

Client Bulletin

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New York's Passenger Bill of Rights

On June 21, 2007, New York became the first State to pass legislation that would require airlines operating at New York airports to provide passengers delayed on aircraft for three (3) hours with adequate food and water, electric generation for fresh air and lights, and waste removal services. The legislation requires Governor Elliot Spitzer's approval before becoming law. The legislation also creates the Office of the Airline Consumer Advocate which would be empowered to resolve consumer complaints concerning air travel, investigate violations of the bill of rights, and refer cases to the Attorney General for potential legal action. Civil penalties can be sought by the Attorney General of up to \$1,000 per passenger for violations.

The legislation would amend New York's General Business Law by adding a new section entitled "Airline Passenger Rights." The legislation would only affect aircraft delayed at New York airports. The legislation does not afford passengers the right to disembark the aircraft.

Whether New York State has the authority to enforce such legislation remains questionable as air transportation is governed by U.S. federal statutes. Specifically, the New York legislation may be preempted by a federal statute known as the Airline Deregulation Act of 1978 (ADA). This ADA provides that 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." 49 U.S.C. § 41713(b)(1). The term "service," however, is not defined in the ADA.

Over the years, courts throughout the United States have grappled with how "service" should

be defined under the ADA and, at times, have taken conflicting positions on this question of statutory interpretation. In 1995, the United States Supreme Court addressed the preemption issue in *American Airlines, Inc. v. Wolens* and struck plaintiffs' claims based upon the Consumer Fraud Act of Illinois. In its decision, the Supreme Court mentioned the term "services," interpreting it to mean "access to flights and class of service upgrades".

Although the New York legislation states that it shall not be "construed to require taking any action in contravention of any written directive of the Federal Aviation Administration or other federal authority," the question remains whether the law would be enforceable in light of the preemptive effect of the ADA.

The U.S. House of Representatives introduced similar legislation entitled the Airline Passenger Bill of Rights earlier this year. This legislation outlines the services airlines must incorporate in their contracts of carriage, which are considered part of the contract for travel between passengers and airlines. These standards include allowing passengers to deplane after three hours on the tarmac, and providing passengers with adequate food, safe drinking water, clean and sanitary facilities, air ventilation and a reasonable temperature while waiting on an aircraft. Under the legislation, airlines also would be required to keep passengers fully informed about the timing and cause of flight delays and cancellations. Such legislation, if passed by Congress and signed into law by the President, would significantly affect carriers.

The European Union has already adopted the practice of compensating passengers for flight delays. Under European Regulation No.

261/2004, which became effective February 18, 2005, passengers are entitled to refreshments as well as compensation depending upon the length of the delay. Earlier this year, the European Union Transport Commissioner told member states to improve enforcement of the EU passenger rights or face legal action. It appears that New York legislators are learning from the Europeans on this issue.



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