

**HURRY UP AND WAIT:
AIR CARRIER LIABILITY FOR FLIGHT DELAYS**

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HURRY UP AND WAIT: AIR CARRIER LIABILITY FOR FLIGHT DELAYS

"Airlines don't guarantee their schedules, and you should realize this when planning your trip. There are many things that can-and often do-make it impossible for flights to arrive on time. Some of these problems, like bad weather, air traffic delays, and mechanical repairs, are hard to predict and beyond the airlines' control."¹

I. INTRODUCTION

Airlines today face a diverse array of challenges, including heightened security, increasing operating costs, escalated market competition, aging Air Traffic Control ("ATC") equipment failures, and, of course, unpredictable weather. Additionally, airport congestion is at or near capacity due, in large part, to the increased use of regional jets (which are scheduled at higher frequencies) and the rise in the use of private jets at airports that traditionally service commercial carriers. Contemporaneously, air carriers are under increased pressure to maximize revenues. As a result, airline passengers have experienced more frequent and extensive travel delays than ever before, and, quite literally, have been left to wait.

In the last few years, as a result of mounting travel delays and a few high-profile delay incidents that received intense media attention, flight delays/cancellations and airlines' customer service shortcomings have become an increasingly prominent target for legislators, politicians, and consumer advocacy groups. In fact, certain airlines, consumer groups, and legislators have advocated and lobbied for protective statutory and federal legislation to supplement the remedies available to the traveling public under state law and international treaty and to provide basic and uniform consumer protections to passengers on severely delayed flights.

The purpose of this article is to analyze the remedies and defenses available under state law and international treaty in passenger delay cases. Additionally, this article will discuss new state and federal legislation addressing the issue of passenger delay. Specifically, the article will review the recently enacted New York Passenger Bill of Rights, as well as the first legal challenge to this new law, Congress' proposed federal legislation, and the Department of Transportation's proposed regulation, all which seek to enhance airline passengers' rights and remedies for excessive flight delays.

II. LIABILITY AND RECOVERY FOR DELAY CLAIMS

Passenger delay litigation can take a myriad of forms. Plaintiffs' claims can sound in contract or tort – and usually both – and the term "delay" has been applied in overbooking/bumping situations, in addition to situations where flight departures have been delayed or cancelled due to circumstances outside of the airline's control, *e.g.*, inclement weather, aircraft mechanical problems, and/or air traffic delays. Whatever the scenario, the theory or recovery, the measure of damages, and the availability of defenses depends on the facts of each case and whether the travel at issue is domestic or international in nature.

A. Delay Claims Under State Law

Airline liability for delayed or cancelled flights is an area of aviation law that is not well defined. There is much uncertainty on the state of the law regarding the extent of liability and potential recovery in cases involving claims for delay, and, specifically, whether a passenger's relief is limited to recovery under the Contract of Carriage ("COC").²

1. Recovery Under Contract, Tort, or Both?

A threshold issue in litigation arising out of delayed or cancelled flights under state law is the basis for and the scope of recovery, *e.g.*, contract, tort, etc. Airlines often take the position that a claim for delay should be limited to a breach of contract claim based on the document outlining the airline-passenger relationship (*i.e.*, the COC) with no recovery in tort. Passengers, on the other hand, often argue that the remedies usually available under the COC, (*e.g.*, refund and rebooking expenses) are inadequate, and that additional breach of contract and tort damages should be awarded. Even assuming *arguendo* that there is a permissible tort recovery beyond the COC remedies, airlines will argue that any damages from such tort recovery must be limited to those arising independently and directly from the tort and not from the breach of contract.

Whether a COC provides the exclusive remedy to a passenger will turn on the specific facts, which may differ from passenger to passenger, and also might depend greatly on the judge. Courts have enforced provisions in an airline's COC in numerous circumstances, including actions based on a change in seat assignments, the removal of a passenger from the aircraft, changes in the airline's timetable, and claims arising from a passenger's failure to have proper travel documents. While the courts often offer little guidance for the basis of their decisions, they generally rely on the basic premise that the COC exclusively governs the contractual rights and obligations between the passenger and the airline. As explained by the Supreme Court in American Airlines v. Wolens, 513 U.S. 219, 228-29 (1995), the "terms and conditions that airlines offer and passengers accept are privately ordered obligations." Additionally, the receipt of a ticket by each passenger creates and defines the terms of the contract between that passenger and the airline.³

Federal regulations also lay out specific rules on disclosure requirements that are incorporated by reference in a carrier's COC.⁴ FAR Section 253.5(a) requires each air carrier to include a conspicuous notice on the ticket or other written instrument given to a passenger, which states that any terms incorporated by reference are part of the contract and passengers are entitled to receive and inspect a copy of the full text of the terms. Section 253.5(b)(5) further provides that the incorporated terms may include the "rights of the carrier and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate air carrier or aircraft, and rerouting."⁵

Some courts, nevertheless, have expanded a passenger's rights and remedies beyond the usual COC remedies of refund and rebooking expenses, and have awarded additional damages based on breach of contract and tort theories. For example, additional remedies may be available

if the airline committed an independent tort or the passenger was physically injured as a result of the delay or cancellation. As noted by the court in Clark-Fitzpatrick, Inc. v. Long Island R.R., 70 N.Y. 2d 382, 389 (1987) on the general question of when a tort claim can be brought in addition to a contract claim: "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract has been violated. . . . This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" However, even when a tort claim can be brought, the tort recovery cannot be a basis for recovering breach of contract damages; rather, the damages ordinarily must be related to the tort itself. The nature of the tort recovery would likely depend on the specific facts.

In the end, the liability analysis for domestic delay cases is extremely fact-specific. The case law indicates, however, that courts are more likely to grant recovery beyond the COC if there is evidence of tortious conduct by the airline or if the delay itself is very extensive. That is, the likelihood of a court allowing recovery beyond the COC probably increases for passengers who receive misinformation from the airline and/or are delayed while in the aircraft on the ground for extended periods due to alleged negligence or other tortious conduct by the airline.

2. Defenses – the Airline Deregulation Act of 1978 ("ADA")⁶

In defending against claims for domestic delay that seek a recovery beyond the COC, airlines may argue that common law tort claims are preempted by the ADA. The ADA provides that a state may not enact or enforce a law, regulation, or other provision if it has the force and effect of law relating to a carrier's prices, routes, and services.⁷ The Supreme Court has interpreted the preemption clause broadly and advised that a claim relates to airline "services" if it has a "connection with or reference to" that subject.⁸

For instance, courts in the Second Circuit generally determine that the ADA preempts state law claims when: (1) the activity at issue is an airline service; (2) the claim directly affects that service; and (3) the underlying conduct was reasonably necessary to the provision of the service and the tortious act occurred during the service or in furtherance of providing the service in a reasonable manner. If the action is too tenuous, remote, or peripheral to the service, it may not be preempted.⁹

Notably, courts have interpreted "services" to include ticketing, boarding, in-flight services, or the implementation of airline policies, such as bumping of passengers, denial of boarding, and segregation of smoking passengers.¹⁰ Courts also have found that state tort law claims based on negligence in providing access to flights or alleged mistreatment by airline personnel in attempting to provide alternate transportation to delayed passengers relate to airline "services" and also are preempted by the ADA.¹¹

B. Delay Claims Governed By International Treaty

Article 19 of the Montreal Convention provides:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the 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.¹²

Because the delay provisions under the Montreal Convention are similar to the Warsaw Convention, this article will refer to the Montreal Convention provisions while making note of certain differences with the Warsaw Convention. Several courts have also determined that the case law interpreting the Warsaw Convention can be applied in many cases to the Montreal Convention claims. It is important to note that in the treaty context, the practice of overbooking/bumping is considered analogous to circumstances involving a traditional delay because the results are essentially the same – a delay in transportation.¹³

1. Preemption of State Law Claims

State law claims that result from delay during international transportation generally are preempted by Article 19 of the Montreal Convention.¹⁴ This includes claims resulting from flight delays caused by weather-related conditions or mechanical problems.¹⁵ Claims for delay brought under the various state deceptive trade practices statutes also have been held preempted by the Montreal Convention.¹⁶

Notwithstanding this preemption, courts have determined that certain claims fall outside the scope of Article 19 and, therefore, are not preempted.

2. Claims Not Governed By Article 19

Courts have held that claims arising from complete nonperformance of the COC are not preempted by the Montreal Convention or Warsaw Convention.¹⁷ Airlines, however, generally must be given an opportunity to perform and provide alternative transportation before a passenger can claim nonperformance. For example, in Igwe v. Northwest Airlines, 2007 WL 34811 (S.D. Tex. Jan. 4, 2007), the passengers' refusal of the airline's reasonable offer of alternative transportation and two \$500 vouchers precluded their claim of complete nonperformance by the airline.¹⁸

Additionally, some cases have found that Article 19 is inapplicable, and the claim not preempted, when the carrier's acts that cause delay occur before boarding or are unrelated to the flight. For example, in Lathigra v. British Airways, 41 F.3d 535 (9th Cir. 1994), the Ninth Circuit held that the carrier's negligent act occurred not during the performance of the contract, but days before when the airline representative relayed improper information concerning a

discontinued flight. The court stated "[o]nce the passenger presents herself to the carrier or its agents as ready to begin the air journey, the Convention generally governs liability for delays in the carrier's performance, and its provisions apply until completion of disembarkation at the destination airport."¹⁹

Similarly, in Donkor v. British Airways, 62 F. Supp. 2d 963 (E.D.N.Y. 1999), the court found the Warsaw Convention inapplicable because plaintiff's claims arose from harms she incurred when she was detained and deported by British Immigration during her flight from New York to Paris via the UK because she had received incorrect information from the carrier and travel agent on the need for a transit visa. The court held that plaintiff had completed the process of disembarking at the time she sustained her alleged injuries and that the Warsaw Convention did not encompass claims where the plaintiff would have suffered the same injuries regardless of the delay of her flight. Interestingly, the court also held that plaintiff's breach of contract and negligence claims were not preempted by the ADA.²⁰

3. Defenses to Liability

Courts have found that airlines are afforded a defense to liability when they have taken all necessary/reasonable measures to avoid the damage or when the delay was caused by the contributory negligence of the passenger.

a. *All Necessary/Reasonable Measures*

Under Article 19 of the Montreal Convention (Article 20 of the Warsaw Convention), the carrier shall not be liable if it proves that it took "all necessary measures" to avoid the damage or that it was impossible for it to take such measures.²¹ "All necessary measures" has been interpreted as those measures that are reasonably available to the carrier and that are calculated to prevent the damage or avoid the accident.²²

For example, in Obuzor v. Sabena Belgium Airways, 1999 WL 223162 (S.D.N.Y. Apr. 16, 1999), over 200 passengers experienced a delay of their flights from New York to Lagos, Nigeria via Brussels. Due to fog, the air traffic controller diverted the New York-Brussels flight to Luxemburg, and, after five hours, buses transported the passengers to Brussels Airport. The passengers missed their connecting flight to Lagos, but they were provided with food and lodging during their five days in Brussels until the next flight to Lagos. Plaintiffs alleged, among other things, negligence and breach of contract. Applying a reasonableness/negligence standard, the court held that the carrier took "all necessary measures" to avoid plaintiffs' damages. The court found no evidence of willful misconduct by the carrier and held that the breach of contract claim was preempted by the Convention.

In Lee v. American Airlines, 2004 WL 2624647 (N.D. Tex. Nov. 17, 2004), however, the District Court denied, in part, the carrier's motion for summary judgment, finding that there was an issue of fact as to whether the airline took "all reasonable measures" to avoid a delay caused by mechanical problems. Although passengers had boarded the aircraft, they were

permitted to deplane and wait in the terminal during the attempts to fix the mechanical problem. The flight was not cancelled until approximately 5-6 hours later. The court found that the misinformation provided by the carrier to the passengers was relevant to the passengers' decisions on whether or not to make alternate arrangements.

b. *Passenger Fault*

Under Article 21 of the Warsaw Convention (Article 20 of the Montreal Convention), the carrier also may assert that it is not liable if the delay was caused by the contributory negligence of the passenger. This defense generally is involved when a passenger fails to comply with time requirements for check-in.²³

4. Limitations on Damages

Under Article 22(1) of the Montreal Convention, the carrier is liable for provable damages caused by delay, but the liability of the carrier is limited to 4,150 SDRs (approximately US \$6,500) per passenger. Under Article 22(1) of the unamended Warsaw Convention, an airline may be liable up to \$10,000 for delay damages.

5. Willful Misconduct/Intentional and Reckless Acts

A passenger may be able to recover damages in excess of the liability limits of the Montreal Convention if the passenger can prove that the carrier's acts were done with "intent to cause damage or recklessly and with knowledge that damage would probably result."²⁴ Although this is a difficult burden, it has been met in major accident cases,²⁵ and also in baggage delay cases.²⁶

6. Summary of Recoverable Damages

The Montreal Convention, like the Warsaw Convention, does not specify the types of damages that are recoverable (within the limits) for delay, and the case law that has developed concerning Article 19 damages has been "unclear and varied."²⁷ For claims governed by the treaties, generally the amount of damages is determined based on applicable state law – up to the applicable Convention limits and except to the extent that a type of damage is barred by the Convention.²⁸ Additionally, because the Conventions are premised on a "contract" between the passenger and carrier, courts generally rely on basic contract principles that permit reasonably foreseeable damages.²⁹

a. *Compensable Damages*

The following are the types of damages generally awarded in an action for delay in Convention cases:

- Economic Damages – Courts usually permit recovery of economic damages arising out of the delay itself. Often these damages include hotel accommodations, transportation costs

to and from the airport, food expenses, costs to replace clothing and other necessary items, etc.³⁰ Damages for the loss of a vacation or prepaid vacation expenses may or may not be recoverable depending on the circumstances (and probably the judge).³¹

- Physical Injury Damages – A carrier is only liable for personal injury if the conditions set forth under Article 17 are satisfied – bodily injury caused by an accident (*i.e.*, an unusual or unexpected event external to the passenger) on the aircraft or in the course of embarking or disembarking.³²
- Mental Anguish and Emotional Distress Damages – Mental anguish and emotional distress damages are not recoverable where they do not arise from a physical injury.³³
- "Inconvenience" Damages – Courts are split as to whether damages for "inconvenience" are recoverable. Some courts have found "inconvenience" damages to constitute cognizable harm for delay in international travel because they can encompass an economic loss.³⁴ Other courts have found that "inconvenience" damages are barred by the convention because they are a re-characterization of mental anguish damages.³⁵
- Consequential Damages – Consequential damages, such as lost financial opportunities, are only recoverable when they are a foreseeable consequence of the alleged breach. Consequential damages that are unforeseeable are not recoverable.³⁶

b. *Punitive Damages Not Recoverable*

The Montreal Convention explicitly prohibits the recovery of punitive damages. The majority of case law also holds that punitive damages are not recoverable under the Warsaw Convention.

C. **Summary Of Damages Awarded In Actions For Delay Stemming From Both Domestic And International Travel**

The following summary provides a general overview of the types of damages that may be recovered in an action for delay arising from either domestic or international transportation.

1. Damages Awarded in Delay Cases:

- Food expenses³⁷
- Lodging³⁸
- Additional costs for the replacement of items in lost or inaccessible baggage³⁹
- Telephone/telecopier costs⁴⁰
- Lost/damaged/inaccessible baggage⁴¹
- Emotional distress and mental anguish (anxiety)⁴²
- Exhaustion, frustration, humiliation, inconvenience⁴³
- Physical discomfort⁴⁴

2. Damages Denied in Delay Cases:

- Lost earnings or business opportunities⁴⁵
- Spending the night in an airport, or unpleasant or unsafe hotel⁴⁶
- Being subjected to repeated intentional and negligent misrepresentations⁴⁷
- Being trapped in an aircraft or holding area without adequate food, water, restroom facilities, and status information⁴⁸
- Punitive damages⁴⁹

3. Damages Denied and Awarded in Delay Cases:

- Additional airfare costs⁵⁰
- Refund of airfare ticket price⁵¹
- Cab fare/car rental⁵²
- Prepaid and/or nonrefundable connecting flight airfare⁵³
- Loss of a refreshing and memorable vacation⁵⁴
- Loss of time⁵⁵
- Obtaining, without assistance, alternative travel arrangements⁵⁶
- Physical injury (pain and suffering)⁵⁷

III. PASSENGER BILL OF RIGHTS LEGISLATION

A. New York's Passenger Bill of Rights

On June 21, 2007, New York became the first state in the nation to enact a passenger bill of rights requiring airlines to provide basic consumer protections to the flying public who are stranded on aircraft on severely delayed flights operating out of New York.⁵⁸ The New York State Legislature proposed the bill in response to a series of high-profile incidents – including the ice storm that hit New York's airports during Valentine's Day 2007, which resulted in many airline passengers being grounded on the runway at New York's area airports for over 3 hours (and in some cases over 6 hours) without water, food, and other basic comforts.

New York's Passenger Bill of Rights took effect in January 2008 and applies to all airlines, both U.S. and foreign, that provide scheduled air service to or from New York and covers any airline regulated by the Federal Aviation Administration ("FAA") that conducts scheduled passenger air transportation.

This new law requires airlines to provide their passengers with basic necessities when the passengers have boarded the aircraft and are delayed for more than 3 hours on the aircraft before takeoff. These necessities include adequate food, drinking water, and other refreshments; electric-generation service for fresh air and lights; and working restrooms, which includes the removal of waste from holding tanks.⁵⁹

The New York Passenger Bill of Rights does not apply to situations where passengers are delayed at the airport before boarding, and, unlike the pending federal legislation (discussed below), the new law also does not grant passengers the right to disembark the aircraft in the event of a long delay after boarding.

In addition, the new law provides for the creation of the Office of Airline Consumer Advocate ("OACA") to oversee compliance under the new legislation, and to investigate passenger complaints filed with the OACA.⁶⁰ Pursuant to the law, the OACA is authorized to:

- assist customers in resolving problems with airlines;
- identify areas in which customers have problems dealing with the carriers;
- propose solutions to practices and procedures of the carrier or airport;
- preserve and promote the rights of the customer;
- promote open and direct communications; and
- initiate, investigate, attempt to resolve, and (if necessary) refer any violations to the New York State Attorney General's Office.⁶¹

The New York Passenger Bill of Rights also requires airlines to provide clear and conspicuous notice of consumer complaint contact information. Specifically, airlines must post signs and provide forms at all service desks and other appropriate locations with the following information:

- basic information about the OACA;
- a telephone number and mailing address of the OACA, the Aviation Consumer Protection Division, and the Office of Aviation Enforcement of the U.S. Department of Transportation;
- explanations informing passengers of their rights under the law; and
- any other information the Consumer Advocate may recommend.⁶²

Importantly, not only is the Consumer Advocate authorized to refer any violations by the airlines to the New York State Attorney General's Office, but the Attorney General is authorized to recover a civil penalty of up to \$1,000 per passenger per violation by way of a civil action in any court of competent jurisdiction.⁶³ Also, as a part of its investigatory duties, the new law grants the Consumer Advocate with subpoena power.⁶⁴

The Air Transport Association of America ("ATA") has challenged the legality of New York's Passenger Bill of Rights in the United States District Court for the Northern District of New York in the case of Air Transport Association of America v. Cuomo.⁶⁵ The case was decided on December 20, 2007, and the Court upheld this new law. The parties currently are briefing the appeal, which is pending before the United States Court of Appeals for the Second Circuit.

1. New York's Passenger Bill of Rights Upheld - *ATA v. Cuomo*

Although New York's Passenger Bill of Rights only became effective in January 2008, the ATA, the trade association representing the major U.S. air carriers, already has become the first entity to challenge the constitutionality of this new law by suing the State of New York. The ATA argued that the legislation – requiring airlines to furnish fresh air, sanitation facilities, and food and water to passengers on flights delayed on the ground for more than 3 hours – regulates the "services" provided by air carriers and, thus, is explicitly preempted by the Airline Deregulation Act ("ADA"). According to the ATA, only the federal government can regulate commercial airlines and any regulation passed by New York State must be held unconstitutional. The ATA, thus, sought summary judgment from the United States District Court for the Northern District of New York.

In reaching its holding, the District Court first evaluated: (1) whether the area of legislation (health and safety) is within the State's historic police power, (2) whether Congress intended that state laws such as the Passenger Bill of Rights be preempted by the ADA, (3) whether the ADA explicitly preempts the provisions of the Passenger Bill of Rights, (4) whether Congress intended to implicitly preempt the entire field of aviation health and safety, and (5) whether there was a real danger of diverse regulation in aviation health and safety regulation.

In conducting its analysis, the Court first held that the field of health and safety, particularly, is one of the most established areas of state police power. The court stated:

[T]he Passenger Bill of Rights is an exercise in state protection of the public health. Fresh air, water, sanitation and food are necessities in the extreme situation in which this act applies. It threatens the public health to contain people on grounded airplanes for hours without these necessities, particularly, though not exclusively, if passengers include diabetics, young children, the sick or the frail. Because the Passenger Bill of Rights involves the historic police power of New York State, Plaintiff bears a heavy burden in seeking to overcome the presumption against preemption.⁶⁶

The Court recognized that the ADA was created to "encourage, develop, and attain an air transportation system which relied on competitive market forces to determine the quality, variety, and price of air services, and for other purposes,"⁶⁷ and that it explicitly asserts that states "may not enact or enforce a law, regulation, or other provision . . . related to a price, route, or service of an air carrier."⁶⁸ The Court then analyzed the New York legislation against the backdrop of the ADA to determine whether the state law should be preempted – either explicitly or implicitly.

The Court found that the provisions of the New York Passenger Bill of Rights is a health and safety issue and not a "service" within the meaning of the ADA. The Court noted that,

"[m]uch as passengers do not specifically contract for the right to be free of tortious behavior, they do not contract for access to bathrooms, air and water: the provision of these necessities is presumed."⁶⁹ The Court also found that because Congress did not intend to preempt the entire field of aviation health and safety, state actions outside the explicit preemption provisions of the ADA are not preempted. The Court also noted that Plaintiff did not meet its burden in establishing that a finding of broad implicit preemption would advance the purpose of the ADA.

In *dicta*, the Court also found that there is limited danger of diverse regulation in the area of health and safety regulation and concluded that any potential hardship to the airlines is outweighed by the State's interest in exercising its power to protect the safety and welfare of its citizens.

Following its analysis, the Court dismissed the ATA's preemption challenge and held that:

1. New York was acting within its police powers in enacting the statute, which covers legitimate health and safety issues and does not affect an airline's rates, routes, or service;
2. the ADA did not explicitly preempt New York's Passenger Bill of Rights based on health concerns; and
3. Congress did not intend to preempt the entire field of airline health and safety, precluding an implied preemption claim.

Unsolicited and for judicial efficiency, the Court also *sua sponte* granted summary judgment to the State of New York with respect to this challenge by the ATA.

2. ATA Appeal of the District Court Order (Currently Pending)

The ATA has appealed the District Court's Order to the United States Court of Appeals for the Second Circuit. On December 28, 2007, the ATA moved to expedite the appeal, which the Court granted.

The issues on appeal before the Second Circuit are:

- 1) Whether the District Court correctly held that the Passenger Bill of Rights is not expressly preempted by the ADA because it neither references a "service of an air carrier" within the meaning of the ADA nor has a significant economic effect on an airline price, route, or service?
- 2) Whether the ATA waived their claim of implied preemption, and, in any event, whether the ADA and other express preemption provisions represent Congress' deliberate choice limiting the scope of preemption of state airline regulation? and
- 3) Whether the District Court properly granted summary judgment *sua sponte* to the State defendants without notice to the parties and dismissed the complaint in its

entirety, where ATA moved for summary judgment on all claims in the complaint and represented that the case presented only legal issues?

The parties continue to brief the appeal and Defendant-Appellee the State of New York submitted its response brief on February 8, 2008.

B. Pending Federal Legislation – Airline Passenger Bill of Rights Act of 2007

Historically, the aviation industry has been highly regulated by the federal government, and federal courts and legislators have not looked upon state efforts favorably, such as those taking place in New York, to regulate airline service. It should come as no surprise, therefore, that Congress, in both the House of Representatives and the Senate, has introduced new passenger rights legislation. Of course, the increased media attention on the issue of passenger delays and airline customer service no doubt also played a large role in the Congressional action. The new legislation is known as the Airline Passenger Bill of Rights Act of 2007.⁷⁰

The Act, which would amend Chapter 417 of Title 49 of the United States Code, was introduced in the Senate on February 17, 2007 by Senators Barbara Boxer (D.) of California and Olympia Snowe (R.) of Maine (as S. 687) and in the House of Representatives on March 1, 2007 by Representative Mike Thompson (D.)⁷¹ of California (as H.R. 1303). The purpose of the Act is to improve air carrier passenger services and protections and was created in response to the recent increase in incidents of passenger delays.

1. The Senate Bill (S. 678)

S. 678 was introduced to ensure that passengers have access to necessary services while on a grounded aircraft and are not unnecessarily held on a grounded aircraft before or after a flight.⁷² The Senate bill, unlike the New York legislation, only would cover certified air carriers (i.e., U.S. air carriers) that conduct scheduled passenger air transportation.⁷³

In cases where a flight is delayed, the Senate bill would require airlines to do the following:

- Provide adequate food, potable water, and restroom facilities to grounded passengers during the delay;⁷⁴
- Where an aircraft is delayed for more than three hours on the ground and the passengers have boarded, the airline would have to provide passengers with the option to deplane.⁷⁵ The airline then would have to give its passengers the option to deplane at least once every three-hour period. There are two exceptions to this rule: (1) if the pilot reasonably determines that the flight will depart within 30 minutes after the three-hour delay or (2) if the pilot reasonably determines that permitting passengers to deplane would jeopardize passenger safety or security.⁷⁶

On April 11, 2007, the Senate bill was referred to the Senate Committee on Commerce, Science, and Transportation, and hearings were held. There has been no further activity with respect to this legislation date.

2. The House Bill (H.R. 1303)

The House bill, H.R. 1303, is more comprehensive than the Senate bill and imposes even more obligations on the airlines.⁷⁷ Like the Senate bill, H.R. 1303 only would cover certified air carriers (i.e., U.S. air carriers) that conduct scheduled passenger air transportation.⁷⁸

According to its terms, H.R. 1303 would require airlines to do the following:

- Establish and implement procedures for handling passenger complaints;⁷⁹
- Provide notification to passengers at the airport or on board an aircraft with "the best information available" as to delay, cancellation, or diversion in a timely, reasonable, and truthful manner.⁸⁰ Airlines, specifically, must provide notification as to the cause of the delay and the "best estimate" of the departure time;⁸¹
- Implement procedures to permit passengers to deplane the aircraft in both departure and arrival delays exceeding three hours, like the Senate bill. Also like the Senate bill, the two exceptions to this rule are: (1) if the pilot reasonably determines that the flight will depart within 30 minutes after the three-hour delay or (2) if the pilot reasonably determines that permitting passengers to deplane would jeopardize passenger safety or security.⁸² Unlike the Senate bill, however, although the pilot can extend the 30-minute period, he/she only may do so for an additional 30 minutes;⁸³
- Provide for the essential needs of their passengers at all times the aircraft is on the ground for a delay.⁸⁴ These "essential needs" include adequate food and drinking water, sanitary facilities, medical access, adequate ventilation, and comfortable cabin temperatures;⁸⁵
- Publish information on their websites (and update on a monthly basis) a list of chronically delayed flights;⁸⁶
- Disclose to passengers, without being asked, the on-time performance of chronically delayed flights at the time of reservation or purchase;⁸⁷
- Publish and update lowest fare and schedule information and information on schedules and itineraries;⁸⁸
- Make every reasonable effort to return lost baggage within 24 hours of a passenger claim;⁸⁹
- Display prominently the consumer rights of the passenger;⁹⁰ and
- Importantly, incorporate the consumer rights of H.R. 1303 into the airlines' COC.⁹¹

H.R. 1303 also directs the Secretary of Transportation to work with the airlines to ensure that a pilot operating an aircraft affected by a departure delay is permitted to return the aircraft to the airport terminal to allow passengers to exit the aircraft without losing his/her position in the departure sequence.⁹² The Secretary of Transportation is also directed to review the emergency contingency plans of air carriers and airports to ensure that the plans will effectively address

weather emergencies in a coordinated fashion, and also shall convene a meeting with representatives of airlines, airports, and the FAA to develop procedures to better respond to weather emergencies resulting in long departures.⁹³ H.R. 1303 also directs the Department of Transportation ("DOT") within 180 days of enactment to issue final regulations to carry out these provisions, which shall require airlines to comply not later than one year after enactment.⁹⁴

The House bill was referred to the House Committee on Transportation and Infrastructure (March 1, 2007) and the House Subcommittee on Aviation (March 2, 2007). There has been no further activity with respect to this legislation to date.

C. Notice of Proposed Rulemaking by the DOT to Enhance Passenger Protections

By enacting a Passenger Bill of Rights that purports to prescribe airline services, in addition to providing remedies for service deficiencies, New York has arguably usurped the DOT's jurisdiction in this area and raised the specter of airlines being subject to different – and perhaps even conflicting – regulations by each of the 50 states. Additionally, according to its explicit terms, H.R. 1303 requires the DOT to issue final regulations to carry out its provisions.

Not surprisingly, on November 10, 2007, the DOT issued an Advanced Notice of Proposed Rulemaking ("ANPRM"). The DOT recognized that the capacity and operational constraints that have contributed to delays are being addressed by the FAA and specific airports. The DOT sought comments on the following proposed measures that seek to enhance airline passenger protections:⁹⁵

1. Require carriers to adopt contingency plans for lengthy tarmac delays and incorporate them into their COCs.

The proposed amendment to 14 C.F.R. Part 253 would require any certificated or commuter air carrier⁹⁶ that operates domestic scheduled passenger service using aircraft with more than 30 passenger seats to develop a contingency plan for long ground delays on the tarmac for all of its flights (including those using aircraft with fewer than 30 seats) and to incorporate it into its COC. The contingency plan would have to include the following:

- The maximum tarmac delay that the carrier will permit;
- The amount of time on the tarmac that would trigger the plan's terms;
- Assurance of adequate water, food, restroom facilities, and medical attention, if necessary, while the aircraft remains on the tarmac;
- Assurance that the carrier has adequate resources to implement the plan; and
- Assurance that the plan has been coordinated with the airport authorities at medium and large hub airports.

Importantly, with the contingency plan incorporated into the COC, passengers would be able to bring suit if the airline failed to adhere to its plan. Carriers also would have to post their COCs on their websites and would be required to keep for two years any information about

ground delays that either trigger the contingency plan or last for at least 4 hours. This information includes the length of the delay, the cause of the delay, and the actions taken to minimize the hardships to the passengers (e.g., food and water, working lavatories, etc.). The DOT would consider the failure to take such action to be an unfair and deceptive practice, and the airline would be subject to enforcement action. The DOT also recognizes that it is best to have the carriers set the terms of their own plans and to rely on the courts and enforcement actions to ensure that the terms are followed.

2. Require airlines to respond to consumer problems.

The proposed new regulation, 14 C.F.R. Part 259, would require any certificated or commuter air carrier that operates domestic scheduled passenger service using aircraft with more than 30 passenger seats to respond to passenger complaints in the following ways:

- At each airport or system operations center designate an employee who is responsible for monitoring the effects of flight delays, flight cancellations, and lengthy tarmac delays on passengers;
- Make information available on its website, on e-ticket confirmations, and upon request at the ticket counter on how to file a complaint with the carrier (e.g., name, office, address, telephone number); and
- Send a response to each passenger complaint within 30 days.

3. Declare the operation of flights that remain chronically delayed to be an unfair and deceptive practice and an unfair method of competition.

The proposed amendment to 14 C.F.R. Part 399.81 would set forth the DOT's stance on chronically delayed flights. The amendment would apply to any carrier that reports on-time performance data to the DOT (i.e., any certificated U.S. carrier that accounts for at least 1% of its domestic scheduled revenue in a 12-month period). The amendment would define a chronically delayed flight as a flight by a covered carrier that operates at least 45 times in a calendar quarter and arrives more than 15 minutes late more than 70% of the time. The proposed amendment would also specify that the DOT considers a chronically delayed flight to be an unfair and deceptive practice and an unfair method of competition within the meaning of 49 U.S.C. § 41712.

4. Require carriers to publish delay data on their websites.

The proposed amendment to 14 C.F.R. 234.11 would require carriers that report on-time performance data to the DOT (i.e., any certificated U.S. carrier that accounts for at least 1% of its domestic scheduled revenue in a 12-month period) and use online reservation services to include on their websites, at a point before purchase, the following information regarding the flight's performance during the previous month:

- The percentage of on-time arrivals;

- The percentage of arrivals that were more than 30 minutes late;
- Special highlighting if the flight is late more than 50% of the time; and
- The percentage of cancellations.

5. Require carriers to publish complaint data on their websites.

The proposed new regulation, 14 C.F.R. Part 259, would require certificated and commuter carriers that operate domestic scheduled passenger service using aircraft with more than 30 passenger seats to publish complaint data on their websites. Each carrier would be required to disclose the number of passenger complaints it has received within a defined timeframe concerning subjects such as tarmac delays, missed connections, and the failure to provide amenities to passengers affected by delayed or cancelled flights.

6. Require carriers to report on-time performance of international flights.

The proposed amendment to 14 C.F.R. Part 234.4 and 234.11 would require carriers that report on-time performance data to the DOT (i.e., any certificated U.S. carrier that accounts for at least 1% of its domestic scheduled revenue in a 12-month period) and the largest foreign carriers to report on-time performance for international flights to and from the United States. The DOT's publication of this data would give consumers information on on-time performance when choosing international flights.

7. Require carriers to audit their adherence to their customer service plans.

The proposed new regulation would require certificated and commuter carriers that operate domestic scheduled passenger service using aircraft with more than 30 passenger seats to audit their adherence to their own customer service plan.

Although the DOT recognizes that many of the proposed measures do not come without a financial cost to the airlines in both their implementation and operation, it believes that the benefits to the traveling public outweighs any costs. Specifically, the DOT is seeking to relieve consumers of the burdens resulting from lengthy ground delays and chronically delayed flights, in addition to affording consumers significantly more information about delayed and cancelled flights and about how carriers will respond to their needs during lengthy ground delays. The DOT believes that this new information will not only alleviate consumers' difficulties during long delays, but also enable them to make informed choices when booking flights.

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IV. CONCLUSION

It is clear that the service delays that have afflicted domestic carriers in the past year have had far-reaching ramifications. With the passing of New York's Passenger Bill of Rights and its recent unsuccessful challenge by the ATA, it is almost certain that we will see both additional litigation and challenges to the new law, as well as other states following suit with their own versions of the Passenger Bill of Rights. With the enhancement of consumer protection laws taking such prominence, it is increasingly likely that Congress will seek to pass its own uniform rules in the form of the federal Airline Passenger Bill of Rights in order to forestall further steps by states to impose their own standards and remedies.

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¹ Office of Aviation Enforcement and Proceedings, Aviation Consumer Protection Division, Department of Transportation, *"Fly-Rights A Consumer Guide to Air Travel"*, available at <http://airconsumer.ost.dot.gov/publications/flyrights.htm#pass>.

² Compare Sousanis v. Northwest Airlines, No. C-99-2994, 2000 WL 34015861 (N.D. Cal. Mar. 3, 2000) (finding no breach of contract by the airline for failing to provide lodging and amenities where 1) the COC only provided for such amenities when the flight was diverted, 2) the contract allowed the defendant to modify its scheduled travel dates and times, and 3) defendant fulfilled its obligations when the passengers traveled the next day) with Freedman v. Northwest Airlines, 638 N.Y.S.2d 906, 907 (City Court of Albany 1996) (plaintiff could sue in negligence and breach of contract after a ten-hour flight delay, even though the COC limited sole remedies to refunds or rebooking).

³ See Bernstein v. Cunard Line, No. 83 Civ. 2206, 1985 WL 1980, at *5 (S.D.N.Y. June 27, 1985).

⁴ See 14 C.F.R. § 253.1-253.9.

⁵ Direct notice only is required for certain terms relating to refund restrictions, monetary penalties, or increase in prices in order to bind a passenger by any of these terms. See 14 C.F.R. § 253.7. A passenger must receive a conspicuous written notice of the salient features of those terms on or with the ticket.

⁶ Airline Deregulation Act of 1978, 49 U.S.C. § 41713

⁷ For example, in Weiss v. El Al Israel Airlines, 433 F. Supp. 2d 361 (S.D.N.Y. 2006), the Court ruled plaintiffs' tort claims for "physical and emotional suffering" and "great inconvenience" were preempted by the ADA and, therefore, were dismissed. The court also ruled that the plaintiffs' cause of action alleging violations of 14 C.F.R. § 250.1 relating to overselling practices failed to state a claim because the federal regulations create no private remedy for their violations. Plaintiffs moved for reconsideration of the dismissal of their tort claims, contending that their suffering was not related to an airline service, particularly since EL AL ultimately did not provide them with any transportation. The court denied the motion, finding that the alleged mistreatment of plaintiffs was directly connected with airline "services" since plaintiffs' claims related to poor treatment by airline personnel in attempting to obtain alternate transportation. Weiss v. El Al Israel Airlines, 471 F. Supp. 2d 356 (S.D.N.Y. 2006).

⁸ Morales v. Trans World Airlines, 504 U.S. 378, 384 (1992).

⁹ Rombom v. United Airlines, 867 F. Supp. 214, 221-22 (S.D.N.Y. 1994).

¹⁰ Trinidad v. American Airlines, 932 F. Supp. 521, 526 (S.D.N.Y. 1996).

¹¹ See Weiss, *supra* n.6; Elnajjar v. Northwest Airlines, No. Civ.A H-04-680, 2005 WL 1949545 (S.D. Tex. Aug. 15, 2005) (plaintiffs' state law claims, including intentional infliction of emotional distress, invasion of privacy, defamation, and false imprisonment, arising from forcible removal from the aircraft, alleged harassment at the check-in gate, and re-routing were all preempted; to the extent the claims were based on conduct distinct from the airline's decision to remove the passengers from the flight, they would not be preempted); Ruta v. Delta Airlines, 322 F. Supp. 2d 391 (S.D.N.Y. 2004) (decision on whether to transport a given passenger constitutes a "service" and claims of negligence, negligent and intentional infliction of emotional distress and wrongful ejection were preempted by the ADA; claims based on rudeness also were preempted, but alleged slander claim was not).

¹² Convention for the Unification of Certain Rules for International Carriage by Air, concluded at Montreal, Canada, May 28, 1999, ICAO Doc. No. 9740 (entered into force on November 4, 2003), *reprinted in* S. Treaty Doc. 106-45, CCH Av. L. Rep. ¶ 27,400-459, 1999 WL 33292734 (hereinafter the "Montreal Convention"). Article 19 of the Warsaw Convention provides that "The carrier is liable for damage occasioned by delay in the transportation by air of passengers, baggage or cargo." Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (1934), *reprinted in* 49 U.S.C.A. § 40105 (1997) (note), as amended by the Montreal Protocol No. 4 *reprinted in* S. Exec. Rep. No. 105-20 pp. 21-32 (1998) (hereinafter the "Warsaw Convention").

¹³ Fields v. BWIA Int'l Airways, 2000 WL 1091129, at *3 (E.D.N.Y. July 7, 2000).

¹⁴ See Lee v. American Airlines, 2002 WL 1461920, at *4 (N.D. Tex. July 2, 2002) ("Warsaw Convention preempts state law claims covered by it"), *aff'd*, 355 F.3d 385 (5th Cir. 2004); Yanovsky v. Air France, 1998 WL 305648 (S.D.N.Y. June 10, 1998) (claims arising from delay in bumping fall within scope of Article 17); Sassouni v. Olympic Airways, 769 F. Supp. 537 (S.D.N.Y. 1991) (same); see also EL Al Israel Airlines v. Tseng, 525 U.S. 155 (1999) (Warsaw Convention preempts all state laws falling within scope of Article 17); Rogers v. American Airlines, 192 F. Supp. 2d 661, 667 n.6 (N.D. Tex. 2001) (applying Tseng to hold that Articles 18 and 19 provide the exclusive cause of action for claims falling within the substantive scope of these provisions).

¹⁵ See Daniel v. Virgin Atlantic Airways, 59 F. Supp. 2d 986 (N.D. Cal. 1998) (where flight encountered fueling shortage, claims for false imprisonment and negligence in fueling, operations and maintenance, and failure to devise emergency plan, all fell within scope of Article 19); Obuzor v. Sabena Belgium Airways, No. 98 Civ. 0224, 1999 WL 223162 (S.D.N.Y. Apr. 16, 1999) (negligence claims for flight delay resulting from fog were preempted); Chendrimada v. Air India, 802 F. Supp. 1089 (S.D.N.Y. 1992) (negligence claim arising from being confined on aircraft for over 11 hours was preempted by the Warsaw Convention); see also Lee v. American Airlines, No. Civ. A 3:01-CV-1179-P, 2002 WL 31230803 (N.D. Tex. Sept. 30, 2002) (noting, in *dicta*, that plaintiff whose flight was delayed for mechanical problems would not be able to assert misrepresentation claim because it would be preempted by Article 19).

¹⁶ See Igwe v. Northwest Airlines, No. H-05-1423, 2007 WL 43811 (S.D. Tex. Jan. 4, 2007) (claims under Texas Deceptive Trade Practices Act preempted by Montreal Convention); Malek v. Societe Air France, 827 N.Y.S.2d 485 (N.Y. City Civ. Ct. Sept. 8, 2006) (deceptive business practices claim under N.Y. General Business Law § 349 preempted by the Montreal Convention).

¹⁷ See Wogel v. Mexicana Airlines, 821 F.2d 442 (7th Cir. 1987); Weiss v. El Al Israel Airlines, 433 F. Supp. 2d 361 (S.D.N.Y. 2006) (court found nonperformance by carrier after passengers waited two days on airline's standby list and then passengers purchased seats on another carrier); Shifrin v. Compagnie Nationale Air France, No. 99 C 5427, 2001 WL 204801, at *2 (N.D. Ill., Mar. 1, 2001) (Paris-Chicago flight cancelled because of bad weather; airline discussed alternate arrangements with passengers and allegedly promised to transport passengers from Paris-New York-Chicago; passengers were not provided any transportation from New York).

¹⁸ See also Paradis v. Ghana Airways, 348 F. Supp. 2d 106 (S.D.N.Y. 2004) (passenger cannot convert a mere delay into contractual nonperformance by choosing to obtain more punctual conveyance; contract on the ticket did not require carrier to provide prompt transportation – it merely provided that the carrier would do its best to carry the passengers with reasonable dispatch).

¹⁹ Lathigra, however, has been questioned in light of the decision in Tseng clarifying the exclusivity of the causes of action under the Convention.

²⁰ See also Rullman v. Pan Am. World Airways, 122 Misc. 2d 445 (N.Y. Sup. Ct. 1983) (passenger became ill after 8-hour delay in terminal waiting room, and then later fell after 2-hour connecting flight and suffered injury to her knee; court held the claim fell outside Article 17 because the injury resulted from inadequate terminal facilities during the delay).

²¹ See Peralta v. Continental Airlines, No. C 98-1252, 1999 WL 193393 (N.D. Cal. Mar. 30, 1999) (plaintiffs' delay caused by ticketing error causing passenger to miss flight did not result in carrier liability because carrier took reasonable measures to get plaintiff on next available flight); DeVera v. Japan Airlines, No. 92 Civ. 6698, 1994 WL 698330 (S.D.N.Y. Dec. 13, 1994) (because the one-week delay in plaintiffs' transportation resulted from a typhoon and volcanic eruption, and not from any error of the carrier, the carrier was not liable for the plaintiffs' delay).

²² See Verdesca v. American Airlines, 2000 WL 1538704 (N.D. Tex. Oct. 17, 2000).

²³ See Igwe v. Northwest Airlines, 2007 WL 34811 (S.D. Tex. Jan. 4, 2007) (no Article 19 liability where passengers' failure to present themselves on time to claim and receive their assigned seats); Fields v. BWIA Int'l Airways, 2000 WL 1091129 (E.D.N.Y. July 7, 2000) (no Article 19 liability where passenger left check-in line and failed to comply with time requirements for check-in).

²⁴ See Shah v. Pan. Am World Airways, 148 F.3d 84, 93 (2d Cir. 1998).

²⁵ See, e.g., Koirala v. Thai Airways Int'l, 126 F.3d 1205 (9th Cir. 1997); In re Korean Air Lines Disaster of Sept. 1, 1983, 156 F.R.D. 18, 24 (D.D.C. 1994), *aff'd per curiam*, 52 F.3d 1122 (D.C. Cir. 1995) (deviation from flight path suggested that crew either flew through Soviet airspace intentionally or repeatedly ignored navigational procedures which would have alerted the crew to the deviation).

²⁶ See Tasar v. Pakistan Int'l Airlines, 17 Av. Cas. (CCH) 18,618 (S.D. Tex. 1982) (willful misconduct found when delivery of casket was delayed for funeral); Cohen v. Varig Airlines, 62 A.D.2d 324 (1st Dep't 1978) (failure to deliver baggage during extended tour of South America is willful misconduct); see also Siben v. American Airlines, 913 F. Supp. 271 (S.D.N.Y. 1996) (Article 25 exception to limits of liability could be proved on claim that airline advised plaintiffs that their baggage was at the airport, knowing that the baggage was not there).

²⁷ Lee, 2002 WL 1461920, at *4.

²⁸ See Zicherman v. Korean Air Lines, 516 U.S. 217 (1996); Daniel v. Virgin Atlantic Airways, 59 F. Supp. 2d 986, 989 (N.D. Cal. 1998); Pakistan Arts & Entertainment Corp. v. Pakistan Int'l Airlines Corp., 232 A.D.2d 29 (1st Dep't 1997) (applying New York contract law to determine legally cognizable damages).

²⁹ See Lee, 2002 WL 31230803, at *11 ("most courts apply the general contract rule that recoverable damages include all 'contemplated and foreseeable damages for the failure to timely transport the passenger'"); Warsame v. Kenya Airways, No. 95 C 7670, 1994 WL 381464 (S.D.N.Y. July 19, 1994) (basic contract law states that only those damages that are reasonably foreseeable at the time of contract are recoverable).

³⁰ Lee, 2002 WL 1461920, at *4.

³¹ See Kupferman v. Pakistan Int'l Airlines, 108 Misc. 2d 485 (N.Y. City Civil Ct. 1981) (awarding 1/3 of the vacation cost to passengers who were without their baggage for almost the entire 18-day tour).

³² A passenger who has been sitting in an aircraft on the ground for an unusually long amount of time may claim that he/she suffered an Article 17 accident if he/she had physical injuries attributed to, for example, deprivation of food, a chronic back condition, or being without medication. A court might find that an issue of fact exists on whether the delay is, or caused, an Article 17 accident. See Chendrimada v. Air-India, 802 F. Supp. 1089 (S.D.N.Y. 1992) (confinement on runway for over 11 hours created an issue of fact as to whether passenger suffered physical injuries as a result of an Article 17 accident); see also Ratnaswamy v. Air Afrique, 1998 WL 111652 (N.D. Ill. Mar. 3, 1998) (permitting recovery of damages for physical manifestations of injury).

³³ See Ehrlich v. Am. Airlines, 360 F.3d 366, 400 (2d Cir. 2004); In re Air Crash at Little Rock, Ark., on June 1, 1999 (Lloyd v. Am. Airlines), 291 F.3d 503, 509-11 (8th Cir. 2002), cert. denied, 537 U.S. 974 (2002); see also Eastern Airlines v. Floyd, 499 U.S. 530 (1991).

³⁴ Daniel, 59 F. Supp. 2d at 993-94 (because inconvenience damages "could conceivably encompass economic damages," court permitted recovery); Harpalani v. Air India, 622 F. Supp. 69, 71 (N.D. Ill. 1985) (permitting plaintiff to sue for inconvenience damages and monetary loss); Malek, 827 N.Y.S.2d at 488 (awarding \$1,000 in damages for inconvenience and damage to baggage).

³⁵ Lee, 355 F.3d at 387 (inconvenience damages arising from delay - including being trapped in a holding area without adequate food, water, restroom facilities, and status information; being forced to spend the night in substandard, dirty, and unsafe motels; being subject to repeated, intentional, and negligent misrepresentations; being required, without adequate assistance, to obtain alternative means of transportation, etc. - do not result in economic loss and are barred by the Convention.)

³⁶ See, e.g., Peralta, 1999 WL 193393, at *2 (in order for plaintiff to recover special damages, the damages must be a foreseeable consequence of the alleged breach; in this case the airline had no knowledge of the financial reasons for plaintiff's travel to Costa Rica); Warsame, 1994 WL 381464 at *1 (3-week delay that allegedly caused concert pianist's loss of deposits on concert halls and \$100,000 of lost income from concerts she had planned to perform were not foreseeable by the airline); see also Ikepeazu v. Air France, No. 3:04 CV 00711, 2004 WL 2810063 (D. Conn. Dec. 6, 2004) (court stated that a surgeon's allegations of financial injury for missed surgeries "provide a basis" for Article 19 claim).

³⁷ Semrod v. Compania Mexicana de Aviacion, S.A., 22 Av. Cas. (CCH) 17,747 (D.N.J. 1990) (\$300 for three people for one day); Goranson v. Trans World Airlines, 121 Misc. 2d 68 (White Plains City Ct. Sept. 12, 1983) (\$400 - combined with lodging).

³⁸ Vick v. National Airlines, 409 So. 2d 383 (La. Ct. App. 1982); Goranson, 121 Misc. 2d at 80.

³⁹ Malek, 827 N.Y.S.2d at 488 (Camera (\$116.13), Vase (\$250), Wine (\$160), Dry Cleaning (\$90), Paintings (\$130) - total award, which included damages for delay was \$1000); Stone v. Continental Airlines, 804 N.Y.S.2d 652 (N.Y. City Civ. Ct. 2005) (\$750 awarded).

⁴⁰ Kupferman, 108 Misc. 2d at 490 (1/3 of cost of trip); Vick, 409 So. 2d at 385.

⁴¹ Malek, 827 N.Y.S.2d at 487; Stone, 804 N.Y.S.2d at 659-60.

⁴² Vick, 409 So. 2d at 384 (\$2,500 awarded); Lopez v. Eastern Airlines, 677 F. Supp. 181 (S.D.N.Y. 1988) (\$450 awarded).

⁴³ Stone, 804 N.Y.S.2d at 660 (\$1,000); Lopez, 677 F. Supp. 183 (S.D.N.Y. 1988) (\$450); Vick, 409 So. 2d at 384 (\$2,500); Daniel, 59 F. Supp. 2d at 993-94; Goranson, 121 Misc. 2d at 80 (\$100); Smith v. Piedmont Aviation, 567 F.2d 290 (5th Cir. 1978) (\$1,000).

⁴⁴ Kupferman, 108 Misc. 2d at 490 (1/3 cost of trip).

⁴⁵ Lee, 2002 WL 1461920 at *4; Johnson v. Northwest Orient Airlines, 642 P.2d 1067 (Mont. 1982); Kalantar v. Lufthansa German Airlines, 402 F. Supp. 2d 130 (D.D.C. 2005); Peralta v. Continental Airlines, 1999 WL 193393 (N.D. Cal. 1999); Jamil v. Kuwait Airways Corp., 773 F. Supp. 482 (D.D.C. 1991).

⁴⁶ Lee v. American Airlines, 2002 WL 1461920 (N.D. Tex. July 2, 2002), aff'd, 355 F.3d 386 (5th Cir. 2004).

⁴⁷ Id.

⁴⁸ Id.

⁴⁹ Abourezk v. New York Airlines, 895 F.2d 1456 (D.C. Cir. 1990).

⁵⁰ Shifrin, 2001 WL 204801 at *3 (damages awarded); Semrod v. Compania Mexicana de Aviacion, S.A., 22 Av. Cas. (CCH) 17,747 (D.N.J. 1990) (damages awarded); Paradis, 348 F. Supp. 2d at 113 (damages denied); Igwe, 2007 WL 43811 at *4 (damages denied).

⁵¹ Cenci v. Mall Airways, 531 N.Y.S.2d 743 (Albany City Court 1988) (\$52.74 granted for one half of the price of plaintiff's original ticket with airline, as plaintiff did not use this portion of her ticket due to cancellation); McMurry v. Capitol Int'l Airlines, 424 N.Y.S.2d 88 (N.Y. Civ. Ct. 1980) (\$1,000 awarded for the refund of the original ticket plus additional tickets purchased as substitute flight); Goranson, 121 Misc. 2d at 80 (\$800 awarded); Smith, 567 F.2d at 292 (\$63.18 granted); Paradis, 348 F. Supp. 2d at 113-14 (S.D.N.Y. 2004) (damages denied).

⁵² Malek, 827 N.Y.S.2d at 488 (\$141 awarded); Mahaney v. Air France, 474 F. Supp. 532 (S.D.N.Y. 1979) (damages denied because claim was time-barred).

⁵³ Stone, 804 N.Y.S.2d at 658 (\$1,360 granted for pre-paid ski lodge accommodations, lift tickets, and equipment rental); Semrod v. Compania Mexicana de Aviacion, S.A., 22 Av. Cas. (CCH) 17,747 (D.N.J. 1990) (damages denied).

⁵⁴ Kupferman, 108 Misc. 2d at 488 (1/3 cost of trip); Vick, 409 So. 2d at 384 (\$2,500); Semrod v. Compania Mexicana de Aviacion, S.A., 22 Av. Cas. (CCH) 17,747 (D.N.J. 1990) (\$1,000 per person per day).

⁵⁵ Lopez, 677 F. Supp. at 183 (\$450 awarded); Lee, 2002 WL 1461920 (damages denied).

⁵⁶ Vick, 409 So. 2d at 384 (damages granted); Lee, 2002 WL 1461920 at *4 (damages denied).

⁵⁷ Vick, 409 So.2d at 385 (damages granted though no physical injury); Johnson v. Northwest Orient Airlines, 642 P.2d 1067 (Mont. 1982) (damages denied).

⁵⁸ N.Y Executive Law § 553(2)(d) (2007) and N.Y Gen. Bus. Law § 251(f)-(j) (2007).

⁵⁹ N.Y Gen. Bus. Law § 251(g)(1).

⁶⁰ Id. § 251(h).

⁶¹ Id. § 251(h)(2)(a)(i)-(vii).

⁶² Id. § 251(g)(2).

⁶³ Id. § 251(h)(1)(d).

⁶⁴ Id. § 251(h)(2)(b).

⁶⁵ Air Transp. Ass'n v. Cuomo, --- F. Supp. 2d ---, No. 1:07-CV-1103, 2007 WL 4480046 (N.D.N.Y. Dec. 20, 2007) (Kahn, J.).

⁶⁶ Id. at *2-3.

⁶⁷ Id. at *3 citing S. 2493, 95th Cong, Pub.L. 95-504 (Oct. 24, 1978).

⁶⁸ 49 U.S.C. § 41713 (b)(1).

⁶⁹ Id. at * 4.

⁷⁰ S.678, 110th Cong. (2007); H.R.1303, 110th Cong. (2007)

⁷¹ For himself, Mrs. Cubin, Mr. Markey, Mr. Shuler, Mr. Skelton, Ms. Eshoo, Mr. George Miller of California, Mr. Farr, Ms. Zoe Lofgren of California, Mr. Hare, Mr. Moran of Virginia, Mr. Fattah, and Ms. Jackson-Lee of Texas.

⁷² S.678, 110th Cong. (2007).

⁷³ S. 678, 110th Cong. § 41781(b) (2007).

⁷⁴ Id. § 41781(a)(1)(A)and(B).

⁷⁵ Id. § 41781(a)(2)(A).

⁷⁶ Id. § 41781(a)(2)(B).

⁷⁷ H.R.1303, 110th Cong. §§ 41782-41783 (2007).

⁷⁸ Id. § 41781(2).

⁷⁹ Id. § 41782(2)(a).

⁸⁰ Id. § 41782(2)(b)(1).

⁸¹ Id. § 41782(2)(b)(1)(A)and(B).

⁸² Id. §§ 41782 (c)(2)(A).

⁸³ Id. §§ 41782 (c)(2)(B).

⁸⁴ Id. §§ 41782 (c)(3).

⁸⁵ Id. §§ 41782 (c)(3). The food and drinking water also must comply with the Safe Drinking Water Act or the Federal Food, Drug, and Cosmetic Act, as appropriate.

⁸⁶ Id. §§ 41782 (d)(1).

⁸⁷ Id. §§ 41782 (d)(2). A "chronically delayed flight" is defined as a regularly scheduled flight that has failed to arrive within 30 minutes of the scheduled arrival time at least 40% of the time in the last three month period. Id. §§ 41782 (d)(3).

⁸⁸ Id. §§ 41782 (e)(1)and(2).

⁸⁹ Id. §§ 41782 (f).

⁹⁰ Id. §§ 41782 (g).

⁹¹ Id. §§ 41782 (h).

⁹² Id. §§ 41783(a).

⁹³ Id. §§ 41783(b).

⁹⁴ Id. §§ 41783(c).

⁹⁵ See Enhancing Airline Passenger Protections, 72 Fed. Reg. 65233 (proposed Nov. 20, 2007) (to be codified at 14 C.F.R. 234, 235, 253, 259, 399); *see also* CCH Aviation Law Reports, No. 1368, November 30, 2007. Comments on the proposed measure were due by January 22, 2008.

⁹⁶ A certificated air carrier is a U.S. direct air carrier that holds a certificate issued under 49 U.S.C. 41102 to operate passenger and/or cargo and mail service or that holds an exemption to conduct direct passenger operations under 49 U.S.C. 41102. A commuter air carrier is an air taxi operator that carries passengers on at least five round trips per week on at least one route between two or more points according to published flight schedules.