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lies ahead. While I very much doubt that view, I am certain that all those who, like myself, have spent a lifetime pursuing consistent profitability, avidly hope it's so.[98]

Unfortunately, Mr. Crandall's hopeful expectations failed to materialize. Following the attack on the World Trade Center on September 11, 2001, coupled with an already depressed economy, and followed by wars in Iraq and Afghanistan, the airline industry was threatened with financial collapse. US Airways, United Airlines and Hawaiian Airlines filed for Chapter 11 protection, the major airlines sought deep concessions in labor costs to aid in recovery from a $20 billion plus industry-wide loss. The two decades following deregulation were marked dramatically more by bankruptcy than solvency. The much-hyped deregulatory era of laissez faire culminated in a major bailout by government in 2003 to make for added security costs and to offset war-related losses. By 2009, with the addition of pension plans of the auto industry, the PBGC had liabilities of more than $30 billion exceeding its assets.[99] In FY 2010, 147 pension plans failed.

Paradoxically, the U.S. Government now holds major equity positions in several airlines. It should be noted that regulation is not the antithesis of capitalism; socialism is. Government ownership of the means of production is the very definition of socialism. Decades after deregulation, the competitive landscape is littered with the corpses of scores of airlines, with employees and investors as collateral damage, while the government is in the business of bailing out the survivors.

[98] Robert Crandall, in Paul Stephen Dempsey & Laurence E. Gesell, *Airline Management: Strategies for the 21st Century*, Foreword (1997).
[99] http://unfundedliabilitiesandclasswar.blogspot.com, (visited Mar. 6, 2011).

CHAPTER 12

CONSUMER PROTECTION

Code sharing is unnecessary for, indeed irrelevant to, any legitimate purpose or actual service. Code sharing doesn't enable an airline to fly to any more places. It just enables the airline to mislead travelers into thinking that they fly to places they don't. I call that fraud.

Edward Hasbrouck,
Author[1]

INTRODUCTION

As stated before in this text, the ultimate purpose of the antitrust acts was to protect the public (corporations and individuals alike) against destructive competition, or restriction of competition.[2] In Chapters 10 and 11 we reviewed corporate welfare interests. In this Chapter, we look at the consumer protection legislation and regulations of both the United States and the European Union.

The Civil Aeronautics Board [CAB], established in 1938, was sunset on January 1, 1985, and its remaining functions were transferred to the Department of Transportation [DOT]. In 1984, the final year of the CAB's existence, the number of consumer complaints against airlines filed with the CAB totaled 10,332. The largest category of complaints for U.S. carriers involved flight problems (28.1%), baggage related complaints (17.6%), and refund complaints (16.8%). Total complaints rose 14% over the preceding year. The situation gave rise to real concerns of consumer protection in ensuing years,

[1] Edward Hasbrouck, *The Practical Nomad* (5th ed. 2011).
[2] *See FTC v. Raladam Co.*, 283 U.S. 643 (1931).

prompting the DOT to implement a consumer hot line and a method for reporting consumer complaints and on time performance by the various airlines.

Upon the sunset of the CAB in 1985, 209 functions were transferred to the Department of Transportation. Several were directly concerned with consumer protection:

- 14 C.F.R. Part 205, "Aircraft Accident Liability Insurance";
- 14 C.F.R. Part 250, "Oversales";
- 14 C.F.R. Part 252, "Smoking aboard aircraft";
- 14 C.F.R. Part 253, "Notice of terms of contract of carriage";
- 14 C.F.R. Part 254, "Domestic baggage liability";
- 14 C.F.R. Part 374, "Implementation of the Consumer Credit Protection Act with respect to air carriers and foreign air carriers";
- 14 C.F.R. Part 379, "Nondiscrimination in federally assisted programs of the Board—Effectuation of Title VI of the Civil Rights Act of 1964"; and
- 14 C.F.R. Part 382, "Nondiscrimination on the basis of handicap."

On several occasions, state and federal legislatures have stepped forward with proposed legislation to provide consumer protection against various forms of consumer abuse. The first Congressional bill was introduced in 1989. Mounting calls for legislation were opposed by the airline industry, which attempted to derail further legislative initiatives with its own Airline Customer Service Commitment of 1999.[3] As airlines became more adept at disaggregating the fare from auxiliary services, stripping down the product to the short term rental of a seat and a seat belt, consumer dissatisfaction grew. Though DOT staff had drafted regulatory remedies for consumer abuse, these proposals remained bottled up until the Obama Administration. Finally, the Department of Transportation promulgated more meaningful regulations during the 2010-2012 period.

[3] Audrey Johnson, *Consumers and Congress Lobby for Airline Customer Service Improvements: Voluntary Action or Legislation?*, 13 Loy. Consumer L. Rev. 402 (2001); Zachary Garsek, *Giving Power Back to the Passengers: The Airline Passengers' Bill of Rights*, 66 J. Air L. & Com. 1187 (2001) (however, this article erroneously gives the impression that airlines supported deregulation because they "pushed for more freedom in both routing and pricing." Actually, the industry as a whole opposed deregulation; the only major airline to support deregulation was United Airlines.).

FEDERAL PREEMPTION OF STATE REGULATION OF RATES, ROUTES AND SERVICES

Two provisions of federal law have led to serious conflict over the dividing lines between state and federal jurisdiction of aviation. Congress added a savings clause to the Civil Aeronautics Act of 1938 which provided that nothing in the Act should be construed to "abridge or alter the remedies now existing at common law or by statute, but that the provisions of this Act would be in addition to such remedies."[4] Subsequent re-codifications of this act preserved this savings clause, giving states jurisdiction over intrastate economic regulatory issues, as well as common law negligence and contract claims.

But with the promulgation of the Airline Deregulation Act of 1978 [ADA], Congress was concerned that the states might attempt to exert economic regulation over the airline industry at a time when Congress had determined that entry and pricing regulation should be terminated. As a consequence, Congress added a provision which stated, "[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...."[5] However, the Airline Deregulation Act left untouched the general remedies savings clause in the Federal Aviation Act, which provides: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute...."[6]

The preemption clause of the Airline Deregulation Act was designed to prohibit the states from re-establishing economic regulation that the federal government had abolished. In other words, the question of whether a state law relates to rates, routes or services is "whether state law actually 'interferes' with the purposes of the federal statute, in this case airline deregulation."[7] In turn, airline deregu-

[4] 49 U.S.C. § 40120 (2002).
[5] 49 U.S.C. § 41713(b) (2002).
[6] 49 U.S.C. App. § 1506.
[7] *Abdu-Brisson v. Delta Air Lines*, 128 F.3d 77, 82 (2nd Cir. 1997), "Permitting full operation of New York's age discrimination law will not affect competition between airlines—the primary concern underlying the ADA. Unlike the regulation of marketing practices at issue in *Morales*

lation explicitly was designed to stimulate "'efficiency, innovation and low prices' as well as 'variety [and] quality...of air transportation services'...."[8] Yet some courts have tended to construe the preemption provision broadly to prohibit an airline from suit for any general matters touching on airline operations.[9]

Under deregulation, some carriers began to engage in various methods of arguably false and misleading advertising that likely would not be tolerated in other industries. This led the National Association of Attorneys General [NAAG] to adopt detailed comprehensive guidelines for advertising and marketing practices in the airline industry in 1987. They required:

- Restrictions on promotional fares be in legible type;
- Round-trip purchase requirements be "clear and conspicuous" and include the round-trip price;
- Any "sale" or "discount" fares actually represent "a true savings over regularly available air fares";
- Any advertised fare "be available in sufficient quantity so as to meet reasonably foreseeable demand," so as to curtail the widespread airline industry practice of "bait and switch"; and
- Restrictive changes in the frequent flyer programs be adopted prospectively only.[10]

While the guidelines did not have the force and effect of law, they set a uniform national standard by which to measure airline practices. Several attorneys general warned airlines that they were violating the guidelines, implicitly threatening judicial action under their state consumer protection laws, while one explicitly threatened suit. The airlines retaliated with a suit of their own seeking a preliminary injunction, arguing that such state regulation of airlines was explicitly preempted by the above provision, and that being subjected to 51 different jurisdictions' views of appropriate advertising would unduly burden interstate commerce.

A reassessment of the preemption issues was stimulated by the U.S. Supreme Court decision in *Morales v. Trans World Airlines*,[11] and participation by the George Bush (the Elder) Administration's Justice and Transportation Departments, as *amicus curiae*, in advocating federal preemption of state tort law actions brought against aircraft manufacturers. Similarly, in *ATA v. Cuomo*, the Second Circuit found that the New York State Passenger Bill of Rights was preempted: "We hold that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays does relate to the service of an air carrier and therefore falls within the express terms of the ADA's preemption provision."[12] In *Morales* the Supreme Court held that the "rates, routes or services" provisions of the Airline Deregulation Act explicitly preempt enforcement of state truth-in-advertising laws[13]

The U.S. Supreme Court in *Morales v. Trans World Airlines*[14] held that the airline fare advertising provisions of the NAAG guidelines were preempted by the Airline Deregulation Act, holding that the phrase "related to a price, route or service," is to be given broad construction, as if it read, "if it has a connection with or reference to." *Morales* held that state law is "related to" rates, routes or services if it has a connection with them, but also recognized that "some state actions may affect [airline rates, routes and services] in too tenuous, remote, or peripheral a manner" to have a preemptive effect[15] The court found that the Airline Deregulation Act preempted the States "from prohibiting allegedly deceptive airline fare advertisements through enforcement of their general consumer protection statutes."[16] In the court's view, the NAAG guideline' requirement that advertised

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or the regulation of frequent flyer programs at issue in *Wolens*, whether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition or efficiency."

[8] *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), at 378. *See* Paul Dempsey & Andrew Goetz, *Airline Deregulation and Laissez Faire Mythology* (1992); *see also* Paul Dempsey, *The Social and Economic Consequences of Deregulation: The Transportation Industry in Transition* (1989).

[9] *See Smith v. Comair*, 134 F.3d 254 (4th Cir. 1998).

[10] *Morales v. Trans World Airlines*, 504 U.S. 374, 391, Appendix (1992).

[11] 112 S. Ct. 2031 (1992).

[12] *Air Transport Ass'n. of America v. Cuomo*, 520 F.3d 218 (2nd Cir. 2008), at 223.

[13] *Morales v. Trans World Airlines*, 112 S. Ct. 2031 at 2040-41 (1992). *See also Trans World Airlines v. Mattox*, 897 F.2d 773 (5th Cir. 1989), action brought against deceptive fare advertising under Texas *Deceptive Trade Practices Act* preempted, cert. denied, 490 U.S. 1106 (1989); *Wolens v. American Airlines, Inc.*, 589 N.E.2d 533 (Ill. 1992), contract and fraud actions against airline for retroactive changes in frequent flyer program not preempted, vacated, 113 S. Ct. 32 (1992); *Miller v. Northwest Airlines*, 602 A.2d 785 (N.J. Super. Ct. App. Div. 1992), negligence and intentional wrongdoing claim against airline for detention prior to boarding by security personnel not preempted.

[14] *Morales v. Trans World Airlines*, 504 U.S. 374 (1992).

[15] *Id.* at 384.

[16] *Id.* at 378.

fares be available to meet reasonably foreseeable demand "would have a significant impact upon the airlines' ability to market their product, and hence a significant impact on the fares they charge."[17] The court then limited its holding, proclaiming that it does not "address whether state regulation of the non-price aspects of fare advertising (for example, state laws preventing obscene depictions) would similarly 'relat[e] to' rates."[18] It also insisted that its decision would not give the airlines "carte blanche to lie and deceive consumers; the DOT retains the power to prohibit advertisements which in its opinion do not further competitive pricing."[19] Earlier cases had held that municipal noise regulation[20] handicapped discrimination actions[21] and state drug use laws[22] were preempted. More recent cases have struck down state advertising regulations,[23] and state licensing of intrastate air ambulance services.[24]

After *Morales*, airlines began raising the preemption defense liberally in a multitude of state law actions, including state common law tort and contract actions. Some courts held that state tort law claims were preempted by the Airline Deregulation Act.[25] Others held that common law breach of contract and intentional infliction of emotional distress claims were preempted.[26] State law claims against anticompetitive practices surrounding computer reservation systems were preempted, with federal antitrust law deemed the exclusive means of private enforcement.[27] One court held that state contract and tort claims for denied boarding compensation were not preempted, although punitive damages for such injuries were preempted.[28]

[17] *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), at 390.
[18] *Id.*
[19] *Id.*
[20] *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973); but *see Minnesota Public Lobby v. Metropolitan Airports Comm'n.*, 520 N.W.2d 388 (Minn. 1994), which held that noise regulations which do not, directly or indirectly, control or restrict aircraft flight are not preempted.
[21] *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984), airline practices regarding seating of handicapped passengers preempted); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C. Cir. 1987), state common law "obligation...to provide equal and courteous service to all" preempted.
[22] *French v. Pan Am Express, Inc.*, 869 F.2d 1 (1st Cir. 1989).
[23] *De Jesus v. American Airlines*, 532 F. Supp. 2d 345 (D.P.R. 2007).
[24] *Med-Trans Corp. v. Benton*, 591 F. Supp. 2d 812 (E.D.N.C. 2008).
[25] *See e.g., Hodges v. Delta Airlines*, 4 F.3d 350 (5th Cir. 1993).
[26] *See e.g., Cannava v. USAir*, 1993 WL 565341 (D. Mass. 1993).
[27] *Frontier Airlines v. United Air Lines*, 758 F. Supp. 1399 (D. Colo. 1989).
[28] *West v. Northwest Airlines*, 995 F.2d 148 (9th Cir. 1993).

These issues came to a head again before the U.S. Supreme Court in *American Airlines v. Wolens*,[29] a class action suit against American Airlines under both an Illinois consumer fraud statute and a common law breach of contract claim on grounds that American unilaterally and retroactively imposed restrictions on redemption of frequent flyer mileage award travel (specifically, capacity controls and blackout dates). The court found the statutory claim to be preempted by the Airline Deregulation Act, but did not read the preemption clause "to shelter airlines from suits alleging no violations of state-imposed obligations, but seeking recovery for the airline's alleged breach of its own, self-imposed undertakings."[30] It found that "[m]arket efficiency requires effective means to enforce private agreements." The court also observed that the DOT was not equipped either with "the authority [or] the apparatus required to super-intend a contract dispute resolution regime."[31] Hence, if common law contract claims were preempted, a plaintiff would be without recourse, for neither the DOT nor state courts could adjudicate the dispute. Thus, a state consumer protection or anti-fraud statute or regulation is preempted by the federal Airline Deregulation Act; a state common law cause of action in tort or contract apparently is not.

Numerous courts have recognized that state tort actions surrounding aircraft crashes,[32] state tort actions against carriers for intentional infliction of emotional harm,[33] state tort and contract actions brought by passengers "bumped" from flights as a result of deliberate overbooking,[34] and employment discrimination suits[35] are not preempted,

[29] *American Airlines v. Wolens*, 513 U.S. 219, 115 S.Ct. 817 (1995).
[30] *Id.* at 824. For a review of both the *Morales* and *Wohlens* cases, *see* Jonathan Blacker, *"Fly to London for $298": The Battle Between Federal and State Regulation of Airfare Advertising Heats Up*, 61 J. Air L. & Com. 205 (1995).
[31] *American Airlines v. Wolens*, 513 U.S. at 232.
[32] *Bieneman v. City of Chicago*, 864 F.2d 463 at 471 (7th Cir. 1988); *see also Stewart v. American Airlines, Inc.*, 776 F. Supp. 1194 (S.D. Tex. 1991), negligence action for injuries suffered when nose wheel collapsed not preempted. But *see Cathedral of Hope v. FedEx Corporate Services*, No. 3:07-CV-1555-D, 2008 U.S. Dist. LEXIS 43031 (N.D. Tex. May 30, 2008), negligence and gross negligence claims preempted.
[33] *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984); but *see Anderson v. USAir, Inc.*, 619 F. Supp. 1191 (D.D.C. 1985), aff'd, 818 F.2d 49 (D.C. Cir. 1987), in which the court found that an action for outrageous conduct and violation of the common law obligation to "provide equal and courteous service to all" was preempted.
[34] *West v. Northwest Airlines*, 995 F.2d 148 (9th Cir. 1993), but punitive damages are preempted; vacated and remanded, 112 S. Ct. 2932 (1992).
[35] *Air Transport Assn of America v. City & County of San Francisco*, 266 F.3d 1064, 1072-73 (9th Cir. 2001).

except for punitive damages, and unless the passenger had already accepted the airline's offer of alternative transportation.[36] Some courts have held that actions for compensatory damages,[37] punitive damages[38] and state laws authorizing recovery of attorneys' fees[39] are not preempted. State common law contract actions also have survived preemption challenges by airlines.[40]

UNFAIR AND DECEPTIVE PRACTICES

Upon a finding that the public interest so requires, the DOT has broad power to prohibit unfair or deceptive practices or unfair methods of competition.[41] Federal regulations govern an array of consumer abuses, including false and misleading advertising, overbooking and denied boarding compensation, lost and damaged baggage, access for persons with disabilities, smoking aboard aircraft, gambling, code-sharing, and computer reservation system display bias.

FALSE AND MISLEADING ADVERTISING

The DOT's advertising regulations are less stringent than those promulgated by most states. DOT enforcement practices allow advertising of one-way fares conditioned on round-trip purchase,[42] so long as seats at such prices are available in reasonable quantity, and the round-trip condition is prominently (i.e., the text print must be large enough to alert a reader of the actual fare), and proximately (i.e., the text must be located close to the fare) disclosed with the fare.[43] The DOT Office of Aviation Enforcement and Proceedings also allows carriers to list government-imposed or government-approved passenger charges (e.g., customs, immigration, agricultural inspection, ticket surcharges, international departure taxes, security, and passenger facility charges) separate from the advertised price so long as the ad clearly reveals the nature and amount of the charges.[44]

The regulations also require that any advertising of on-time performance be accurate, be based on recently published data, indicate the basis of the calculation, the time period involved, the carriers with which the advertiser is comparing itself, and the geographical scope of the data reported.[45] The position of the DOT's Enforcement Office is that "large type, prominent on-time performance claims must in and of themselves be accurate, without resort to fine print, non-proximate disclaimers or disclosures." Despite the manifest consumer abuse, the DOT has done nothing about funnel flights (that list a connecting flight as a single-plane operation with a single flight number), and has encouraged the practice of code-sharing (whereby one carrier falsely sells its products as another's).

The DOT has the power to levy fines or enter into consent decrees with carriers that violate its rules. For example, it brought three enforcement actions against Northwest Airlines in three years for violating the DOT's false advertising regulations.[46] Effective as of January 2012, DOT regulations prohibit any advertising or solicitation by a carrier or travel agent of air transportation, tour, or tour component unless the price quoted is the full price to be paid by the customer. In other words, the consumer must be advised of the full price to be paid for air transportation, inclusive of all taxes, fees and charges, at the first point he is presented with a price.

The DOT Office of Aviation Enforcement and Proceedings allows carriers to list government-imposed or government-approved passenger charges (e.g., customs, immigration, agricultural inspection, ticket surcharges, international departure taxes, security, and passenger facility charges) separate from the advertised price, so long as the ad clearly revealed the nature and amount of the charges. The carrier may advise the consumer of separate charges within the total price in

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[36] *Christensen v. Northwest Airlines*, 633 F.2d 529 (9th Cir. 1980); *Wasserman v. Trans World Airlines*, 632 F.2d 69 (8th Cir. 1980).
[37] *In re Air Crash Disaster at John F. Kennedy Int'l. Airport*, 635 F.2d 67 at 74 (2nd Cir. 1980).
[38] *In re Air Crash Disaster at Sioux City, Iowa*, 734 F. Supp. 1425 at 1428 (N.D. Ill. 1990); *In re Air Crash Disaster at Stapleton Int'l Airport*, 721 F. Supp. 1185 at 1187 (D. Colo. 1988).
[39] *Samtech v. Federal Express Corp.*, No. H-03-24, 2004 U.S. Dist. LEXIS 27130 (S.D. Tex. Mar. 14, 2004).
[40] *See e.g., Ginsberg v. Northwest*, 653 F.3d 1033 (9th Cir. 2011), contractual claim for breach of covenant of good faith and fair dealing not preempted; *Butler v. United Airlines*, No. C 07-04369 CRB, 2008 U.S. Dist. LEXIS 36646 (N.D. Cal. May 5, 2008), plaintiff's contract and fraud claims not preempted; and *Feldman v. United Parcel Service*, No. 06 Civ. 2490 (MHD), 2008 U.S. Dist. LEXIS 30637 (S.D.N.Y. Mar. 17, 2008), state law contract claims not preempted); *Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys.*, 235 F.3d 52 (2nd Cir. 2000), breach of contract claims not preempted, but state law insurance law contract claim preempted.
[41] 49 U.S.C. § 41712.
[42] 14 C.F.R. § 399.84.
[43] *See Trans World Airlines, Violations*, DOT Order 95-7-46 (1995).
[44] *See America West Airlines, Violations*, DOT Order 96-1-32 (1996); *American Eagle Violations*, DOT Order 96-1-13 (1996).
[45] 14 C.F.R. § 399.81.
[46] DOT Order 95-4-26 (1995).

fine print or on web page "pop ups" that are presented with the full fare.[47] The disclosure must accurately distinguish between government taxes, fees, and charges and carrier-imposed fees (e.g., fuel surcharges). Such carrier charges must accurately reflect the actual costs thereof.

As the Department of Transportation has noted:

> *Pursuant to 14 CFR 399.84, carriers advertising airfares must state the full price to be paid by the consumer. Under long-standing enforcement case precedent, the Department has allowed taxes and fees collected by carriers and ticket agents, such as passenger facility charges and departure taxes, to be stated separately from base fares in advertisements, so long as such taxes and fees are levied by a government entity, are not ad valorem in nature, i.e., not assessed as a percentage of the fare price, are collected on a per-passenger basis, and their existence and amounts are clearly indicated at the first point in the advertisements where a fare is presented so that consumers can immediately determine the full fare to be paid. Thus, for example, fare advertisements that: 1) fail to identify the existence and amount of separate additional taxes and fees at the first point at which a fare is displayed, or 2) include only general statements regarding the existence of such taxes and fees do not comply with section 399.84 or the Department's enforcement case precedent.*[48]

Carriers also may not include an "opt-out" provision for optional services. Instead, customers must affirmatively "opt-in" to purchase auxiliary services before a fee for such services is added to the total price for the transportation.[49] Any additional fees for such services (e.g., charges for carry-on or checked luggage, seat selection, beverages, snacks, meals, or preferential seating) must be promptly and prominently disclosed on the carrier's web site.[50]

Department of Transportation enforcement practices allow advertising of "each-way" fares conditioned on round-trip purchase,[51] so long as seats at such prices were available in reasonable quantity, and the round-trip condition was prominently (i.e., the text print must be large enough to alert a reader of the actual fare), and proximately (i.e., the text must be located close to the fare) disclosed with the fare.[52] Carriers may not advertise an "each way" airfare available only with a round trip purchase requirement unless the requirement is clearly and conspicuously noted in the ad and is proximately stated to the each way amount.[53] So as to avoid "bait and switch" tactics, the DOT considers it an unfair and deceptive practice for a carrier to offer an outbound each-way fare that is substantially higher than the return each-way fare.[54] Carriers may only advertise a "one way" airfare that is actually available without a round-trip purchase.

The regulations also require that any advertising of on-time performance be accurate, be based on recently published data, indicate the basis of the calculation, the time period involved, the carriers with which the advertiser is comparing itself, and the geographical scope of the data reported.[55] The position of the DOT's Enforcement Office is that "large type, prominent on-time performance claims must in and of themselves be accurate, without resort to fine print, non-proximate disclaimers or disclosures." The regulations require that printed advertisements for code-sharing services shall "prominently disclose that the advertised service may involve travel on another carrier," "clearly indicate the nature of the service in reasonably sized type," and "identify all potential transporting carriers...by corporate name and by any other name under which that service is held out to the public."[56] Despite the manifest consumer abuse, the DOT has done

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[47] 14 CFR § 399.84(a).
[48] 77 Fed. Reg. 11618 (Feb. 27, 2012).
Air Tran Airways Consent Order, DOT Order 2012-1-1 (2012).

[49] 14 CFR § 399.84(c).
[50] 14 CFR § 399.85.
[51] 14 CFR § 399.84.
[52] *See Trans World Airlines, Violations*, DOT Order 95-7-46 (1995).
[53] 14 CFR § 399.84(b).
[54] 77 Fed. Reg. 11618 (Feb. 27, 2012).
[55] 14 CFR § 399.81.
[56] 14 CFR § 257.5(d). *Sky West Airlines Consent Order*, DOT Order 2011-11-25 (2011).

nothing about funnel flights (that list a connecting flight as a single-plane operation with a single flight number), and actually has encouraged the practice of code-sharing (whereby one carrier falsely sells its products as another's).

The DOT has the power to levy fines or enter into consent decrees with carriers that violate its rules. For example, it brought three enforcement actions against Northwest Airlines in three years for violating DOT's false advertising regulations.[57] U.S. and foreign air carriers, travel agents, and tour operators may not increase prices after the transportation has been purchased by the consumer.[58] The only exception is for governmentally imposed post-purchase increases in taxes, fees and charges where the consumer has consented in writing at the time of purchase. Violation of these rules is considered an unfair and deceptive practice potentially subject to enforcement action.

CODE SHARING

Code sharing involves the listing of one carrier's flight as another's, so as to deceive consumers into believing they will be connecting onto two flights of a single airline. The term "code" refers to the identifier used in the flight schedule, generally the 2-character IATA carrier designator code and flight number. Thus, XX123, Flight 123 operated by airline XX, might also be sold by airline YY as YY3456 and by airline ZZ as ZZ9876. Each would (falsely) list the flight as its own. Consumer advocates argue that it should be deemed false and misleading advertising.

Edward Hasbrouck, author of *The Practical Nomad,* notes that "Code sharing is unnecessary for, indeed irrelevant to, any legitimate purpose or actual service. Code sharing doesn't enable an airline to fly to any more places. It just enables the airline to mislead travelers into thinking that they fly to places they don't. I call that fraud." Professor Regis Doganis has observed: "there can be little doubt that airline executives see alliances, especially when they involve code-sharing and capacity rationalization, as a way of reducing or limiting competition." *Consumer Reports* has described code-sharing as a "predatory weapon."

[57] DOT Order 95-4-26 (1995).
[58] 14 CFR § 399.87.

Through dual designation, code-shared connections often are listed three separate times on Computer Reservations Systems [CRS]—once falsely as a carrier A to carrier A on-line connection, a second time falsely again as a carrier B to carrier B on-line connection, and a third time accurately as a carrier A to carrier B interline connection. Multiple listing, and penalties imposed by CRSs on interline displays, tend to give code-sharing flights advantageous CRS display, often on the first CRS screen, where 85% of flights are sold.

Despite the manifest consumer deception code sharing poses, as well as the multiple listings it imposes on CRS, code sharing has been widely approved by DOT in international aviation. The DOT requires that travel agents and air carriers inform consumers of code sharing, a requirement that is widely ignored. Since 1999, air carriers and travel agents have been required to inform ticket purchasers of the true identity of the carrier actually providing the underlying service under code sharing or long-term wet leases. As an example, the rules provide a model written notification: "Important Notice: Service between XYZ City and ABC City will be operated by Jane Doe Airlines d.b.a. QRS Express."[59]

But not until a Notice of Proposed Rulemaking [NPR] in 1996 did the Department of Transportation address the anticompetitive issue of discriminatory domestic code-sharing, under which passengers destined to small communities are funneled by dominant hub carriers onto monopoly turboprop aircraft to the competitive exclusion and injury of independent regional jet or competing turboprop carriers.[60] Except in one proceeding,[61] DOT also has failed to address multiple flight listings of code-sharing flights that squeeze competitive alternatives off the first page of the CRS screen, and the practice of CRS adopting computer algorithms to add up to 24-hours of artificial flight time to the listings of competitive interline connections.

In 2010, Congress amended Section 41712, which contains a general prohibition against unfair and deceptive practices and unfair methods of competition, by adding a new Section 41712(c) that specifically requires disclosure in any oral, written or electronic communication to the public, prior to the purchase of a ticket, the identity of

[59] 14 CFR Part 257 (2003). 64 Fed. Reg. 12838 (Mar. 15, 1999).
[60] 61 Fed. Reg. 42,208 (Aug. 14, 1996).
[61] *Termination of Review under 49 U.S.C. 41720 of Delta/Northwest/Continental Agreements,* 68 Fed. Reg. 3293 (Jan. 23, 2003).

the carrier actually providing the service for each segment of a passenger's itinerary. Moreover, the amendment explicitly requires that on websites, disclosure must be made "on the first display of the web site following a search of a requested itinerary in a format that is easily visible to a viewer."[62]

COMPUTER RESERVATIONS SYSTEMS

DOT has observed that, "the airlines owning each [computer reservations] system have an incentive to use it to prejudice the competitive position of rival airlines."[63] Sabre, developed by American Airlines, was spun off and is now a publicly owned company. Most of Galileo's airline owners sold their stock by the end of 2000, though United Airlines continued to own 18% of Galileo's stock, Swissair 8%, and five other airlines 1.5%. Cendant (which owns Avis, a rental car company, and several hotel franchises), purchased Galileo in exchange for stock and cash in early October 2001. United subsequently sold its Cendant stock. Amadeus, a European CRS, entered the U.S. market by acquiring System One, developed by Eastern Airlines and owned by Continental. Continental subsequently sold its Amadeus shares. Amadeus was controlled by three foreign airlines—Lufthansa, Air France, and Iberia. Though most CRSs are no longer exclusively owned by airlines, every CRS continues marketing agreements with one or more airlines. American and Southwest market Sabre and United Airlines provides marketing support for Galileo. It should be noted that DOT's CRS rules apply to systems owned or marketed by airlines.[64]

Rules for Computer Reservations Systems, which are also known as Global Distribution Systems [GDS], were promulgated in attempt to reduce the amount of bias afforded airline CRS owners, albeit with less than perfect results.[65] As early as 1984, the CAB promulgated rules attempting to eliminate CRS display bias by prohibiting CRSs from using carrier identity as a factor for editing and ranking airline services.[66] The rules also required each system to give participating airlines and subscribers a description of its display algorithms on request. Regulations promulgated by the DOT in 1992 attempted to reduce architectural bias by eliminating features that favor the vendor airline (whose flights were previously accessed with fewer keystrokes), requiring equal functionality (to make all enhancements available to all airlines), and requiring each CRS owner to use identical procedures for loading fares and schedules (so that the vendor airline's fares and schedules are not loaded first).[67] In 2004, after airlines divested themselves of CRSs, many CRS rules were repealed.

CONSUMER CREDIT PROTECTION

As noted before, there was a wave of consumer-related federal legislation passed in the decades of the 1960s and 1970s. By the early 1980s, more than 50 consumer laws had been adopted. Included were laws related to consumer credit. As a result, all air carriers engaging in consumer credit transactions must comply with the consumer credit laws. Any violation of the following Acts of Congress is considered a violation of the Federal Aviation Act:

- The *Consumer Credit Protection Act*, incorporating the following legislation:
- The *Truth in Lending Act*, wherein exact finance charges must be divulged;
- The *Fair Credit Reporting Act*, establishing procedures for correcting and explaining billing errors;
- The *Equal Credit Opportunity Act*, making it illegal to discriminate;
- The *Fair Debt Collection Practices Act*, which limit third party collector abuses; and
- The *Electronic Fund Transfer Act*, which places controls on the electronic transfer of funds.

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[62] *Airline Safety and Federal Aviation Administration Extension Act of 2010*, Pub. L. No. 111-216, Title II, § 210, 124 Stat. 2362 (Aug. 1, 2010).
[63] 61 Fed. Reg., 42,208, 42,209 (Aug. 14, 1996).
[64] 14 CFR 255.2.
[65] 14 CFR § Parts 255 & 256. For an excellent review of these rules and their strengths and weaknesses, *see* Marj Leaming, *Enlightened Regulation of Computerized Reservations Systems Requires a Conscious Balance Between Consumer Protection and Profitable Airline Marketing*, 21 Transp. L. J. 469 (1993).
[66] 49 Fed. Reg. 11,644 (Mar. 27, 1984); *see United Air Lines v. CAB*, 766 F.2d 1107 (7th Cir. 1985).
[67] Aviation Daily (Sep. 22, 1992), at 504.

COMPENSATION TO PASSENGERS DENIED BOARDING INVOLUNTARILY

A common complaint against airlines, which became more pronounced after deregulation, is overbooking, whereby the airline sells more tickets for a flight than it has seats. Despite the nonrefundability of a purchase, a ticket and reservation does not guarantee a seat. To one degree or another most airlines practice overbooking. It may be more common where breakeven load factors are most critical, such as with the operation of smaller aircraft, where the lost revenue of just one empty seat can make the difference between profit or loss.

With a fully refundable ticket, it is relatively easy for a passenger to make a reservation and then not show. Before the post-deregulation advent of nonrefundable tickets, an estimated 20% of the passengers who made reservations did not meet their flights. Yet, airline seats are a perishable commodity, and it is not so easy for the airline to make up for lost income. Once the doors are closed and the aircraft taxis away from the jet way, the value of the seat is lost forever. Carriers argue that overbooking is necessary to compensate for the "no show" problem whereby some passengers make reservations for flights they do not board (although ticket non-refundability has reduced the "no show" problem). Deliberate overbooking of flights is a governmentally approved practice.[68]

In the 1960s, the CAB adopted regulations addressing "overbooking," whereby air carriers sell more than the number of available seats on a flight (i.e., oversales).[69] The U.S. Supreme Court observed that overbooking is a "common industry practice, designed to ensure that each flight leaves with as few empty seats as possible."[70] This practice was motivated, in part, by "no-shows," or the tendency of some travelers to book a reservation but not actually board the aircraft. The airlines sell perishable inventory, and want to fill every available seat with a warm, fare-paying derrière. The regulations attempted to reduce the number of passengers that were involuntarily "bumped" (i.e., denied boarding) without interfering unduly with carrier marketing and sales practices. These rules were amended by the CAB in 1978, 1982, and again in 2008 by the DOT, successor to much of the jurisdiction of the CAB when it was sunset in 1985.[71]

Responding to an incident in 2007 when passengers were stranded for hours on a JetBlue flight awaiting takeoff from JFK International Airport in New York, in 2009 DOT regulators ordered airlines to either get domestic passengers in the air within three hours or otherwise let them off the plane. On April 20, 2011, the DOT announced new passenger protections, effective after August of 2011, expanding the tarmac-delay rule to prevent passengers from being stranded on international flights for more than four hours.[72] Airlines can be fined as much as $27,500 per passenger for breaking the rule. Airlines would also be required to refund baggage fees if they lose luggage, and pay travelers more for bumping them from a flight that has been oversold.[73] The DOT's "Oversales" regulations[74] apply to carriers operating in domestic and foreign air transport (if the segment originates in the United States) with aircraft having a capacity of 30 or more passengers.[75] The rules have three essential features:

- If a flight is oversold, the airline must first seek volunteers who are willing to relinquish their seats in exchange for whatever compensation the airline may offer (typically discounts on future ticket purchases or coupons for free flights);[76]
- If an insufficient number of passengers volunteer to surrender their seats, the airline must employ non-discriminatory means (written "boarding priority rules") to determine who will be involuntarily bumped;[77] and
- An involuntarily bumped passenger may be eligible for denied boarding compensation depending on the price of the ticket and length of the delay.[78]

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[68] *See Nader v. Allegheny Airlines*, 626 F. 2d 1031 (D.C. Cir. 1980).
[69] *See* Paul Stephen Dempsey & William Thoms, *Law & Economic Regulation in Transportation* 268-73 (Quorum 1986).
[70] *Nader v. Allegheny Airlines*, 426 U.S. 290, 293 (1976).
[71] *See* DOT, *Oversales and Denied Boarding Compensation*, 73 Fed. Reg. (Apr. 18, 2008).
[72] *See* Sholnn Freeman, *New Rules Say Passengers Can't be Kept Waiting on Plane More Than Three Hours*, Wash. Post (Dec. 22, 2009).
[73] Associated Press, *New DOT Rule Tackles Fees, Bumping*, http://www.azcentral.com (visited Apr. 20, 2011).
[74] 49 C.F.R. Part 250.
[75] 49 C.F.R. § 250.2.
[76] 49 C.F.R. § 250.2b.
[77] 49 C.F.R. § 250.3.
[78] 49 C.F.R. § 250.5; *see also* Associated Press, *New DOT Rule Tackles Fees, Bumping*, http://www.azcentral.com (visited Apr. 20, 2011).

However, airlines typically impose a refund penalty which often may exceed the value of the coupon for which a refund is sought, thus noting that there are exceptions to the above rules. Passengers who fail to comply with the carrier's contract of carriage contained in the tariff regarding ticketing, reconfirmation, check-in or acceptability for transportation are ineligible for denied boarding compensation. Therefore, if the passenger arrives late, or is visibly intoxicated, he or she may be denied boarding and denied compensation as well. Moreover, if the carrier substitutes smaller capacity aircraft because of "operational or safety reasons," no compensation is required.[79] Passengers must be informed that acceptance of compensation may relieve the carrier from any additional liability. Moreover, the passenger may decline the compensation provided under these rules and seek damages in court.[80] For domestic flights, of course, the passenger could seek damages for breach of contract under domestic law, and for international itineraries, the passenger could seek compensation under the delay rules of Articles 20 and 19 of the Warsaw and Montreal Conventions, respectively.

Subject to the exceptions providing for volunteers, prior to 2011 air carriers were obligated to pay compensation to passengers denied boarding involuntarily from an oversold flight at the rate of 200% of the sum of the values of the passenger's remaining flight coupons up to the passenger's next stopover, or if none, to the passenger's final destination, with a maximum of $400. However, the compensation was one half the amount described above, with a $200 maximum, if the carrier arranged for comparable air transportation, or other transportation used by the passenger that, at the time either such arrangement was made, was planned to arrive at the airport of the passenger's next stop-over (or if none, at the airport of the passenger's destination) not later than two hours after the time the direct or connecting flight on which confirmed space was held was planned to arrive in the case of interstate and overseas air transportation, or four hours after such time in the case of foreign air transportation.[81]

In 2011, DOT engaged in a comprehensive update and expansion of its consumer protection rules, including those involving denied boarding compensation.[82] The newer rules raise denied boarding compensation limits to 200% of the one-way fare[83] up to $650 (up from $400) if the delay is between one and two hours for domestic flights (or one to four hours for international flights), and 400% of the one-way fare up to $1,300 (up from $800) if the delay is more than two hours for domestic flights (or more than four hours for international flights). Further, the new rules call for an inflation adjustment every two years based on the Consumer Price Index—All Urban Consumers, rounded to the nearest $25. Denied boarding compensation must also be provided to "zero fare ticket" holders (e.g., a ticket paid for with frequent flyer points) who are involuntarily bumped. In such circumstances, compensation will be the lowest price charged for a ticket in the same class of service (economy, business or first).[84]

Table 12-1, "Payments Required for Denied Boarding Compensation," reveals the changes in compensation levels:

Table 12-1—PAYMENTS REQUIRED FOR DENIED BOARDING COMPENSATION

Arrival Delay	*Before August 2011*	*After August 2011*
0-1 hours	No Compensation	No Compensation
1-2 hours (domestic) 1-4 hours (international)	100% of one-way fare up to $400	200% of one-way fare up to $650
Over 2 hours (domestic) Over 4 hours (international)	200% of one-way fare up to $800	400% of one-way fare up to $1,300

[79] 49 C.F.R. § 250.6.
[80] 49 C.F.R. § 250.9; *see generally, http://airconsumer.dot* (visited Nov. 21, 2009).
[81] *See Rousseff v. Western Airlines*, CCH 13 AVI 18,391 (1976).
[82] 76 Fed. Reg. 23110 (Apr. 25, 2011).
[83] The base fare does not include ancillary fees for optional services.
[84] 14 CFR § 250.5(d).

Carriers may offer free or reduced rate air transportation in lieu of the cash due, if:

- The value of the transportation benefit offered is equal to or greater than the cash payment otherwise required;
- The carrier informs the passenger of the amount of cash compensation which would otherwise be due and that the passenger may decline the transportation benefit and receive the cash payment; and
- The carrier fully discloses all material restrictions, including administrative fees, non-transferability, advance purchase or capacity restrictions, and blackout dates.[85]

A passenger denied boarding involuntarily from an oversold flight is not eligible for denied boarding compensation if:

- The passenger does not comply fully with the carrier's contract of carriage or tariff provisions regarding ticketing, reconfirmation, check in, and acceptability for transportation;[86] thus, if the passenger arrives late, or is visibly intoxicated, he may be denied boarding and denied compensation as well;
- The flight for which the passenger holds confirmed reserved space is unable to accommodate that passenger because of flight cancellation or substitution of equipment of lesser capacity when required by operational or safety reasons;[87]
- The passenger is offered accommodations or is seated in a section of the aircraft other than that specified on the ticket at no extra charge, except that a passenger seated in a section for which a lower fare is charged shall be entitled to an appropriate refund; or
- The carrier arranges comparable *air* transportation at no extra cost to the passenger that is planned to arrive at the airport of the passenger's next stopover or, if none, at the airport of the final destination, not later than one hour after the planned arrival time of the passenger's original flight. However, passengers may decline alternative transportation provided by an

[85] 14 CFR § 250.5(c).
[86] *See Goodman v. National Airlines* CCH 8 AVI 18,406 (1964).
[87] 114 C.F.R. § 250.6.

air taxi or by other modes of transportation (e.g., taxi, bus, or train).[88]

Passengers who are denied boarding involuntarily are to be furnished a written statement explaining the terms, conditions and limitations of denied boarding compensation, and describing the carrier's boarding priority rules and criteria. Furthermore, every carrier is required by regulations to display where tickets are sold and in a conspicuous public place a sign that is clearly visible and readable to the traveling public.

The sign shall have printed thereon the following:

NOTICE—OVERBOOKING OF FLIGHTS

Airline flights may be overbooked, and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation. If the flight is overbooked, no one will be denied a seat until airline personnel first ask for volunteers willing to give up their reservation in exchange for a payment of the airline's choosing. If there are not enough volunteers the airline will deny boarding to other persons in accordance with its particular boarding priority. With few exceptions persons denied boarding involuntarily are entitled to compensation. The complete rules for the payment of compensation and each airline's boarding priorities are available at all airport ticket counters and boarding locations. Some airlines do not apply these consumer protections to travel from some foreign countries, although other consumer protections may be available. Check with your airline or your travel agent.

[88] 14 C.F.R. § 250.9.

Notice of overbooking must be provided in the travel documents. Passengers must hold a confirmed reservation and check in on time. Passengers must be informed that acceptance of compensation may relieve the carrier from any additional liability for its failure to honor his or her confirmed reservation. However, the passenger may decline the compensation provided under these rules and seek damages in court.[89] For domestic flights, of course, the passenger could seek damages for breach of contract under domestic law, and for international itineraries, the passenger could seek compensation under the delay rules of Articles 20 and 19 of the Warsaw Convention[90] and the Montreal Convention[91] respectively. Note, however, how one-sided the rules are. A passenger with a confirmed seat may not actually get that seat. A passenger holding a non-refundable ticket who is unable to make the flight is not entitled to a refund, even if the airline sells the seat to another patron. Thus, there is no guarantee of a seat for a passenger who arrives in time to board the flight and no refund if he or she does not.

Unlike the European Union, the United States does not require passenger compensation for flight delays or cancellations. Carriers instead identify the assistance they may provide to passengers (e.g., ticket refunds, hotel accommodations, alternative transportation to destination, meals, and such) in their tariffs. The DOT has promulgated rules requiring air carriers to report data of delays of more than 15 minutes.[92] The data are publically disseminated to inform passengers of which carriers, and which airports, are chronically late.

TARMAC DELAYS

On January 2, 1999, a Northwest Airlines was stranded for more than seven hours at Detroit Metro Airport in a snow storm. Food and water ran out. The lavatories began to overflow. All the while, passengers were forced to remain in their seats. The crew did little to keep the passengers informed of when the aircraft would move.[93] This was only one of several instances where passengers were effectively imprisoned on aircraft, unable to deplane despite lengthy delays and inadequate provisions.

Regulations adopted in 2010 require U.S. and foreign air carriers to adopt contingency plans for lengthy tarmac delays at U.S. airports. These plans must be coordinated with U.S. Customs and Border Protection and the Transportation Security Administration [TSA] at large, medium and small hub airports, as well as airports to which their aircraft are regularly diverted. Carriers may not permit an international flight to remain on the tarmac at a U.S. airport for more than four hours from the time the aircraft door is closed or passengers are no longer allowed to deplane. For domestic flights, the limit is three hours. Two exceptions exist:

- Where the pilot in command determines that allowing a passenger to deplane would jeopardize safety or security (e.g., weather, air traffic control, or a requirement from a governmental agency); and
- Where air traffic control concludes that disembarkation would significantly disrupt airport operations.

Deplanement must be allowed even if the flight is diverted to an airport other than that originally scheduled. Moreover, the rules require that carriers provide adequate food and potable water (a granola bar and bottle of water would suffice) not less than two hours after the aircraft leaves the gate on departure, or touches down after arrival. Airlines must also provide operable lavatories, and adequate medical attention. Once the aircraft returns to the gate to allow passengers to deplane, the clock stops. However, if the aircraft closes its doors and again returns to the tarmac, the clock begins running again.

Failure to comply with these requirements is deemed an unfair and deceptive practice under the law potentially subject to enforcement action.[94] Large airlines can be subject to a maximum civil penalty of $27,500 for each violation. Each day constitutes a separate viola-

[89] 14 CFR § 250.9. *See generally*, DOT, *Aviation Consumer Protection and Enforcement*, "Fly-Rights: A Consumer Guide to Air Travel," at: http://airconsumer.dot.gov.
[90] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw (12 Oct. 1929), 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838.
[91] Convention for the Unification of Certain Rules for International Carriage by Air, Signed at Montreal (28 May 1999), ICAO Doc. 9740.
[92] 14 C.F.R. Part 234.

[93] Zachary Garsek, *Giving Power Back to the Passengers: The Airline Passengers' Bill of Rights*, Air L. & Com. (2001), Vol. 66, at 1187.
[94] 74 Fed. Reg. 68983 (Dec. 30, 2009); 76 Fed. Reg. 23110 (Apr. 25, 2011). 14 CFR Parts 244, 259.

tion.[95] In 2012, Congress passed a law adding additional requirements beyond those promulgated by the DOT.[96] The statute requires that the delay contingency plans describe:

- How the carrier will provide food, potable water, restroom facilities, comfortable cabin temperatures, and access to medical treatment, and
- Share facilities and gates in an emergency.

The statute also requires airports to file a contingency plan describing how they will:

- Provide for deplanement following excessive tarmac delays,
- Provide for the sharing of facilities and gates during an emergency, and
- Provide a sterile area for passengers that have not cleared customs and border protection.

CUSTOMER SERVICE PLANS

Scheduled U.S. and foreign airlines are required to adopt and implement a Customer Service Plan applicable to their scheduled flights from, to or within the United States.

The Plan must address the following items:

- Disclosure that the lowest fare offered by the carrier may be available elsewhere;
- Notification of known delays, cancellations and diversions;
- Delivery of baggage on time, and efforts to return delayed baggage within 24 hours, compensating passengers for reasonable expenses incurred because of delay, and reimbursing passengers for any baggage fees charged where the bag is lost;
- Permitting reservations to be held at the quoted price without payment, or (at the discretion of the carrier) canceled without penalty, for 24 hours from the time the reservation is made, provided the flight is more than one week prior to departure;
- Provision of prompt ticket refunds for credit card purchases, and refunds of cash and check purchases within 20 days, and refund fees charged for optional services not provided;
- Accommodation of passengers with disabilities;
- Satisfaction of passengers' essential needs during lengthy tarmac delays;
- Treatment of "bumped" passengers with fairness and consistency in the case of oversales;
- Disclosure of cancellation policies, frequent flyer rules, aircraft seating configuration, and lavatory availability on the carrier's website;
- Timely notification of changes in passenger travel itineraries; and
- Identification of services provided to mitigate inconvenience resulting from flight cancellations and misconnections (e.g., meals, telephone calls, hotel accommodations, and rerouting on later flights).[97]

The airlines are required to annually self-audit compliance with their Customer Service Plan, and make the results of such audits available to the DOT upon request.[98]

CONTRACTS OF CARRIAGE

All other issues of carrier liability to consumers are governed by "Conditions of Contract for Carriage." The passenger ticket or air waybill is a contract of carriage, which may incorporate by reference other binding provisions in its Tariffs so long as the ticket (or other travel documents) provides notice that it incorporates additional terms. Such provisions may incorporate arbitrary unilateral terms governing such issues as delayed flights or missed connections. They may include legal limits on the carrier's liability, the time periods within which passengers must file a claim, the right of a carrier to change any terms of the contract, and rules concerning reservations,

[95] 49 U.S.C. § 46301; 14 CFR Part 383.
[96] FAA Modernization and Reform Act of 2012.
[97] 14 CFR § 259.5.
[98] 14 CFR § 259.5(c).

check-in times, and the kinds of property the carrier refuses to carry.[99] These provisions may also include the application of the Warsaw Convention's provision for liability for personal injury, baggage liability, refusal to carry or failure to perform service including schedule changes, substitution of alternative carriers, aircraft and re-routing, restrictions on refunds, monetary penalties, or the circumstances under which the carrier may raise the price.[100]

Although most carriers will make efforts to compensate passengers for meals and overnight accommodations, where necessary, technically airlines are not liable for delays or misconnections caused by mechanical problems or weather.

Air carriers operating large aircraft must give notice of its terms of contract of carriage. As used here, "large aircraft" means any aircraft designed to have a maximum passenger capacity of more than 60 seats or a maximum payload capacity of more than 18,000 pounds. The ticket or other written instrument which embodies the contract of carriage may incorporate the contract terms by reference (i.e., without stating their full text), but each air carrier must provide to passengers, upon their request and free of charge, a copy of the full text of its terms. Additionally, each air carrier must keep available at all times and at all locations where tickets are sold within the United States, information sufficient to enable passengers to order the full text of such terms.

The terms of the contract of carriage may include:

- The limits on the air carrier's liability for personal injury or death of passengers, and of loss, damage, or delay of goods and baggage, including animals;[101]
- Claim restrictions, including time periods within which passengers must file a claim or bring action against the carrier;
- Rights of the carrier to change the terms of the contract;
- Rules about reconfirmation of reservations, check in times, and refusal to carry;[102] and

[99] *See Goodman v. National Airlines*, CCH 8 AVI 18,406 (1964).
[100] 14 CFR § 253.7.
[101] *See Stevenson v. American Airlines*, CCH 24 AVI 17,341 (1992); *See also Gluckman v. American Airlines*, CCH 24 AVI 17,947 (1994).
[102] *See Goodman v. National Airlines*, CCH 8 AVI 18,406 (1964).

- Carrier rights and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate air carrier or aircraft, and rerouting.[103]

Air carriers, flying aircraft with 60 seats or less, are exempt from requirements to file with the federal government, to print, or to keep open to public inspection, their tariffs showing all rates, fares and charges for air transportation between points served by it.[104] They are exempt except for tariffs for through rates, fares and charges filed jointly with air carriers subject to the tariff rules. By definition a "commuter" air carrier is a scheduled air taxi, and may not be subject to the same rules as other air carriers (certificated under Section 401 of the Federal Aviation Act).

Most tickets refer to liability limitations contained in the carrier's contract of carriage and tariffs. In holding that tariffs filed by carriers have the force and effect of law,[105] some courts appear to be under the false impression that the federal government still regulates domestic airline tariffs, and provides oversight to protect the public interest. But with deregulation, no such federal oversight exists, and carriers may unilaterally impose whatever liability provisions as may please them. In the authors' opinion, while a presumption of lawfulness was appropriate when the Federal Aviation Act required carrier filing of tariffs and governmental review and approval thereof, such a presumption is no longer warranted since domestic tariff filing requirements were eliminated in 1983, under the provisions of the Airline Deregulation Act of 1978. One could argue that they should instead be governed under principles of the common law of contracts, including the principle of unconscionability.

Moreover, such liability limitations may constitute "contracts of adhesion," which may be struck down by the courts on public policy grounds. A contract of adhesion is "a standardized contract form offered to consumers of goods and services essentially on a 'take it or leave it' basis, without affording the consumer a realistic opportunity to bargain, and under such conditions that the consumer cannot obtain the desired product or service except by acquiescing to the form of

[103] *See Schaefer v. National Airlines* CCH 16 AVI 17,354 (1980).
[104] *Federal Aviation Act of 1958*, § 403.
[105] *See e.g., Wackenhut Corporation v. Albert Lippert*, 609 So.2d 1304 (Fla. 1992); *Bella Boutique Corp. v. Venezolana Internacional de Aviacion, S.A.*, 459 So.2d 440 (Fla. 1984).

the contract.... [T]he weaker party has no choice to its terms."[106] Courts will not enforce an adhesion contract limiting the duties or liabilities of the stronger party absent plain and clear notification of its terms and understanding consent. Ticket reference to a carrier's contract of carriage may have conferred constructive notice when such contracts were filed in tariffs approved by a federal agency, but deregulation eliminated such filing and approval.

The DOT has imposed rules upon air carrier contracts of carriage in only a few areas. One is a prohibition against carrier limitation of a passenger's choice of forum. If a contract of carriage limits a passenger's freedom from bringing a claim in a court of his choice of competent jurisdiction ("including a court within the jurisdiction of the passenger's residence in the United States, provided that the carrier does business within that jurisdiction"), the carrier will be deemed to have committed a prohibited unfair and deceptive practice.[107] Practically speaking, this applies only to U.S. carriers on domestic flights, as the venue provisions of the Warsaw or Montreal Conventions would govern international flights. Another is a requirement that the carrier's contract of carriage includes a contingency plan for lengthy tarmac delays, and the carrier's customer service plan, and that its entire contract of carriage and updates thereto shall be posted on its web site in an easily accessible format.[108]

AIRLINE REPORTING AND NOTIFICATION REQUIREMENTS

One means of improving customer service is to provide consumers with better information regarding airline performance. In addition to Form 41 requirements under the Uniform System of Accounts and Reports [USAR] regarding carrier operational data, the DOT has imposed reporting requirements on carriers in several areas of consumer concern:

- *On-time performance*—To dissuade airlines from publishing unrealistically short schedules, in 1987 the DOT promulgated on-time performance reporting requirements.[109] The DOT regularly makes certain reported data public in its Air Travel Consumer Report, reporting for example, carrier on-time arrivals and departures. Flights are considered reportably "late" by the DOT only if they are delayed by more than 15 minutes, and the cause of delay is attributable to other than a mechanical or weather problem. As noted above, DOT regulations specify certain requirements for the advertising of such data.
- *Baggage handling performance*—Airlines also must report to the DOT the total number of mishandled baggage reports filed with the carrier on a monthly basis.[110]
- *Overbooking and denied boarding*—Airlines must report to the DOT the number of passengers "bumped" from flights originating in the United States on a quarterly basis.[111]
- *Tarmac delays*—Airlines operating passenger flights with 30 or more seats must report to the DOT tarmac delays of three hours or longer at U.S. airports on a monthly basis,[112] and retain certain information regarding tarmac delays for two years.[113]
- *Flight Status Changes*—Airlines operating passenger flights with 30 or more seats must promptly notify passengers and the public of known flight status changes, such as diversion of aircraft, cancellation of flights, and delays of 30 minutes or more in their scheduled operation.[114] The DOT Enforcement Office considers flight changes more than seven days prior to departure to be "schedule changes," for which "timely" (as soon as practicable) notice is required.[115]
- *Website Notification*—Airlines must post their current contingency plans for lengthy tarmac delays, customer service plans, contracts of carriage,[116] cancellation policies, frequent flyer rules, aircraft seating configuration, and lavatory availability.

[106] *Obstetrics & Gynecologists v. Pepper*, 693 P.2d 1259 (Nev. 1985).
[107] 14 CFR § 253.9.
[108] 14 CFR § 259.6.

[109] 14 CFR Part 234.
[110] 14 CFR § 234.6.
[111] 14 CFR § 250.10.
[112] 14 CFR Part 244.
[113] 14 CFR Part 259.
[114] 14 CFR §259. 8.
[115] 14 CFR § 259.5(b).
[116] 14 CFR § 259.6.

In addition to regulations governing commercial airlines, requirements of truthful disclosure are also imposed on travel agents.[117] Data harvested by the DOT, including comparative air carrier and airport performance in these areas, are published on its web site.

LOST AND DAMAGED BAGGAGE

Another frequent complaint against airlines is that of lost or damaged baggage. Airline companies have taken into consideration the potentiality that luggage may be lost or damaged, and most airlines have established baggage rules as part of their adopted tariffs covering reimbursement on the depreciated value of the baggage and its contents. Some airlines will also pay for repairs to damaged luggage, and if damaged beyond repair will pay for the depreciated value of the luggage. If luggage is delayed, the airline may reimburse the passenger for rental or purchase of new clothing or equipment. However, if and when lost luggage is found and returned, the passenger may be obliged to return the new, replacement items to the airline.

In the post deregulation era, a growing proportion of the airline business has shifted to commuter airlines, many of which operate smaller, 15 to 20-passenger aircraft. In most operational situations, to load these smaller aircraft with a full complement of passengers disallows the attendant carriage of the passengers' entire luggage, without exceeding the aircraft's allowable maximum gross weight. The result is delayed transport of the luggage on subsequent flights, and an inconvenience to the affected passengers. The practice of filling the aircraft to capacity, and intentionally leaving luggage behind without first notifying passengers, creates the potential for litigation to recover damages.[118]

The fear of losing baggage en route has prompted many passengers to carry on board the aircraft as much luggage as possible. Excess baggage in the passenger compartment has become such a problem that some U.S. airlines may now restrict the passenger to one carry-on item, as is the practice in Europe already. Not only are there security concerns associated with the carriage of baggage on board aircraft, there are safety issues as well. In *Andrews v. United Airlines*,

[117] 14 CFR § 399.80.
[118] *See Daun v. Sun Aire*, CCH 17 AVI 17,536 (1982).

for example, a passenger complained of being struck by baggage falling from an overhead bin.[119]

Common carrier liability rules are of ancient origin, and derived from Roman Law codification of bailments around 200 BC.[120] Early English common law also recognized liability for various categories of bailments, even by a gratuitous bailee to whom goods had been entrusted without compensation, saying "any man, that undertakes to carry goods, is liable to an action, be he a common carrier, or whatever he is, if through his neglect they are lost or come to any damage; and if a praemium [sic] be laid to be given, then it is without question."[121] But under the Code of Federal Regulations [C.F.R.], carrier liability is significantly circumscribed. Airlines must pay compensation for lost or damaged baggage, based on the depreciated value of the luggage and/or its contents.

Title 14 C.F.R., Section 254.4 states that an air carrier flying aircraft with more than 60 seats, "shall not limit its liability for provable direct or consequential damages" relating to lost, damaged or delayed baggage to less than $3,300 per passenger. "On any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall not limit its liability for provable direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than $3,300 for each passenger." This limit was raised from $1,250 in 1999.[122]

For international flights governed by the Warsaw Convention, the maximum is $20 per kilogram of checked baggage ($9.07 per pound), with a maximum of $634.90 per bag. Under the Montreal Convention of 1999, liability was raised to 1,000 Special Drawing Rights [SDRs], adjusted for inflation every five years. SDRs are based on current exchange rates (to six digits) for selected currencies according to the International Monetary Fund [IMF]. In early 2012, an SDR was the equivalent of about $1.55. At this writing, the limit is 1,131 SDRs, or approximately $1,750. Excess valuation coverage may be purchased from the airline.

[119] *Andrews v. United Airlines*, CCH 24 AVI 18,072 (1994).
[120] Paul Dempsey & William Thoms, *Law & Economic Regulation In Transportation* 255 (1986).
[121] *Coggs v. Bernard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (K.B. 1703).
[122] 14 CFR § 254.4.

NONDISCRIMINATION

Air carriers may not discriminate in air transportation on grounds of race, color, or natural origin. An airline may not refuse passage to or otherwise discriminate against an individual because of that person's race, color, national origin, religion, sex, or ancestry.[123] An "air carrier or foreign air carrier may not subject a person in air transportation to discrimination on the basis of race, color, national origin, religion, sex, or ancestry"[124] Not only are *passengers* protected against discrimination, but the carrier may not recruit, advertise, hire, fire, upgrade, promote, demote, transfer, layoff, terminate *employees*, nor establish rates of pay or other forms of compensation or benefits, select for training or apprenticeship, use facilities, or otherwise treat employees discriminatorily on the basis of race, color or national origin.

To insure that persons with disabilities receive adequate air transportation without unjust discrimination, the Rehabilitation Act of 1973 was passed to eliminate discrimination on the basis of handicap. In air transportation a "qualified handicapped person" is one who has a physical or mental impairment, but is not one whose carriage will, in the "reasonable expectation of air carrier personnel," jeopardize the safety of a flight or the health or safety of other persons.[125] Air carriers must provide reasonable access to the persons with disabilities. However, if a carrier reasonably believes that the person is not a *qualified* disabled person the carrier may refuse transportation in the interest of air safety.

Prior to the promulgation of the Americans with Disabilities Act of 1990 [ADA], Congress had already imposed requirements for handicapped access on airlines with the Air Carrier Access Act of 1986,[126] which provides that "No air carrier may discriminate against any otherwise qualified handicapped individual, by reason of such handicap, in the provision of air transportation."[127] With a specific aviation statute addressing disabilities, airlines were exempted from

[123] *See Harris v. American Airlines*, CCH 24 AVI 17,156 (1992).
[124] 49 U.S.C. § 40127(a); *see also United Air Lines, Inc.*, DOT Order 2003-11-13 (2003); *see also United Airlines Consent Order*, DOT Order 2011-11-2 (2011).
[125] *See Adamsons v. American Airlines* CCH 17 AVI 17,781 (1982); *see also Walt Shinault v. American Airlines* CCH 22 AVI 18,420 (1990).
[126] 49 U.S.C. § 47044; 14 CFR Part 382.
[127] *See also* 49 U.S.C. § 41705.

the ADA. The DOT has promulgated regulations requiring that new aircraft of more than 30 seats be equipped with folding armrests on half the aisles; that wide bodied aircraft have lavatories accessible to the handicapped; and that aircraft with 100 or more seats have priority space for storing a wheelchair. Wheelchairs, canes and crutches have priority for in-cabin and baggage compartment space over other passengers' baggage. But only able-bodied people capable of performing emergency evacuation functions can be seated in exit rows. Persons with disabilities who believe airlines have violated the Air Carrier Access Act may file a complaint with the DOT.[128]

As an activity receiving federal assistance, airports were dealt with in the Rehabilitation Act of 1973 and the Rehabilitation, Comprehensive Services and Developmental Disabilities Act of 1978, which prohibit discrimination and require equality of treatment for qualified persons with disabilities in terms of employment, access and utilization of airports. Structural changes in facilities are required, including making ticketing, baggage check-in and retrieval, boarding, drinking fountains, rest rooms, and telephones accessible to the disabled.[129]

SMOKING AND GAMBLING ABOARD AIRCRAFT

Smoking has been banned on all U.S. domestic flights.[130] In addition, federal law imposes a $2,000 maximum penalty for tampering with a lavatory smoke alarm.[131] Gambling (or "gaming" as the industry prefers since it is a more benign term) aboard U.S. or foreign air carriers serving the United States is prohibited by statute.[132] Obviously, this places carriers serving the United States at a competitive disadvantage vis-à-vis international carriers flying abroad.

EUROPEAN UNION REGULATIONS

To this point we have addressed United States regulation. We now cross the Atlantic and examine areas of airline regulation by the European Union. In 2008, the E.U. adopted airline advertising regula-

[128] 14 CFR § 302.201; *see e.g., Spirit Airlines Consent Order*, Order 2012-1-20 (2012).
[129] *See* Paul Dempsey, *The Civil Rights of the Handicapped in Transportation: The Americans With Disabilities Act and Related Legislation*, Transp. L. J. (1991), Vol. 19, at 309, 317-321.
[130] 49 U.S.C. § 41706; 14 C.F.R. Part 252.
[131] 49 U.S.C. § 46301(b).
[132] 49 U.S.C. § 41311.

tions. In 1991, the E.U. adopted denied boarding regulations.[133] In 2004, the E.U. adopted regulations providing compensation to travelers for delay, denied boarding and flight cancellations.[134] The regulation is applicable to *all* flights to an E.U. Member State where the operator is a European Community carrier and to *all* flights departing from an E.U. Member State. Practically speaking, it applies to all E.U. "community air carriers" as well as all foreign-flag carriers serving airports within the 27 E.U. Member States.

Under certain specified circumstances, the Regulation requires reimbursement of the ticket price (including those segments flown, and not yet flown), and compensation of between €250 and €600 depending upon the stage length of the flight. For journeys of less than 1,500 km, the airline must pay the passenger €250 (or half that, if travel is rescheduled for arrival within two hours). For all other intra-E.U. journeys and extra-E.U. trips between 1,500 km and 3,500 km, the airline must pay €400 (or half that, if travel is rescheduled for arrival within three hours). Extra-E.U. journeys beyond 3,500 km require payment of €600 (or half that, if travel is rescheduled for arrival within four hours).[135]

The Regulation also includes requirements for re-routing of passengers to their destination at the earliest opportunity, and provision of meals, accommodations and telecommunications under certain circumstances. The carrier must provide meals and refreshments, hotel accommodation where necessary and two communications (telephone/fax/e-mail), and give special attention to reduced mobility persons and those accompanied by children.[136] The carrier must either reroute the passenger to a destination at the earliest opportunity or at a later date according to the passenger's convenience or reimburse the full ticket purchase price including any flown flight sector which became purposeless in the original travel plan. If a passenger is rerouted to another airport in the same urban area, the carrier must pay for transportation to the original airport or an agreed third location.[137]

[133] European Commission Regulation 295/91 (Feb. 4, 1991); *see also* Paul Stephen Dempsey, *European Aviation Law* 145-46 (2004).
[134] European Commission Regulation 261/2004 (Feb. 11, 2004), establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation 295/91.
[135] Art. 7 of Reg. 261/2004.
[136] Art. 9 of Reg. 261/2004.
[137] Art. 8 of Reg. 261/2004.

For the regulation to apply, under Article 3 the passenger must hold a ticket with a fare that is available to the general public, or must have been issued a ticket under a frequent flyer/commercial program. The passenger must respect published cut-off times and have a confirmed reservation.

The European Court of Justice has dealt with the issue of whether a flight from a non-E.U. country to the E.U. on a non-Community carrier falls within the scope of the Regulation where the travel itinerary commenced at an airport within the E.U., thus falling in line with the scope of the Warsaw Convention[138] and the Montreal Convention[139] under their Article 1(2). Advocate General Eleanor Sharpston on March 6, 2008, strongly argued that this was not the intention of the Commission in drafting the regulation, which instead sought to implement a flight-sector-specific criterion to establishing application rather than itinerary-specific criterion used in the Conventions. The Court of Justice concluded that the definition of international carriage in the Warsaw and Montreal Conventions was irrelevant to determining the jurisdictional application of Regulation 261.[140]

ADVERTISING REGULATIONS

In 2008, the E.U. adopted Regulation 1008/08 which provides for non-discriminatory and transparency in airline pricing. Since the E.U. Commission proceeded by way of regulation, the instrument is of general application and is binding in its entirety and directly applicable in Member States without any need for national action.[141] The regulation applies to airlines, travel agents, tour operators, and other air fare sellers. Air transport pricing may not discriminate between the place of residence or nationality of the passengers, or the place or establishment of the travel agent. The final price quoted or advertised must include all applicable fares, charges, fees and taxes, though charges included in the total price may be identified separately. Any

[138] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw (Oct. 12, 1929), 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838.
[139] Convention for the Unification of Certain Rules for International Carriage by Air, Signed at Montreal (May 28, 1999), ICAO Doc. 9740.
[140] *Emirates Airlines v. Schenkel*, Case C-173/07 (2009), All ER (EC) 436; *see also* Paul Stephen Dempsey & Svante O. Johansson, *Montreal v. Brussels: The Conflict of Laws on the Issue of Delay in International Air Carriage*, Air L. (2010), Vol. 34, No. 3, at 206, 222.
[141] *See the Treaty Establishing the European Community*, Art. 110.2 (C325/33).

supplemental charges for services must be communicated in a clear, transparent and unambiguous way and the beginning of the booking process, and may be imposed only on an "opt-in" basis.[142]

FLIGHT CANCELLATION REGULATIONS

Where a flight is cancelled, the passenger must be offered a choice of reimbursement or re-routing.[143] Cancellation is defined as the non-operation of a flight which was previously planned and on which at least one place was reserved.[144] Meals and communications must be provided to all passengers. Where the passenger will depart the following day, overnight hotel accommodation and transportation must be offered. Passengers are also entitled to compensation pursuant to unless:

- Two weeks' notice is given;
- One to two weeks of notice is given, and re-routed arrival time is scheduled within four hours;
- Less than one week of notice is given, and re-routed arrival time is scheduled within two hours; and/or
- Cancellation is caused by extraordinary circumstances which could not have been avoided even by all reasonable measures.[145]

The Commission has noted that there is risk that airlines may too easily invoke *force majeure* (superior force; e.g., an unavoidable accident) to exclude their liability for cancellation.[146] The courts have generally been generous in the interpretation of this provision (e.g., strike action by airline staff was deemed unavoidable).[147] Under certain circumstances, passengers may be entitled to compensation of between €250 and €600. However, the carrier has a defense for cancellations "caused by extraordinary circumstances which could not

[142] Regulation of the European Parliament and of the Council No. 1008/08 (Sep. 24, 2008), OJ L 239 (Oct. 31, 2008).
[143] *See* Art. 5 of Reg. 261/2004.
[144] Art. 2(l) of Reg. 261/2004.
[145] Art. 7 of Reg. 261/2004.
[146] European Commission Communication (Apr. 4, 2007).
[147] *See Rigby v. Iberia*, West London County Court (Apr. 17, 2009).

have been avoided even if all reasonable measures had been taken.[148]

The Warsaw Convention provides: "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."[149] The Montreal Convention provides, *inter alia*, "punitive, exemplary or any other non-compensatory damages shall not be recoverable.[150] It also provides, *inter alia*, "any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention...."[151]

Article 24 of the Warsaw Convention provides: "In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention." The E.U. takes the position that its flight cancellation regulation does not conflict with the remedies under the Warsaw Convention[152] and the Montreal Convention[153] for delay, and their liability ceilings, provisions relieving the carrier for liability if it has taken "all necessary measures" to avoid the loss or that it was impossible to do so, provisions precluding the recovery of punitive or exemplary damages, or provisions declaring that the remedies available under the Conventions are exclusive.

Article 19 of the Montreal Convention provides, *inter alia*, "The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo." Article 22(1) of the Montreal Convention provides, "In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights." Article 19 of the Montreal Convention provides, *inter alia*, "[T]he carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures." Article 20(1) of the Warsaw Convention pro-

[148] Art. 5(3) of Reg. 261/2004.
[149] Art. 20(1).
[150] Art. 29.
[151] *Id.*
[152] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw (Oct. 12, 1929), 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838.
[153] Convention for the Unification of Certain Rules for International Carriage by Air, Signed at Montreal (May 28, 1999), ICAO Doc. 9740.

vides: "The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Article 29 of the Montreal Convention provides, *inter alia*, "[P]unitive, exemplary or any other non-compensatory damages shall not be recoverable. Article 29 of the Montreal Convention provides, *inter alia*, "[A]ny action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention...." Article 24 of the Warsaw Convention provides, "In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention."

Neither the Warsaw nor the Montreal Convention explicitly mentions the term "cancellation," though one could reasonably include it within the concept of "delay" addressed in Articles 20 and 19 of the Warsaw and Montreal Conventions, respectively. The delay provisions of the Conventions have been read by the E.U. as being passenger-specific, whereas due to the distinction drawn by the inclusion of a separate head of Cancellation in the Regulation, delay refers to the cancellation of a scheduled aircraft movement.

The E.U. takes the position that mandatory disbursements under the Regulation is distinct from the remedies available under the Conventions in that the carrier is not liable passenger for delay under the Warsaw and Montreal Conventions where the delay was unavoidable (i.e., where the carrier proves that "it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures"); in such circumstances, the carrier would not be obliged to cover such expenses (actual damages incurred) for the passenger. In contrast, the Regulation provides fixed compensatory amounts. These are not correlated to actual losses and are owed irrespective of whether the passenger suffered any loss as a result of the cancellation. Therefore, the E.U. insists that whereas the Warsaw and Montreal Conventions seek to provide damages, the Regulation focuses on compensating for inconvenience and imposing sanctions upon airlines which cancel flights based on commercial considerations. The passenger retains the right to sue under the Warsaw or Montreal Convention up to the capped

limits on liability set forth therein for other consequential damages flowing from his delay due to cancellation.

FLIGHT DELAY REGULATIONS

Where a flight's departure is delayed by two hours for a flight of less than 1,500 km, three hours for all other intra-E.U. flights and extra-E.U. flights up to 3,500 km, or four hours for all other flights, the air carrier must offer meals and two telecommunications. Where departure will be on the following day, hotel accommodation and transport to hotel must be provided. If the delay exceeds five hours, passengers are allowed the right to a refund of their ticket value including any segments not yet flown as well as any flown sector which no longer serves any purpose related to the passenger's original travel plans.[154] Complaints have been lodged with the Commission that the regime makes it beneficial for airlines to treat effective cancellations as long delays, which may be more inconvenient to passengers since re-routing is not provided. The motivation of the carrier is that no compensation is owed for a long delay. The Commission, however, refuted this claim in its Communication of April 4, 2007, stating that there was no evidence of such practice.

Here again, the E.U. alleges that its flight delay regulation does not conflict with the provisions addressing delay, compensation for delay, the prohibition of punitive damages or the exclusivity of remedy provisions of the Warsaw Convention[155] and the Montreal Convention.[156] The E.U. takes the position that its Regulation forces air carriers to assume certain disbursements from the outset when the disbursements become necessary as a result of delay in carriage of passengers, whereas the Warsaw and Montreal Conventions impose liability on the carriers to compensate all real consequential losses up to a capped amount. This interpretation was proffered by the European Court of Justice in *Queen v. Department of Transport*, in which the court held that the Regulation compensates inconvenience shared by all passengers rather than the individual losses subject to claim under

[154] Art. 6 of Reg. 261/2004.
[155] Convention for the Unification of Certain Rules Relating to International Carriage by Air, Signed at Warsaw (Oct. 12, 1929), 137 L.N.T.S. 11, 49 Stat. 3000, TS No. 876, ICAO Doc. 7838.
[156] Convention for the Unification of Certain Rules for International Carriage by Air, Signed at Montreal (May 28, 1999), ICAO Doc. 9740.

the Conventions.[157] The passenger who is provided with care under the Regulation retains all rights to claim for other consequential losses resulting from the delay under the applicable international regime. An outstanding issue of whether the carrier could include its care expenditure on the passenger when capping its liability under the Conventions remains. The Regulation differs from the Warsaw and Montreal Conventions in that Articles 20 and 19 of these Conventions, respectively, provide for an exclusion of liability wherever the carrier can show that it took all measures to avoid damage or it could not take such measures. Under the E.U. Regulation, the carrier remains obliged to assume the cost of "care" losses irrespective of the cause of delay or its unavoidability. Article 22 of the Montreal Convention limits recovery for delay to the carriage of persons for actual damages up to 4,150 Special Drawing Rights, recovery for delay of baggage to 1,000 SDRs and recovery for delay of cargo to 17 SDRs per kilogram.[158] These limits do not apply to delay of passengers or baggage if the carrier engaged in willful misconduct.

Article 22, "Limits of Liability in Relation to Delay, Baggage and Cargo," of the Montreal Convention provides:

- In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4,150 Special Drawing Rights;
- In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1,000 SDRs for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination;
- In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 SDRs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination;
- In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability; and
- The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

[157] *Queen v. Dep't. of Transport*, Case C-344/04 (resulting from an objection to the Regulation filed in the High Court in the U.K. by the International Air Transport Association, Hapag Lloyd and the European Low Fares Airlines Association).

[158] *Muoneke v. Compagnie Nationale Air France*, 330 Fed. Appx. 457 at 460, 2009 U.S. App. LEXIS 10244 (5th Cir. 2009).

DENIED BOARDING REGULATIONS

Airlines must call for volunteers before involuntary denied boarding. "Denied boarding" is defined as a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation.[159] A "volunteer" is defined as: a person who has presented himself for boarding

[159] Art. 2(j) of Reg. 261/2004.

under the conditions laid down in Article 3(2) and responds positively to the air carrier's call for passengers prepared to surrender their reservation in exchange for benefits. The volunteers are entitled to care required under Article 8.[160]

CHALLENGES TO EUROPEAN UNION REGULATIONS

The International Air Transport Association [IATA] argued that Regulation 261/2004 violated the Montreal Convention. The challenge was presented to the ECJ, and the Regulation upheld in *Queen v. Department of Transport.*[161] The Court declared that passenger delay causes two types of damages: (1) "damage that is almost identical for every passenger, redress for which may take the form of standardized and immediate assistance or care for everybody concerned"; and (2) "individual damage...redress for which requires a case-by-case assessment of the damage caused and consequently only be the subject of compensation granted subsequently on an individual basis."[162]

The European Court of Justice [ECJ] reasoned that the E.U. Regulation addressed the former, while the Montreal Convention addressed the latter. The court did not believe, "that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardized and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts."[163] The court also observed that these "standardized and immediate assistance and care measures" would not prohibit aggrieved passengers bringing an action under Montreal.[164]

As well as upholding the validity of Article 6 of the Convention on delay, the ECJ also upheld the Regulation against other objections filed by the complainants. The ECJ found that the Regulation did not breach the obligation of Community legislature to provide reasons for provisions since the general purpose of the Regulation to protect air

[160] Art. 2(k) of Reg. 261/2004.
[161] 2006 ECJ Celex Lesis 10 (2006).
[162] *Id.* at ¶ 43.
[163] *Id.* at ¶ 45.
[164] *Id.* at ¶ 47.

passenger rights was sufficient without more specific justification for each choice of action. Validity could not be challenged on grounds of proportionality since the Commission has wide discretion in the development of a common transport policy. Voluntary insurance is not an adequate substitute to airline care, since insurance would not grant immediate relief as prescribed by the Regulation. Inconvenience is not correlated with the price of ticket, and therefore this should not have been a factor in determination of carrier obligations (in contrast with the U.S. DOT's approach to denied boarding). Furthermore, differentiated compensation based on ticket price would violate the foundational principle of equal treatment. Compensation for flight cancellation was deemed by the ECJ not manifestly inappropriate since the carrier benefits from *force majeure* exclusion of liability provision. According to the ECJ, the differences from rules applicable to other modes of transport were justified in view of the idiosyncrasies and greater inconvenience/lack of alternatives to air transport.

The ECJ has a reputation for generously upholding aviation regulations promulgated by the ever-growing and power-thirsty Brussels bureaucracy,[165] but the reasoning in this case is beyond the pale. First, the regulation at issue is not standardized, but particularized, depending upon the distance flown and time of delay. Second, while it may be appropriate for a regulatory authority to fine an air carrier for violating consumer protection regulations, the penalties imposed upon carriers for delay by this regulation are paid to the passengers rather than to a governmental authority, and therefore appear to be an effort to compensate passengers for the damages they incurred because of suffering inconvenience, rather than levy an administrative fine upon airlines.

Actually, they are compensation to passengers for delay, precisely the issue addressed in Article 19 of the Montreal Convention, which explicitly provides a remedy for "delay," though the E.U. Regulation is devoid of the carrier defense of "all measures that could reasonably be required to avoid the damage" or impossibility to take such measures. If they are not compensation, they are penalties, and as such run afoul of the prohibition of "punitive, exemplary or any other non-compensatory damages" of Article 29. If, as the ECJ contends, they are supplementary to damages recoverable by passengers under Article 19, they violate the requirement in Article 29 that "any action

[165] *See* Paul Stephen Dempsey, *European Aviation Law* (2004).

for damages, however founded, whether under this Convention or in contract or in tort *or otherwise*, can only be brought subject to the conditions and such limitations of liability as are set out in this Convention...,"[166] and necessarily affront the uniformity of law that is the fundamental purpose of the Montreal Convention of 1999 and its predecessor Warsaw Convention.

SUMMARY

In this Chapter, we have looked at consumer protection legislation and regulations of both the United States and the European Union. The E.U., by 1991, had adopted denied boarding regulations. In 2004, it adopted regulations providing compensation to travelers for delay, denied boarding and flight cancellations. And in 2008, the E.U. adopted airline advertising regulations. European Union regulations are applicable to all E.U. "community air carriers" as well as all foreign-flag carriers serving airports within the E.U. Member States.

In the United States, as of January 1, 1985, the Civil Aeronautics Board was abolished and its functions remaining after deregulation were transferred to the Department of Transportation. At various times, states have likewise stepped forward to provide consumer protection. However, the preemption clause of the Airline Deregulation Act in 1978 was designed to prohibit the states from re-establishing economic regulation that the federal government had abolished. Subsequently, and following sunset of the CAB, the DOT has had broad power to prohibit unfair or deceptive practices or unfair methods of competition. Federal regulations govern an array of consumer abuses, including false and misleading advertising, overbooking and denied boarding compensation, lost and damaged baggage, access for persons with disabilities, smoking aboard aircraft, gambling, code-sharing, and computer reservation system display bias. Additionally, air carriers may not discriminate in air transportation on grounds of race, color, or natural origin.

Having looked at relations between airlines (i.e., the capitalists) and consumers (or the marketplace), attention now turns in Chapter 13 to the third leg of the market's three-legged economic stool, labor, and the tensions existing between workers and management.

[166] Montreal Convention, Art. 29 [emphasis added].

CHAPTER 13

LABOR AND EMPLOYMENT POLICY

I'm not a union buster; I'm an airline builder.

Frank Lorenzo
Chairman, Texas Air

LABOR RELATIONS HISTORY

The tension between labor and management is as old as capitalism itself and the "division of labor" in society.[1] Adam Smith was one of the first to write about the division of labor. In his *Wealth of Nations*, he described a vision of "perfect liberty" where an individual would be "...left perfectly free to pursue his own interest his own way...," amidst an economic balance of the market forces of capital, labor and the consumer.[2] In his ideal, the "invisible hand" of competition was to maintain a balance within the marketplace, wherein the consumer would remain sovereign. Unfortunately, the competitive capitalism of Adam Smith remains an elusive ideal in a modern world of corporate (oligopolistic) capitalism. One can certainly question whether the consumer is, indeed, sovereign as envisioned in Smith's laissez-faire marketplace. Moreover, enmity between management and labor remains a contemporary reality. Considerably more enlightened policies toward organized labor are in effect today than heretofore, but unions are still far from welcome in the eyes of management.

[1] *See* Laurence E. Gesell, *Aviation and the Law* 387-424 (3rd ed. 1998).
[2] Adam Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations* (1776).