

Client Bulletin

May 2008

Just in Time for Summer: A New Consumer Protection Bill is Introduced in California and the DOT Increases the Denied Boarding Compensation Limits

As the busy summer season for air travel arrives, two new consumer-beneficial pronouncements have been made, one federal and the other at the state level, both with the potential to substantially increase the costs of the financially beleaguered airline industry.

The word from Washington is that the denied boarding compensation rules have been modified to provide for the doubling of the maximum recoverable allowance for denied boarding compensation, from US\$400 to US\$800. Compensation is due to a passenger “bumped” from a confirmed flight where airline cannot arrange alternate transportation to accommodate the passenger to his or her scheduled arrival point within four hours after the original scheduled arrival time. There is no obligation on the part of the passenger to accept the denied boarding compensation and a passenger is free to refuse the compensation and sue for damages. The denied boarding compensation rules have been an effective deterrent to litigation arising out of overbookings.

The state legislation comes from California, where the State Assembly recently enacted, by a vote of 57 to 17, a Passenger Bill of Rights strikingly similar to the New York statute recently struck down by a federal appellate court in *Air Transport Association of America, Inc. v. Cuomo*, 520 F.3d 218 (2d Cir. 2008).

The California statute, which passed the State Assembly but which must still be passed by the State Senate before being sent to Governor Schwarzenegger for signature, would amend the

Public Utilities Code to require that where passengers have boarded an aircraft which is delayed by more than three hours, or where the passengers have not disembarked for more than three hours after an aircraft lands, the airline is obligated to provide electrical service sufficient to provide the passengers with fresh air and light, waste removal services in order to service the holding tanks for the restrooms on board the aircraft and adequate food, drinking water and other refreshments. The California bill, in addition to being toothless since it provides for no civil penalties and no method of enforcement, probably runs afoul of the Airline Deregulation Act, the federal statute which preempts states from enacting any laws based on airlines’ “rates, routes and services”.

In the *Cuomo* case, a virtually identical Bill of Rights statute enacted by the New York Legislature required air carriers to provide boarded passengers with adequate food and drinking water, waste removal services and sufficient electric power for fresh air and lights. A challenge to the New York statute was initially denied by the New York federal district court holding that the statute related not to rates, routes and services, but rather to health concerns. The California Assembly based its passage of its Passenger Bill of Rights on the same rationale. However, in *Cuomo*, the Second Circuit Court of Appeals, in striking down the New York statute, had little difficulty in concluding that the statute’s requirements related to the services of an air carrier, an area of regulation preempted by the Airline Deregulation Act and resting exclusively within the providence of the Federal Government.

While some of its proponents in California admitted that the California Bill of Rights is a “feel good” statute, even its backers realize that the statute is probably a violation of federal law and that the issue is one which needs to be resolved at the federal level. In that context, Senator Barbara Boxer of California has

introduced before Congress a federal Bill of Rights statute for airline passengers.

In short, the summer season has just begun and even before the usual array of bad weather and flight delays, the airline industry is already facing determined efforts by state and federal regulators to require it to provide additional services and compensation to passengers whose air travel is delayed during the busy summer months.



If you have any questions or would like further information concerning the topics in this Bulletin, please contact:

Michael J. Holland, Esq.
Condon & Forsyth LLP
Times Square Tower
7 Times Square
New York, NY 10036
Tel: (212) 894-6740
Fax: (212) 370-4482

E-mail: mholland@condonlaw.com