

## Aviation - USA

### Airline Passenger Bill of Rights: A Survey of Recent Legislative and Judicial Actions

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#### Current Developments Structures of Various Passenger Bills of Rights Recent Judicial Challenge Remaining Questions

In response to a number of highly publicized incidents in which airline passengers were forced to stay in parked aircraft for extended periods, various states and the federal government began to finalize different versions of a passenger bill of rights. These bills of rights outline requirements for airlines during extended ground delays. Initiated by consumer advocacy groups, the new regulations aim to provide passengers with food, water and toilet services during such delays. However, airlines have resisted the enactment of such bills, claiming that modern industry practices render such legislation unnecessary and that compliance would substantially increase costs. In addition, the delicate balance between federal and state regulation in this area of airline operations raises questions as to the legality of any state regulation.

#### Current Developments

Although talk of a passenger bill of rights is not new, the push to implement such legislation gained momentum due to a number of highly publicized incidents in December 2006 and February 2007. On December 29 2006 hundreds of flights to Dallas, Texas were diverted to nearby airports because of a 1,000-mile-long thunderstorm. Passengers spent up to nine hours sitting in a stationary aircraft without food, water or access to toilet facilities. On February 14 2007 thousands of passengers were kept in grounded aircraft for up to 10 hours at John F Kennedy (JFK) Airport, New York during a snow and ice storm. Again, passengers alleged that they were denied food and water and that the toilet facilities began to overflow, causing noxious odours in the cabin.

In response to these and other events, passenger rights groups elevated pressure on state and federal governments to pass legislation. On August 1 2007 New York Governor Eliot Spitzer signed into law a passenger bill of rights, the first of its kind in the country. Having survived a court battle at the end of 2007 seeking to overturn the legislation, or at least postpone its implementation, the New York Passenger Bill of Rights became law on January 1 2008, thus affecting two of the country's busiest airports, JFK Airport and LaGuardia Airport. The states of New Jersey, Rhode Island and Connecticut are also contemplating similar legislation.<sup>(1)</sup>

In 2007 Congress also introduced legislation to enact a federal passenger bill of rights. Both the House of Representatives and the Senate introduced bills explicitly creating a passenger bill of rights, as well as including analogous bill of rights provisions in the Federal Aviation Administration (FAA) Reauthorization Act. Congress intends to review these bills in February 2008.

#### Structures of Various Passenger Bills of Rights

The New York Bill of Rights which came into effect on January 1 2008 provides that:

*"Whenever airline passengers have boarded an aircraft and are delayed more than three hours on the aircraft prior to take-off, the carrier shall ensure that passengers are provided as needed with:*

- a. electric generation service to provide temporary power for fresh air and lights;*
- b. waste removal service in order to service the holding tanks for on-board restrooms; and*

*c. adequate food and drinking water and other refreshments.*"<sup>(2)</sup>

The New York Bill of Rights also establishes the Office of the Airline Consumer Advocate, which has the power to:

- investigate complaints;
- issue subpoenas for documents; and
- refer complaints to the New York attorney general.

Violation of the law by an airline authorizes the attorney general to recover civil penalties of up to \$1,000 for each passenger, as well as attorneys' fees and costs.<sup>(3)</sup> Airlines must give passengers "clear and conspicuous" notice regarding the function of, and contact information for, the Office of the Airline Consumer Advocate, as well as "explanations of the rights of airline passengers".<sup>(4)</sup> The new regulations are applicable to 'carriers', defined as "any partnership, corporation or other business entity regulated by the FAA that conducts scheduled passenger air transportation". Hence, the New York Bill of Rights is applicable to both US and foreign airlines.<sup>(5)</sup>

In the immediate aftermath of the incident at JFK Airport, both the House of Representatives and the Senate introduced bills creating a national bill of rights.<sup>(6)</sup> While similar to the New York Bill of Rights, both bills are more ambiguous and expansive than the New York bill. Both would amend Chapter 417 of Title 49 of the US Code by requiring airlines to provide food, water and adequate toilet facilities to passengers during such a delay. Unlike the New York Bill of Rights, which applies only to postponements of three or more hours, neither bill defines a 'delay'. Arguably, an airline would have to meet the service requirements during any delay, regardless of the duration. In addition, both bills require that airlines establish and implement procedures to allow passengers to exit the aircraft (or deplane) in case of a departure or arrival delay of three hours or more.<sup>(7)</sup> However, the House and Senate bills provide an exception: if the pilot reasonably determines that the flight will depart within 30 minutes after the three-hour delay or that permitting a passenger to deplane would jeopardize passenger safety and security, the crew may keep the passengers on board.<sup>(8)</sup> Despite this exception, the right to deplane represents a substantial expansion over the New York Bill of Rights, which does not provide for deplaning because the New York legislature knew that a deplaning requirement had to come from the federal government due to pre-emption issues. In addition to these bills, both Houses of Congress have included nearly identical provisions in larger pieces of legislation: the FAA Reauthorization Act<sup>(9)</sup> and the FAA Modernization Act.<sup>(10)</sup> Both pieces of legislation are expected to be part of the congressional calendar starting in February 2008.

### Recent Judicial Challenge

It did not take airlines long to challenge the New York Bill of Rights. The Air Transport Association of America, the trade association representing the major US airline carriers, initiated suit against the state of New York shortly after the New York law was passed, seeking to overturn the legislation or postpone its implementation beyond the planned start date of January 1 2008.

In *Air Transportation Association of America, Inc v Cuomo*<sup>(11)</sup> the association argued that federal law pre-empted the New York Bill of Rights and that implementation of such legislation would financially injure the airlines. Specifically, it claimed that the federal Airline Deregulation Act 1978 pre-empted the New York Bill of Rights.<sup>(12)</sup> Under the Deregulation Act, states may not enact or enforce a law, regulation or other provision related to the "price, route or service of an air carrier".<sup>(13)</sup> The association asserted that the New York Bill of Rights specifically and directly regulates the services provided by air carriers and is thus pre-empted.<sup>(14)</sup>

On December 20 2007 the US District Court for the Northern District of New York denied the association's motion for preliminary judgment. Instead, it granted summary judgment for the state of New York, thereby clearing the way for the implementation of the legislation on January 1 2008 and effectively ending the association's case. In reaching this decision, the court examined the legislative purpose of the Deregulation Act, which the legislative record indicated was to foster:

*"a regulatory and economic environment which will encourage the realistic threat of competition, facilitate entry into markets by qualified firms and develop market incentives to lower costs and better efficiency by existing and new carriers."*<sup>(15)</sup>

Distinguishing between consumer health and safety issues and consumer choice issues, the court reasoned that the New York Bill of Rights did not interfere with and was outside the scope of the Deregulation Act's intent to foster competition.

The field of health and safety remains "one of the most established areas of state police power".

(16) Traditionally, states have been given broad freedom in protecting the health and safety of their citizens. The court categorized providing fresh air, water, sanitation and food as health and safety measures for which the state may enact legislation, particularly in the extreme situation when passengers are forced to remain on a grounded aircraft for over three hours.(17)

To determine whether the Deregulation Act pre-empted the New York Bill of Rights, the court grappled with the nature of the New York legislation: did it specifically regulate services provided by air carriers? The court recognized that there is a split in the federal circuit appellate courts over the statutory interpretation and scope of the term 'services' in the Deregulation Act.(18) The Ninth and Third Circuits have adopted narrow definitions of 'services', holding that the term encompasses only the prices scheduled, origins and destinations of the point-to-point transportation of passengers, cargo or mail, and therefore excludes the provision of in-flight beverages, personal assistance to passengers, the handling of luggage and similar amenities.(19) Conversely, the Fifth, Seventh and Eleventh Circuits have adopted broader definitions of 'services' which would include the economic or contractual features of air transportation. However, ultimately the court determined that in this case the issue did not hinge upon the definition of 'services' in the Deregulation Act. Instead, it found that even under the more expansive definition of 'services' used by the Fifth, Seventh and Eleventh Circuits, services are ultimately limited to the "contractual arrangement between the airline and the user of the service" or the "elements of the air carrier service bargain".(20) Therefore, the issue in *Cuomo* was one of health and safety, distinct from the "*quid pro quo* for [a] passenger's fare".(21)

In addition, the court ruled that the New York Passenger Bill of Rights would not impose undue difficulties on airlines that operate across states due to a variety of diverse regulations among the states. Denying the alleged "huge diversity" of health and safety regulation possible, the court held that the costs associated with regulatory compliance in this narrow area stem not from the potential diversity of state requirements, but rather from the requirements themselves.(22) Any law mandating lavatories, fresh water, air and food for passengers in limbo imposes the same hardship on airlines, irrespective of the legislation's origin. In short, the price is the same no matter who issues the bill and the federal versus state dichotomy is irrelevant.(23)

## Remaining Questions

Despite the *Cuomo* decision, the ultimate legality of a state-mandated airline passenger bill of rights remains subject to further review on federal preemption grounds because of the circuit court split over the definition of 'services' contained in the Deregulation Act. The Air Transportation Association of America has appealed the New York District Court decision on the grounds that the court erroneously applied the Deregulation Act, and the Second Circuit of Appeals has accepted the trade organization's request to expedite the appeal.

If the Second Circuit Court of Appeals decides that the New York Bill of Rights requires airlines to conduct their services in any particular manner, such an appeal could be successful. Even under the narrow definition of 'services' used by the Third and Ninth Circuits, a court might still hold that the New York legislation imposes a specific and positive requirement on the airlines, and as such is pre-empted by the Deregulations Act.

If the New York Bill of Rights continues to survive federal pre-emption challenges, and with other state-sponsored bills on the horizon, differing state regulations raise some important issues. Airlines are particularly vulnerable to inconsistent state regulations because they constantly operate across state lines. If passenger bills of rights with different requirements from New York were enacted across the nation, an airline would be forced to juggle the varying requirements across its entire fleet to ensure compliance. At first glance, it might seem safe for an airline to adhere to the most stringent state's provisions and thereby ensure its compliance with the requirements of all other states. However, it is not difficult to imagine the potential impossibility of reconciling one state's emphasis on ample water with another's stress on sufficient food. The situation becomes more complex if one state's regulations preclude meeting those of another state, or if unplanned re-routings lead to airlines being forced to land in airports where they do not keep an auxiliary facility. Indeed, the development of a state-by-state bill of rights could hamper airlines' much-needed operational flexibility. Such differing requirements could increase service costs for the airline and thus increase ticket prices for passengers. Ultimately, time will tell how the courts or any new federal legislation will affect the requirements that are ultimately enacted as the passenger bill of rights.

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## Endnotes

- (1) "Airline Passenger Rights Movement Taking Off", *SF Chron*, January 4 2008.
- (2) New York General Business Law § 251-g.
- (3) New York General Business Law § 251-h.
- (4) New York General Business Law § 251-g.
- (5) New York General Business Law § 251-f.
- (6) S 678, 110th Cong (2007) and HR 1303, 110th Cong (2007).
- (7) S 678 at §2 and HR 1303 at §2.
- (8) *Id.*
- (9) HR 2881, 110th Cong (2007).
- (10) S 1300, 110th Cong (2007).
- (11) *Air Transport Association of America, Inc v Cuomo*, 2007 WL 4480046 (NDNY 2007).
- (12) 49 USC § 41713(b)(1).
- (13) *Id.*
- (14) *Cuomo* at \*6.
- (15) HR CONF REP 95 to 1779 at 55 (1978).
- (16) *Cuomo* at \*4 (citing *Buckman Co v Plaintiff's Legal Comm*, 531 US 341, 347 (2001)).
- (17) *Id.*
- (18) *Id.*
- (19) *Id* at \*3 (citing *Duncan v Northwest Airlines, Inc*, 208 F 3d 1112, 1114 to 1115 (9th Cir 2000)).
- (20) *Id* at \*4 (citing *Hodges v Delta Airlines*, 44 F 3d 334, 336 (5th Cir 1995)).
- (21) *Id.*
- (22) *Id* at \*6.
- (23) *Id* at \*7 to 8.
- (24) Air Transport Association of America news release (December 20 2007).

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