

# Client Bulletin

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## New York Court Clarifies Damages Recoverable In Bumping Case

A recent decision from the Appellate Term, First Department of the New York Supreme Court, *Stone v. Continental Airlines*, 2005 N.Y. Misc. Lexis 5514 (App. Term, 1<sup>st</sup> Dep't 2005) has clearly laid out the types of damages passengers are entitled to recover when they are involuntarily "bumped" from a flight. Of the almost 900,000 domestic passengers who are bumped annually, about 96% of those passengers accept the compensation offered by airlines, leaving approximately 36,000 who refuse the airline's offer and are entitled to assert damage claims. Because bumping is a common airline industry practice designed to ensure that each flight leaves with as few empty seats as possible, the Department of Transportation allows bumping as long as the airline offers compensation to those bumped passengers. *See* 14 C.F.R. § 250. A passenger is under no obligation to accept the airline's offer, which generally runs to travel vouchers, free seats on a later flight, meals, and overnight accommodations. Under 14 C.F.R. § 250, a bumped passenger is entitled to a maximum of \$400.00 compensation. However, the passenger is not obligated to accept that amount and, if he declines payment, he may seek to recover damages in a court of law.

The facts in the *Stone* case are fairly straightforward. The plaintiff, an aviation lawyer, made arrangements for a Christmas ski trip to Colorado with his 13 year old daughter. The flights were booked with Continental and the passengers were scheduled to depart New York on December 25 and return from Colorado on January 1. After father and daughter checked in for their flight and had their baggage checked, they were bumped at the gate. The only option

offered by Continental was a flight departing on December 31, one day before the duo had planned to return to New York. Continental offered at the gate to refund the cost of the passengers' tickets to them but declined to offload the Stones' baggage from the aircraft. Because the checked baggage contained all of the passengers' winter clothes, they were unable to make alternative plans for a ski getaway.

Mr. Stone brought suit against Continental Airlines in Small Claims Court<sup>1</sup>, seeking recovery for his out-of-pocket losses, the stress and inconvenience of being bumped, and deprivation of the use of his contents of his baggage. He testified that his losses included \$1,360 for prepaid ski lodge accommodations, lift tickets and ski equipment rental, the costs of which were all unrecoverable.

Stone also claimed punitive damages and damages under the New York consumer protection statutes. These latter two damage claims were dismissed by the court.

So just what are the damages recoverable in a denied boarding case? Generally, the bumped passenger is entitled to damages for breach of contract since, by failing to transport the passenger in accordance with his ticket, the airline has breached the contract of carriage that it has entered into with the passenger. In the *Stone* case, the court recognized three elements of recoverable damages:

- ↗ Out-of-pocket expenses flowing from the loss of passage;
- ↗ Inconvenience; and
- ↗ Deprivation of the use of baggage.

Stone first was awarded the \$1,360 of prepaid expenses for the ski trip which he was unable to recoup. Second, damages were awarded for inconvenience, delay and uncertainty, an element

that the court recognized as recoverable under New York law.

Inconvenience damages, which represent compensation for normal reactions to being denied boarding, are clearly distinguishable from damage for severe emotional distress, which are not recoverable in contract cases *Cohen v. Varig Airlines*, 62 App. Div. 2d 324 (1<sup>st</sup> Dep't 1978). The third element of damages awarded was for deprivation of the use of the contents of the checked baggage. In the *Stone* case, had the baggage been made available to the passengers, they could have arranged to substitute a local ski trip. However, they were without their baggage for six days and the failure of the carrier to offload and return their baggage constituted special damages which were compensable. *Kupferman v. Pakistan International Airlines*, 108 Misc.2d 485 (Civil Court, N.Y. Co. 1981).

Accordingly, the court awarded judgment in the amount of \$3,110, including the three elements of damages which the court determined were compensable in a bumping case: the out-of-pocket expenses resulting from the loss of the bargain; damages for inconvenience, delay and uncertainty; and damages for the deprivation of the use of the contents of the checked baggage.

The *Stone* case serves as a good outline for the types of recoverable damages in a bumping case where the passenger declines to accept the \$400 denied boarding compensation offered by the airline. The court correctly declined to award damages for emotional distress or punitive damages, which are generally not recoverable in a breach of contract case. The court adopted a practical common sense application of the law to the facts in fashioning an award which, while adequately compensating the plaintiffs for their losses, did not severely punish the airline for what is a common occurrence, particularly during peak travel periods.

While the *Stone* case applies only to domestic transportation, *i.e.*, *intra* United States transportation, the same result would likely occur in a case involving flights between the United States and a foreign country, which would be governed by the Montreal Convention or the Warsaw Convention. Article 19 of the Warsaw Convention and the Montreal

Convention both provide that the carrier is liable for damage occasioned by delay in transportation of passengers, subject to the defense that the carrier is not liable if it proves that it took all necessary measures to avoid the damage or that it was impossible to take such measures. Neither the Warsaw nor Montreal Convention spells out what type of damages are recoverable in a "bumping case", although punitive damages are not permitted.<sup>2</sup> While the quantum of recoverable damages in a delay case is subject to the underlying law of the jurisdiction in which the case is brought, the carrier's liability for passenger delay is limited to approximately \$6,000 per passenger.

<sup>1</sup> The maximum damages recoverable in Small Claims Court in New York City are \$5,000. N.Y. Civ. Ct. Act § 1801.

<sup>2</sup> Montreal Convention, Article 29.



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