, both parties have advanced credible interpretations, he said.

For example, there's a section in the contract that suggests that Southwest can decide to offer credits when it cancels a flight. There's another section in the contract, however, called the "customer

service commitment," which is incorporated by reference in the contract of carriage and "expresses in no uncertain terms that customers 'will have the option to receive a refund' when Southwest makes 'any change' to a flight schedule more than seven days before departure," according to the ruling.

Adopting Southwest's interpretation that it has sole discretion to offer credits "would afford the contract of carriage a lopsided construction and render Section 10 of the customer service commitment meaningless," the judge said, noting that the court "cannot read that provision out of the contract."

Southwest's attempt to snuff the suit based on federal preemption also failed. Judge Gallagher said the Airline Deregulation Act — the sweeping federal law that preempts state-law claims having a connection with or reference to airline prices, routes or services — does not preempt the consumers' breach-of-contract claim. While the ADA bars states from imposing their own substantive standards with respect to rates, routes or services, it doesn't bar "affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated," as established by the U.S. Supreme Court's 1995 decision in [American Airlines v. Wolens](#) .

The consumers in this case have pointed directly to the terms of Southwest's own contract of carriage, not a state law or regulation.

Southwest's arguments to move the dispute to Texas, meanwhile, largely hinged on the terms and conditions on its website, which tells customers: "You agree to the personal and exclusive jurisdiction of the courts located within Dallas, Texas. You hereby consent to the exclusive jurisdiction and venue of the state and federal courts in Dallas, Texas in all disputes."

Southwest argued that users of its website and mobile app — including Bombin and Rood — must click to accept its terms and conditions upon purchasing tickets. But Judge Gallagher said there still isn't enough evidence to rule on the enforceability of Southwest's forum-selection clause because "there is no factual support for its assertion that plaintiffs actually agreed to the terms and conditions when they purchased their tickets."

"In short, there is no proof (beyond the unsworn allegations of defense counsel) that users of the Southwest website and mobile application must click on an icon to accept the terms and conditions before purchasing airline tickets," Judge Gallagher said.

An attorney for the plaintiffs said in a Monday statement that they're pleased with Judge Gallagher's "well-reasoned order that allows the case to move forward."

"We look forward to pursuing these claims on behalf of consumers who were not given an option of a refund when Southwest changed or cancelled their flights in the wake of the COVID-19 pandemic," Annick M. Persinger, a partner with Tycko & Zavareei LLP, said in the statement.

A Southwest spokesperson said the airline had no comment on the decision Monday.

Lancaster, Pennsylvania, resident Bombin **filed the lawsuit** in April after Southwest canceled at least one leg of his trip from Baltimore Washington International Airport to Havana, Cuba, by way of Fort Lauderdale, Florida, amid plummeting demand for air travel and government travel restrictions aimed at curbing the spread of the novel coronavirus. Bombin alleges that Southwest denied his request for a refund and only offered him a credit for a future flight.

Burbank, California, resident Rood had bought two tickets to Phoenix, Arizona, for flights in May, but Southwest changed the flight schedule three times in the weeks leading up to then, according to the amended complaint. The new flight times did not work for her so she requested a refund, but was told by Southwest that her only option was to accept a credit for future travel.

The plaintiffs are represented by James C. Shah and Michael P. Ols of Miller Shah LLP; Hassan A. Zavareei and Annick Persinger of Tycko & Zavareei LLP, and Melissa S. Weiner of Pearson Simon & Warshaw LLP.

Southwest is represented by Todd A. Noteboom and Roy Goldberg of Stinson LLP, and James T.

Moughan of Bennett Bricklin & Saltzburg LLC.

The case is Bombin v. Southwest Airlines Co., case number 5:20-cv-01883, in the U.S. District Court for the Eastern District of Pennsylvania.

--Additional reporting by Allison Grande and Matthew Santoni. Editing by Regan Estes.