

Aviation - USA

Second Circuit Court of Appeals Invalidates New York Airline Passenger Bill of Rights

Contributed by **Katten Muchin Rosenman LLP**

June 18 2008

Introduction
Second Circuit Court of Appeals Decision
Developments in Other States
Federal Government Developments

Introduction

On August 1 2007 the State of New York adopted a passenger bill of rights in response to a number of recent incidents involving airlines that kept passengers aboard parked airplanes during ground delays of up to 10 hours.⁽¹⁾ The bill required airlines to provide food, water and toilet services during any takeoff delay of more than three hours and to create a consumer office charged with investigating passenger complaints. The airline industry, led by the Air Transportation Association of America (ATA), immediately challenged the bill on federal pre-emption grounds but was rebuffed by the US District Court for the Northern District of New York, which held that New York's inherent police power to legislate on health and safety issues permitted passage of the bill.⁽²⁾ On appeal, the US Court of Appeals for the Second Circuit overturned the district court's decision,⁽³⁾ finding that the bill was preempted by the Airline Deregulation Act.⁽⁴⁾

While the State of New York is considering appealing the case to the Supreme Court, other states are contemplating bills similar to the New York model. A federal version of the bill is currently stuck in Congress and is not expected to become law in the near future.

Second Circuit Court of Appeals Decision

In *ATA v Cuomo* the US Court of Appeals for the Second Circuit overturned a lower court decision holding New York's bill of passenger rights valid due to New York's wide latitude to enact health and safety legislation. The court explained that the Airline Deregulation Act's pre-emption language which expressly prohibits states from enacting or enforcing a law related to the price, route or service of an air carrier, has no exception for the states' traditional role of regulating health and safety.⁽⁵⁾ The court reasoned that, pursuant to the act, actions having a connection with airline services such as the bill, which required that food, water and toilet services be provided during a prolonged ground delay, are wholly within the scope of federal authority.⁽⁶⁾

Furthermore, the court reasoned that if the act's pre-emption provision were interpreted narrowly, then states could create a patchwork of regulations on airline services that would frustrate the goal of the act to promote airline efficiency and competition on a national scale. The Second Circuit disagreed with the Third and Ninth Circuits' narrower interpretation of the term 'services',⁽⁷⁾ arguing that the Supreme Court's recent unanimous ruling in an analogous case, *Rowe v New Hampshire Motor Transport Ass'n*, should be determinative.⁽⁸⁾ *Rowe* involved identical pre-emption language and interpreted 'services' under the act to extend beyond prices, schedules, origins and destinations to include tobacco shipment delivery procedures designed to prevent underage tobacco purchase and use.⁽⁹⁾ The State of Maine argued that these procedures should be upheld because of the states' traditional role of regulating health and safety issues,⁽¹⁰⁾ but the Supreme Court disagreed and held that the procedures were invalid under the act's pre-emption language. The Second Circuit in *ATA v Cuomo* reasoned that 'airline passenger services' should likewise be interpreted broadly under the act.⁽¹¹⁾

The Second Circuit's opinion in *ATA v Cuomo* concluded by admitting that although "the goals of the bill are laudable and the circumstances motivating its enactment deplorable", only the federal government has the power to enact such rules.⁽¹²⁾ By commending the creation of the New York bill, the court implied that such laws are appropriate, but need to originate from the federal government to be enforceable.

Developments in Other States

Many states have followed the lead of New York by considering the adoption of their own passenger bills of rights, including California, New Jersey, Connecticut, Florida, Washington, Rhode Island, Arizona, Colorado, Illinois, Michigan and Pennsylvania.⁽¹³⁾ Generally these states have modelled their proposed bills on the New York state model. Washington State is considering legislation similar to the New York bill, but with an additional provision allowing passengers medical attention if necessary on grounded flights.⁽¹⁴⁾

California's state assembly recently passed a bill guaranteeing airline passengers minimum rights such as food, water, lights and toilet services during extended ground delays. In order to ensure enough votes to pass the legislation, California removed an initial provision allowing passengers to sue based on violations of these guarantees. The bill now awaits approval by the California Senate.

In response to criticism of the law based on perceived federal pre-emption grounds, California has argued that its version of the bill is narrower than the New York legislation and therefore will be more likely to survive judicial scrutiny.⁽¹⁵⁾ Additionally, any challenge to California or Washington's legislation would test the Ninth Circuit's narrower definition of 'services', thus setting the stage for a potential circuit split between the Second Circuit and Ninth Circuit on the legality of state enacted bills. If the Ninth Circuit were to rule in this fashion, the Supreme Court could view the issue as ripe and grant certiorari to decide the federal pre-emption issue.

Federal Government Developments

The federal passenger bill of rights was introduced in 2007, but after passing through the House of Representatives, has stalled in the Senate Commerce and Finance Committee.⁽¹⁶⁾ Currently it is attached to another bill, the Federal Aviation Administration Reauthorization and Modernization Act⁽¹⁷⁾ – a broad measure providing overall funding for the Federal Aviation Administration, including money to modernize outdated air traffic control systems.⁽¹⁸⁾ The Senate cannot move forward on the federal passenger bill of rights until these general funding issues are resolved.

The ATA has not expressed disapproval with the overall federal bill, but disagrees with a proposed provision forcing planes to return to the gate if they are delayed for more than three hours. The ATA argues that in certain situations, such as during severe weather, planes should be allowed to remain in place on the tarmac.

Whether it is to come from the Supreme Court or Congress, there is no doubt that a final word is needed to resolve the pre-emption issues raised by state sponsored passenger bill of rights legislation.

For further information on this topic please contact [Timothy Lynes](mailto:timothy.lynes@kattenlaw.com) at Katten Muchin Rosenman LLP by telephone (+1 202 625 3500) or by fax (+1 202 298 7570) or by email (timothy.lynes@kattenlaw.com).

Endnotes

(1) New York General Business Law § 251-f-j.

(2) *Air Transport Ass'n of America, Inc v Cuomo*, 528 F Supp 2d 62 (NDNY 2007).

(3) *Air Transport Ass'n of America, Inc v Cuomo*, 520 F 3d 218 (2d Cir 2008).

(4) 49 USCA § 41713(b)(1).

(5) *Cuomo*, 520 F 3d 218 at 223.

(6) *Id* at 225.

(7) See *Charas v Trans World Airlines, Inc*, 160 F 3d 1259, 1261 (9th Cir 1998) (*en banc*) (holding 'services' under the Airline Deregulation Act does not include dispensing food and drinks or include the assistance of flight attendants); *Taj Mahal Travel, Inc v Delta Airlines, Inc*, 164 F 3d 186, 193-94 (3d Cir 1998) (holding that fraudulent letters to airline passengers advising them that their tickets were stolen were not considered 'services' under the act in a state tort law claim).

(8) *Rowe v New Hampshire Motor Transport Ass'n*, 128 US 989, 995 (2008).

(9) *Id*.

(10) *Id* at 992.

(11) *Cuomo* 520 F 3d 218 at 223.

(12) *Id* at 225.

(13) Andrew Garber, "Passenger Rights Bill gets a Push in State", *The Seattle Times* (January 23 2008), available at seattletimes.nwsources.com/html/politics/2004139780_airlines23m.html.

(14) *Id*.

(15) Thomas Steinmetz, "California Assembly Adopts Airline Passenger Bill of Rights" (May 1 2008), available at www.eturbonews.com/2345/calif-assembly-adopts-airline-passenger-bill-.

(16) S 678, 110th Cong (2007) and HR 1303, 100th Cong (2007).

(17) HR 2881, 110th Cong (2007).

(18) Samantha Pawlak, "Judge Throws Out New York's Airline Passenger Bill of Rights", *Legislative Gazette*, (March 31 2008), available at www.legislativegazette.com/read_more.php?story=2953.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

Author

Timothy J Lynes



Official Online Media Partner to the International Bar Association
An International Online Media Partner to the Association of Corporate Counsel
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2008 Globe Business Publishing Ltd

Published for clients as a source of information. The material contained herein is not to be construed as legal advice or opinion.

CIRCULAR 230 DISCLOSURE: Pursuant to regulations governing practice before the Internal Revenue Service, any tax advice contained herein is not intended or written to be used and cannot be used by a taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

©2008 Katten Muchin Rosenman LLP. All rights reserved.

Katten

KattenMuchinRosenman LLP

www.kattenlaw.com

CHARLOTTE

CHICAGO

IRVING

LONDON

LOS ANGELES

NEW YORK

PALO ALTO

WASHINGTON, DC

Katten Muchin Rosenman LLP is an Illinois limited liability partnership including professional corporations that has elected to be governed by the Illinois Uniform Partnership Act (1997).
London affiliate: Katten Muchin Rosenman Cornish LLP.