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Airline Passenger Tarmac Confinements and Delays: Reasonable Regulation Trumps Market Forces

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The U.S. Department of Transportation (DOT) recently adopted regulations to protect passengers from extended tarmac confinements and reduce flight delays aggravated by unrealistic scheduling. This article recounts the history of tarmac confinements that led to the new regulations, discusses key elements of the current and proposed additional DOT rules, and reviews recent passenger litigation seeking compensation. It concludes that, because the litigation model is broken, an alternative fixed-compensation system similar to DOT's regulations requiring airlines to provide specific compensation to passengers who are denied boarding (the so-called bumping rule) is needed.

Historical overview

Deregulation in the United States of air fares, schedules, and service substituted a largely unregulated market model (except for safety) for a model

based on detailed public utility-type government regulation, thus beginning a wave of deregulation in numerous other industries such as the telecommunications and energy supply industries. After the warning signs from Enron's collapse and unsafe Chinese imports, the financial crisis of 2008 and the BP Gulf of Mexico oil spill of 2010 have demonstrated that deregulation and self-regulation of formerly closely regulated industries have their limits. Air transportation is the primary—and often the only—means of long-distance travel for the general public. Efficient, relatively low-cost air transportation is an essential component of a modern economy and a way of life in American society.

With airline deregulation came deregulation of scheduling, giving airlines the right to schedule their flights at airports (other than those subject to slot restrictions) without regard to any capacity limitations

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at a particular airport, the right to limit liability to passengers for flight delays, and exemption of airlines from state and local consumer protection laws that govern other public accommodation industries such as hotels, restaurants, stores, and even airports.¹

As air traffic increased in the 1980s and 1990s, the capacity of U.S. airports did not keep pace. No new major airport—with the exception of Denver—has been built in the United States for 30 years. Airlines negated the major strategy for increasing airport capacity by phasing out wide-bodied jets carrying 300–500 passengers in preference for narrow and medium-bodied jets with 80–250 seats, thereby greatly increasing the number of flights, but carrying fewer passengers per flight. Consequently, since the 1980s, air travel has become significantly slower and less reliable. Airlines, for competitive cost-cutting reasons, have reduced reserves of equipment and flight crews to less than 1 percent. Any system that operates at near capacity during normal times will suffer delays and breakdown in situations of disruption or stress.²

Tarmac confinements of 3 to 12 hours are a manifestation of a lack of reserves, lack of contingency planning for known disruptions such as stormy weather, and congestion at major hub or choke-point airports brought on by deregulation, and abetted by the extreme pay differential for flight crews for flight pay on the tarmac versus stand-by pay when aircraft are docked at a gate.³

Tarmac confinements first came to wide public attention in January 1999 when a snowstorm over the New Year's holiday week grounded Northwest Airlines aircraft at its hub airport in Detroit, affecting over 4,000 passengers. Rather than allow passengers to deplane to the airport terminal,

Northwest confined them to their aircraft for 3 to 12 hours on the tarmac, notwithstanding the pleas of pilots to release the passengers. This incident received national publicity. Congress held hearings, and introduced passenger rights legislation with bipartisan support. A class action also was filed in state court, resulting in a settlement of \$7.15 million, with payments to passengers of \$1,000 to \$2,000.⁴

In June 1999, the lead sponsor and chair of the Senate Commerce Committee announced he was withdrawing the proposed passenger rights legislation in light of the airlines' representations that they would adopt voluntary customer service standards to prevent future tarmac confinements under DOT supervision and correct other consumer abuses. By 2000, however, according to a DOT study, 27 percent of flights were delayed, diverted, or canceled, which was twice the number in 1995.⁵

In response to the public and political pressure, most U.S. airlines then adopted vague and nonbinding customer service standards.⁶ Thereafter, the problem of tarmac confinements diminished with a decline in air traffic caused by a recession, the dot-com bust, and the terrorist attacks of September 11, 2001. Subsequently, however, chronic flight delays and tarmac confinements returned as air traffic volumes recovered to, and ultimately exceeded, 1999 levels.⁷

By 2007, estimates indicated that as many as 250,000 passengers per year experienced tarmac confinements of over three hours.⁸ Two incidents in particular reignited public anger and frustration. On December 29, 2006, thunderstorms around Dallas, Texas, prompted American Airlines to divert over 100 incoming flights from its hub airport (DFW) to 17 other airports, affecting the

holiday travel of about 12,000 passengers. Many were confined on the tarmac for 3 to 11 hours, often without adequate food, hydration, breathable air, and sanitation facilities.

Overall, thousands of passengers were delayed or stranded for one to four days.⁹ A second incident that received extensive media attention occurred

on Valentine's Day (February 14), 2007, involving JetBlue Airways flights held on the tarmac at New York's JFK International Airport for 3 to 12 hours, involving as many as 2,000 passengers, whose flights were then canceled.¹⁰

Congress again held hearings and introduced passenger rights legislation, which was not enacted.¹¹ In the absence of federal legislation, the state of New York enacted its own legislation requiring airlines operating in that state to provide passengers with adequate food, water, and sanitation facilities for passengers confined on the tarmac after two hours, subject to fines and civil enforcement by the state attorney general. The Air Transport Association, representing the major U.S. airlines, immediately challenged the statute. It was upheld in U.S. District Court for the Northern District of New York, which found it to be a valid

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exercise of state power over health and safety, but was overturned as unconstitutional by the U.S. Court of Appeals for the Second Circuit. The appeals court ruled under the doctrine of federal preemption based on the Supremacy Clause in the U.S. Constitution that the Airline Deregulation Act of 1978 (ADA) prohibited state legislation regulating tarmac confinements, and that such regulatory power could only be exercised by the federal government under the ADA.¹²

DOT, meanwhile, issued new regulations generally requiring U.S. airlines to allow passengers to deplane in the event of a tarmac

delay of over three hours, with airlines being potentially subject to civil penalties of up to \$27,500 per passenger for violation of the regulations.¹³ Since the new DOT regulations became effective on April 29, 2010, the number of tarmac confinements

has plunged and flight cancellations, despite industry predictions to the contrary, have not increased. Flight delays also have declined and this improvement is expected to continue.¹⁴

The DOT regulations require airlines to adjust their schedules to reduce unrealistically scheduled flights, post on-time information on websites, and eliminate chronically late flights. A chronically delayed flight is defined as one that is late more than 30 minutes over 50 percent of the time during that month. The regulations make holding out a chronically delayed flight for four consecutive

months subject to civil penalties as a deceptive, unfair practice, or an unfair method of competition.¹⁵ This long-sought truth-in-scheduling provision should eliminate the airlines' incentive to unrealistically overschedule flights at popular times that exceed an airport's capacity for competitive reasons.¹⁶

In June 2010, DOT proposed additional rules that would require foreign air carriers to also adopt tarmac delay contingency plans and improve bumping procedures, including increasing compensation for bumping (i.e., involuntary denial of boarding of ticketed passengers due to overselling of tickets) to \$650/\$1,300 from the present \$400/\$800 based on the length of delay. The proposed rule also could enable consumer actions in state and local courts for damages for confinements on board aircraft during extended tarmac delays.¹⁷

Unlike the bumping rule, none of the rules thus far adopted by the DOT nor any pending legislation provides for compensation to passengers in any specific amounts for tarmac confinements and flight delays, even if the delay is in violation of the three-hour rule.¹⁸ Damages for flight delay in the course of international travel is compensable under the Montreal Convention of 1999, providing for damages up to about \$6,000.¹⁹

Judicial response to confinements

The recent history of litigation by passengers to secure damages arising from tarmac confinements and extraordinary delays demonstrates the need for substantial legal reform to protect the interests of the consumer. Passengers filed several cases as putative class actions against American Airlines and JetBlue Airways arising out of their respective tarmac confinement incidents.²⁰ In such cases, plaintiffs and their counsel face a gauntlet of one to three years of defendant airline motions practice,²¹ followed by discovery and more motions practice. In each

case filed in state court, the airline defendant removed the action to federal court.²² Then, the airline filed motions to dismiss state tort claims based on federal preemption. To date, courts have consistently denied motions to dismiss tort claims and contract claims based on preemption in tarmac confinement cases.²³

In one case, American Airlines successfully obtained a change of venue to its headquarters city of Fort Worth, Texas, hundreds of miles from the district court where the plaintiff resided, and over a thousand miles from where most of the proposed class members resided. In another case, plaintiff passenger was assessed \$13,000 in attorney fees for a brief delay in discovery, while the court refused to entertain a similar plaintiff motion for defendant discovery delay/obstruction, instead granting the airline a stay of discovery pending decision on its motion for summary judgment.²⁴ After brief discovery, airline defendant American Airlines filed motions for summary judgment and prevailed at the district court level in two cases but not in a third case.²⁵

As to class action certification, which as a practical matter is essential for small claimants facing the legal and financial resources of a large corporation, federal courts have largely refused to certify consumer airline passenger class actions, primarily on technical and manageability grounds.²⁶ Moreover, since the enactment of the Class Action Fairness Act of 2005, state courts have lost their jurisdiction over national class actions except in small cases.²⁷

The principal cause of action in state tort law for tarmac confinements has been false imprisonment, defined as the unlawful restraint by one person of the physical liberty of another without consent or legal justification.²⁸ Notwithstanding established tort law holding that consent of the plaintiff to confinement is not an adequate defense

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in situations involving deception or acquiescence to apparent legal authority, two federal district courts and one federal appeals court have ruled that in order for a passenger to prevail in a tort claim based on tarmac confinement, the passenger (at least in the state of Texas) must have protested or requested to deplane or he/she will be deemed to have consented to the confinement.²⁹

Modifying passenger compensation

As the judicial response to tarmac delay claims described above demonstrates, the current state of the law places virtually insurmountable obstacles in the way of passengers to obtain judicial relief or compensation for tarmac confinements and flight delays. New federal regulation and legislation are needed for airline passengers to have more than theoretical rights to recover in such situations not involving serious physical injury or death.

Such measures should include the unequivocal right to compensation for tarmac confinements of over three hours in a fixed amount (e.g., \$10 per minute), and for flight delays over two hours in international air transportation (e.g., \$50 per hour), plus out-of-pocket expenses. Such a compensation system could be structured along the same lines as the DOT's bumping rule. Passengers who accept such compensation would give up the right to sue, as is now the case for bumping compensation. Passengers who do not accept the flat amounts for compensation must be able to bring actions for damages arising from flight delays in state or local small claims courts.

Claims should be processed by independent, experienced claims adjusters who are not affiliated with the airlines, rather than the airlines themselves as is now the case, with a right to a hearing before a neutral arbitrator for disputed claims. An Airline

Passengers' Compensation Fund could be created with a small portion of the ticket taxes, which now represent 15–25 percent of the cost of air travel, or by special assessments on airlines based on the number of flight delays in the prior year.³⁰

No valid reason exists to exempt airlines from the consumer laws that apply to all other providers of services to the general public. Considering the high financial and time cost of federal civil litigation, an airline's right to remove consumer cases to federal court should be limited to cases involving individual claims in excess of \$500,000.

To balance the scales of justice in litigation between passengers and airlines, which presently allows airlines to effectively defeat claims by wearing down consumer actions with tens of thousands of dollars in litigation expenses, a fee-shifting statute is needed. Were airline defendants required to pay the litigation expenses, including reasonable attorney fees and time cost for pro se litigants, when the passenger plaintiff recovery exceeds the amount offered by the airline in settlement of the claim prior to litigation, the incentive airlines now have to run up litigation expenses to defeat consumer claims would end and most cases could be settled.

Finally, federal class action law is also badly in need of reform. The present law—since the enactment of the Class Action Fairness Act of 2005—has virtually eliminated certification of national consumer class actions by granting essentially unbridled discretion to federal district courts, most of which strongly disfavor certification.

Conclusion

The new DOT rules are a major step forward for airline passengers and the airline industry. They should reduce congestion delays and deceptive scheduling, and virtually eliminate extended tarmac

confinements. However, effective means to compensate passengers for extended tarmac and flight delays are still lacking. The litigation model for consumer claims is broken. A fixed compensation model similar to the bumping rule (which has proven successful over several decades) would avoid most litigation and provide passengers and airlines with a fair, efficient, uniform, and transparent system of compensation for excessive flight delays.

Endnotes

1. The Airline Deregulation Act of 1978 (ADA) preempts state laws related to a price, route, or service of an air carrier. 49 U.S.C. § 41713(b)(1) (2006). The U.S. Supreme Court has interpreted this statute to mean that a party seeking to prove preemption under the ADA must demonstrate that the challenged law either (1) makes explicit reference to an airline price, route, or service or (2) has a connection with an airline price, route, or service. *Morales v. TWA*, 504 U.S. 374, 384 (1992). In *Morales*, state attorney general rules covering the terms of air fare advertisements were deemed preempted. In *American Airlines v. Wolens*, 513 U.S. 219, 230 (1995), the only other ADA case the Supreme Court has decided, changes to a frequent flyer program were held to be preempted. The Court, however, also held that a state did not enact or enforce a law within the meaning of the ADA when it allowed a civil action for breach of contract against the airline because giving effect to the economic purpose of the ADA required interpreting the term "law" to exclude a private contract. *Id.* (internal citations omitted).

Following *Morales* and *Wolens*, the Second Circuit in *Abu-Brisson v. Delta Air Lines*, 128 F.3d 77, 81 (2d Cir. 1997), held that some state actions may affect airline fares in too tenuous, remote, or peripheral a manner to have preemptive effect. State age discrimination claims were upheld against preemption where the state law (a) had no reference to an air carrier's rates or services and (b) as to the "connection with" prong, did not establish that enforcing state law would have an economic impact. The other circuits have generally followed this approach. See generally D.H. Rosenthal, Note, *Legal Turbulence: The Court's Misconstruction of the Airline Deregulation Act's Preemption Clause and the Effect on Passengers' Rights*, 51 *Dea. L.J.* 1857 (2002).

2. See Aviation Consumer Action Project and Coalition for Airline Passengers Bill of Rights (CAPBOR), White Paper on Airline Delays (2007); Frederick J. Foreman, 2009 Real Air Travel Consumer Report, *FlyersRights.com* (2009); Paul Hudson, Aviation Consumer Action Project, *U.S. DOT Fiddles While Airline Passengers Burn with Delays. Aviation Consumer Group Charges, COMMON DREAMS PROGRESSIVE NEWSWIRE* (2001), available at <http://www.commondreams>.

org/news2011/0205-02.htm.

3. Hudson, *supra* note 2.

4. That case, *Koczan v. Wayne Co. & Northwest Airlines, Inc.*, No. 99-900422 (Wayne Cty. Cir. Cl., Mich.), was remanded from federal court and certified as a class action in state court. Before 2005, most common law class action lawsuits were filed in state court and usually remained there as federal courts often lacked original jurisdiction. For the terms of the settlement, see Declaration of Paul S. Hudson in Support of Motion to Remand at 4, *Hanni v. American Airlines, Inc.*, No. 4:08-cv-00732 (N.D. Cal. Feb. 29, 2008) (ECF No. 21-2).

5. See Don Phillips, *Passenger-Rights Proposal Gets Stuck on the Runway*, WASH. POST, June 11, 1999, at E04; Michael Grunwald, *As Soft Money Flows In, a McCain Crusade Faded, Airlines Thwarted Passenger Rights Bill*, WASH. POST, Oct. 20, 1999, at A01; Keith L. Alexander, *Passenger Rights Expanded; Airlines' Vow Is Effort to Head Off New Law*, WASH. POST, June 8, 2011, at E01.

6. See Air Transport Association, *Customers First 12-Point Customer Service Commitment*, available at <http://www.airlines.org/PassengerCargo/PassengerInfo/Pages/CustomersFirst12-PointCustomerServiceCommitment.aspx>.

7. U.S. Department of Transportation, *U.S. Air Carrier Traffic Statistics, Domestic Passenger-Revenue Departures Performed* (Jan. 1999-July 2010).

8. The DOT did not start requiring the airlines to report accurate statistics of tarmac strandings until 2009. For best available statistics for 2007, see Coalition for an Airline Passengers' Bill of Rights, *Airline Stranding Report Card*, Feb. 14, 2008, available at <http://boardingarea.com/blogs/joesharkey/files/2008/02/final2007report.pdf>, or <http://www.flyersights.org>.

9. Claire Cummings, *Passengers Stuck on Plane over 8 Hours*, DALLAS MORNING NEWS, Dec. 30, 2006, available at <http://www.dallasnews.com/shared/content/dws/bus/industries/airlines/stories/123006detswstranded.351dc32.html>; Jeff Bailey, *Airlines Work on Systems to Reduce Delays*, N.Y. TIMES, Nov. 15, 2007, available at http://www.nytimes.com/2007/11/15/business/15airlines.html?_r=1&ref=air_travel.

10. Katy Byron, *Passengers Trapped on Runway for 8 Hours*, CNN.COM, Feb. 15, 2007, available at <http://www.cnn.com/2007/Travel/02/15/passengers.stranded/index.html>; Jeff Bailey, *JetBlue's CEO Is 'Mortified' After Flights Are Stranded*, N.Y. TIMES, Feb. 19, 2007, available at <http://www.nytimes.com/2007/02/19/business/19jetblue.html>.

11. *Airline Service Improvements: Hearing Before the Senate Comm. on Commerce, Science & Transportation*, 110th Cong. (Apr. 11, 2007); *Aviation Consumer Issues: Hearing Before the House Comm. on Transportation and Infrastructure*, 110th Cong. (Apr. 20, 2007) (witness testimony and transcripts available on committee websites).

12. Air Transport Ass'n of Am. v. Cuomo, 520 F.3d 218 (2d Cir. 2008) (*Citing Rowe v. N.H. Motor Trans. Ass'n*, 522 U.S. 364, 128

S. Ct. 989 (2008)), reversing Air Transport Ass'n of Am. v. Cuomo, 528 F. Supp. 2d 62 (N.D.N.Y. 2007), which upheld the New York statute; cf. *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (holding that "service" in the ADA refers to point-to-point transportation, not beverage, personal assistance to passengers, and similar amenities); *Elussaud v. Independence Air, Inc.*, No. 08-3878, 2010 U.S. App. LEXIS 13721 (3d Cir. July 6, 2010) (no preemption of state regulation for air safety where plane has come to complete stop).

13. *Enhancing Airline Passenger Protections*, 74 Fed. Reg. 68,983 (Dec. 30, 2009); *Posting of Flight Delay Data on Web Sites*, 75 Fed. Reg. 34,925 (June 21, 2010).

14. Scott McCartney, *Flying This Summer Isn't So Terrible After All*, WASH. ST. J., July 15, 2010, available at http://online.wsj.com/article/SB10001424052748704746804575366903974024506.html?mod=WSJ_Lifestyle_Lifestyle_6; DEP'T OF TRANSP., *LONG TARMAC DELAYS DOWN DRAMATICALLY IN JULY FROM LAST YEAR*, DOT AIR TRAVEL CONSUMER REPORT, DOT 168-10 (Sept. 13, 2010) (3 flights delayed over 3 hours July 2010 versus 161 flights in July 2009, with little increase in cancellations), available at <http://airconsumer.dot.gov/reports/index.htm>. Detailed information on flight delays is available at <http://www.bts.gov>.

15. 14 C.F.R. § 399.81.

16. Elizabeth Bailey & David Kirstein, *Require Airline Truth in Scheduling*, N.Y. TIMES, May 27, 1987, available at <http://www.nytimes.com/1987/05/27/opinion/require-airline-truth-in-scheduling.html>; Hudson, *supra* note 2; Aviation Consumer Action Project & Coalition for Airline Passenger Bill of Rights (CAPBOR), *Reasonable Regulation Can Reduce Airline Delays in Short Term at Little or No Cost* (2007), available at <http://www.flyersights.org> and <http://www.USNewsWire.com>.

17. *Enhancing Airline Passenger Protections*, Notice of Proposed Rulemaking, 75 Fed. Reg. 32,318 (June 8, 2010).

18. The European Union provides for compensation for flight delays in fixed amounts (e.g., if a flight is delayed by five hours, the passenger is entitled to compensation in the amount of the full ticket price, including return flight), but enforcement has been inconsistent. See Regulation (EC) 261/2004 of European Parliament, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0261:EN:HTML>. Most U.S. airlines provide by contract for overnight accommodations (food, in some circumstances, meals) if a delay is the airline's fault.

19. The Montreal Convention of 1999 (which became effective in the United States in November 2005) makes airlines liable for damages caused by delay in the transporting of passengers internationally up to about \$6,000, unless the airline proves that it took all reasonable measures to prevent the damage caused by delay or that it was impossible to take such measures. No airline is permitted by contract to assert lower liability limits for international air travel than those provided for in the Montreal Convention. In general, state common law tort or statutory actions are

now preempted, as most courts view the Montreal Convention as the exclusive remedy for claims arising out of international air transportation. There is little if any judicial interpretation of this treaty by U.S. courts. The treaty text is available at <http://www.jus.uio.no/lu/air-carriage/unification-convention-montreal.1999/doc.html>.

20. *Ray v. Am. Airlines, Inc.*, No. CV07-3082-6 (Wash. Cty. Cir. Cl., Ark.); *Hanni v. Am. Airlines, Inc.*, No. 26-40576 (Napa Cty. Cir. Cl., Cal.); *Harper v. Am. Airlines, Inc.*, No. 4:09cv318-Y (N.D. Tex.); *Dickson v. Am. Airlines, Inc.*, No. 4:09cv750-A (N.D. Tex.); *Biscione v. JetBlue Airways Corp.*, No. 08-3776/2008, 700140/2010 (N.Y. Sup. Ct. Queens Cty.); *McCaw v. JetBlue Airways Corp.*, No. 08-3777 (N.Y. Sup. Ct. Queens Cty.).

21. Typical defendant airline motions include motions to dismiss based on preemption and insufficient pleading; motions to transfer venue to the headquarters city of the defendant airline; motions to strike; motions to deny class certification; motions to stay or compel; motions for costs, sanctions, and attorney fees; motions for extensions of time or time shortening; discovery; motions for summary judgment; and removal to federal district court of any case filed in a state or local court.

22. Plaintiffs' motions to remand to state court were denied in two cases against American Airlines, but granted in a case against JetBlue. *Hanni v. Am. Airlines, Inc.*, No. C08-00732 CW, 2008 WL 1885794 (N.D. Cal. Apr. 25, 2008) (denying plaintiff's motion to remand, granting defendant's motion to amend removal notice); *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2008 WL 2323023 (W.D. Ark. June 2, 2008) (denying plaintiff's motion to remand); *Biscione v. JetBlue Airways Corp.*, 681 F. Supp. 2d 583 (E.D.N.Y. 2010) (granting plaintiff's motion to remand).

23. See *Perdigao v. Delta Air Lines, Inc.*, 973 So. 2d 33 (La. App. 5th Cir. 2007) (false imprisonment claim arising from tarmac confinement not preempted); *Daniel v. Virgin Atl. Airways Ltd.*, 59 F. Supp. 2d 986 (N.D. Cal. 1998) (international passenger's delay and inconvenience cognizable under Warsaw Convention); *Ray v. Am. Airlines, Inc.*, 609 F.3d 917 (8th Cir. 2010) (affirming denial of federal preemption for false imprisonment and negligence); *Harper v. Am. Airlines, Inc.*, No. 4:09cv318-Y (N.D. Tex. June 12, 2009) (ECF No. 30) (motion to dismiss based on preemption denied for flight delay and tarmac confinement for international flight under Montreal Convention of 1999).

24. *Harper v. Am. Airlines, Inc.*, No. CV-08-5-2410-NE, 2009 WL 1605800 (N.D. Ala. May 18, 2009) and 2009 WL 2524524 (N.D. Ala. June 12, 2009); *Hanni v. Am. Airlines, Inc.*, No. C-08-00732CW, 2009 WL 1505286 (N.D. Cal. May 27, 2009); *Plaintiffs' Objections to Magistrate Judge's Order*, *Hanni v. Am. Airlines, Inc.*, No. 08-732 (N.D. Cal. June 7, 2009) (ECF No. 285); *Clerk's Notice Denying Objection Denied*, *Hanni v. Am. Airlines, Inc.*, No. 08-732 (N.D. Cal. June 25, 2009) (ECF No. 310).

25. *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2009 WL 921124 (W.D. Ark. Apr.

2, 2009) (motion for summary judgment granted on claim of false imprisonment arising from nine-hour tarmac confinement because plaintiff did not affirmatively ask to exit aircraft, and on negligence claim because plaintiff failed to claim any physical injury, as required by Texas law), *aff'd*, 609 F.3d 917 (8th Cir. 2010); *Abouzek v. New York Airlines*, 895 F.2d 1456 (D.C. Cir. 1990) (no false imprisonment for three-hour tarmac confinement without exigent circumstances); *Hanni v. Am. Airlines, Inc.*, No. 08-732, 2010 WL 1576435 (N.D. Cal. Apr. 19, 2010), 2010 WL 289297 (N.D. Cal. Jan. 15, 2010) (summary judgment granted for eight-hour tarmac confinement where passenger's failure to personally request to exit aircraft was deemed to constitute consent to remain on the aircraft; court found no breach of contract for airline's failure to provide overnight accommodations); *Harper v. Am. Airlines, Inc.*, No. 4:09-cv-318-Y (N.D. Tex. 2010) (summary judgment not granted, but class certification denied; plaintiff discontinued the case due to high cost of litigating in federal court relative to the small size of the individual claim).

26. *See Ray*, 2009 WL 921124; *Hanni*, 2010 WL 1576435; *Mullany v. Delta Air Lines, Inc.*, 258 F.R.D. (S.D.N.Y. 2009) (class certification denied); *Lee v. Am. Airlines, Inc.*, No. 3:01-cv-1179, 2002 WL 31230803 (N.D. Tex. Sept. 30, 2002) (class certification denied for flight delay); *Harper v. Am. Airlines, Inc.*, No. 4:09-CV-318-Y, 2009 WL 4858050 (N.D. Tex. Dec. 16, 2010) (granting motion to strike class certification motion based on interpretation of local procedural rule); *Harper v. Am. Airlines, Inc.*, No. 09-65, 2010 WL 1141647 (5th Cir. Mar. 23, 2010) (declining to entertain interlocutory appeal); *cf. Liechtung v. Tower Air Inc.*, 269 A.D.2d 363, 702 N.Y.S.2d 111 (N.Y. App. Div. 2000) (granting class certification); *In re Nigeria Charter Flights Contract Litig.*, 235 F.R.D. 297 (E.D.N.Y. 2006) (class certified, but subsequently decertified); see generally, Thomas A. Dickerson, *Flight Delays: The Airline Passengers Rights & Remedies*, 171 *TRAVELER* J., Issue 2 (Spring 2000), available at <http://www.courts.state.ny.us/tandv/flightdelays.html>.

27. The Class Action Fairness Act of 2005 provides original federal jurisdiction and for removal from state court to U.S. district court of any civil action that is a proposed class action where (1) the proposed class contains at least 100 members, (2) the primary defendant is not a state official, (3) any member of the class of plaintiffs is a citizen of a different state than any defendant, and (4) the matter in controversy exceeds \$5 million, 28 U.S.C. §§ 1332(d), 1441, 1453 (2006). Federal case law grants discretion to district courts in certifying class actions and class certification decisions are rarely overturned in favor of certification on appeal, *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 100 (1981); *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010); *Luskin v. Intervoice-Brite Inc.*, 261 F. App'x 697 (5th Cir. 2008); *Payton v. County of Carroll*, 473 F.3d 845, 847 (7th Cir. 2007); *Greg v. Finiva Capital Corp.*, 442 F.3d 188 (4th Cir. 2006); see generally *Wiscon-Miller-Kanz*, 7AA *FD*,

PRACTICE & PROC., § 1785 d.17. Some legal scholars question whether national class actions are possible given the court discretion and the many hurdles faced to certify. *Symposium, Fairness to Whom? Perspectives on the Class Action Fairness Act of 2005*, 136 U. PA. L. REV. 1823 (2008); *Symposium on Aggregate Justice*, 58 U. KAN. L. REV. 1027 (2010); Michael Miller, *The Class Action (Un)fairness Act of 2005: Could It Spell the End of the Multistate Consumer Class Action?*, 36 *PROV. L. REV.* 879 (2009). No federal court has certified a national class action for tarmac confinements or flight delays since 2005.

28. 32 *ASL J.R.*, 20 *False Imprisonment* § 1 (2007). Other causes of action include breach of contract (however, contracts of carriage are written entirely by airlines and invariably contain exculpatory clauses that negate liability and most damages unless overridden by federal law, and federal courts have disallowed these actions based on preemption of state doctrines of adhesion, unconscionability, and state consumer protection statutes that otherwise protect consumers from overreaching or illusory contracts), negligence (however, this usually requires physical injury), fraud and deceit (requiring proof of detrimental reliance), outrage, or intentional infliction of emotional distress (generally requiring acts that are outrageous and outside the bounds of civilized society). See *Hanni v. Am. Airlines, Inc.*, No. 08-732, 2008 WL 2740345 (N.D. Cal. July 11, 2008); *Ray v. Am. Airlines, Inc.*, No. 08-5025, 2008 WL 2525923 (W.D. Ark. June 2, 2008); *Order Denying Plaintiffs' Motion for Class Certification, Granting Defendant's Motion for Summary Judgment, and Denying Colleen O'Conner's Motion for Intervention*, *Hanni v. Am. Airlines, Inc.*, No. 08-732 (N.D. Cal. Jan. 15, 2010) (ECF No. 365) (dismissing contract claims for overnight accommodations).

29. See *Hanni*, 2010 WL 1576435; *Ray*, 2009 WL 921124 (airline passengers consent to lengthy confinement on aircraft and must affirmatively withdraw that consent by request to deplane to flight crew); *cf. Scofield v. Critical Air Medicine*,

45 *Cal. Rptr.* 2d 915 (1996); 32 *ASL J.R.*, 20 *False Imprisonment* § 53 (2007); *Restatement of Torts Second* §§ 892B, 40A, 43, 41; *Fraudulently Induced Consent to Intentional Torts*, 46 U. CON. L. REV. 71 (1977) (consent must be clearly manifest and may not be based on deceit, apparent legal authority, or threat of force).

30. The litigation model for small or even medium-sized claims by airline passengers is clearly broken. Litigation expenses and attorney fees for a lawsuit are in the tens of thousands of dollars, which only an airline can easily afford. Even wealthy consumers cannot justify litigation expenses far in excess of potential recoveries, essentially granting airlines impunity to deny claims. In the only two known cases (*Koczara v. Wayne Co. & Northwest Airlines, Inc.*, No. 99-900422 (Wayne Cty. Cir. Cl., Mich.), and *In re Nigeria Charter Flights Contract Litig.*, 233 F.R.D. 297) where a class was certified for tarmac confinement or delay, passengers received \$2,000 or less, while the plaintiff attorney fees and litigation expenses were in excess of \$2 million (35-40 percent of the settlement recoveries). The model of a compensation fund with an experienced compensation attorney as decider of claims to avoid litigation against airlines was successfully used in compensating victims of the September 11, 2001, terrorist attacks and is now being utilized for compensation of victims of the BP Gulf of Mexico oil spill disaster.

The DOT regulations providing for bumping compensation (which are codified at 14 C.F.R. Part 250) emerged from the settlement of a lawsuit brought by Ralph Nader (*Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)). That regulatory compensation scheme has operated successfully (albeit the compensation amounts have been eroded by inflation) for many years, and has no doubt avoided thousands of lawsuits by passengers, while allowing airlines a safe harbor to overbook flights to account for no-shows without any significant threat of breach of contract suits for dishonoring tickets or confirmed reservations.



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