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Second Circuit Shuts Down New York's Airline Passenger Bill of Rights

By Thomas A. McCann *

The U.S. Court of Appeals for the Second Circuit has struck down New York State's highly touted Airline "Passenger Bill of Rights" law, thwarting efforts by New York and several other states to improve how airlines treat their customers during tedious and interminable flight delays.¹

The New York state law was the strongest effort yet to improve the plight of the nation's harried airline customers, who have faced record delays in U.S. airports over the last two years, often having to wait hours in cramped terminals or on the plane itself before their flights finally take off or are cancelled.² However, the Second Circuit ruled on March 25 that only the federal government has the power to regulate service standards on the nation's air carriers, and that any state legislation attempting to address the problem is null and void.³

The decision has produced relief for the airline companies and their lobbying group, the Air Transport Association of America, but has sparked anger among consumer rights activists and legislators in

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¹ Cara Matthews, *Courts Say No to Airline Passengers' Rights Law*, GANNETT NEWS SERV., March 26, 2008.

² Frank Ahrens, *Court Rejects Air Travelers Bill of Rights*, WASH. POST, March 26, 2008, at D03.

³ *Air Transp. Ass'n of Am. v. Cuomo*, No. 07-5771-cv, 2008 WL 763163, *6 (2d Cir. March 25, 2008).

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at least nine other states who were drafting similar legislation for their own constituents.⁴

The New York State Passenger Bill of Rights (“PBR”) was the legislative response to a major debacle at John F. Kennedy International Airport on Valentine’s Day 2007, when JetBlue Airways stranded thousands of passengers on parked planes for up to ten hours during an ice storm.⁵ Passengers complained of receiving no information from pilots or flight attendants about the circumstances outside, and staff on some planes refused to hand out food or water even though some passengers were diabetic.⁶

The New York legislation, sponsored by State Sen. Charles J. Fuschillo Jr. and State Assemb. Michael N. Gianaris, mandated that:

1)Whenever airline passengers have boarded an aircraft and are delayed more than three hours on the aircraft prior to takeoff, 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 onboard restrooms; and

(c)adequate food and drinking water and other refreshments.⁷

The New York law also required that all airline carriers in the state display clear and conspicuous contact information for lodging consumer complaints, including written explanations explicitly outlining these rights.⁸ The law also required that the airline companies publicize the existence of New York’s newly created Airline Consumer Advocate’s office.⁹ The Advocate’s office, in

⁴ Matthews, *supra* note 2.

⁵ *Passengers Trapped on Runway for Eight Hours*, CNN.COM, February, 15, 2007, available at <http://www.cnn.com/2007/TRAVEL/02/15/passengers.stranded/index.html> (last visited April 20, 2008).

⁶ *Id.*

⁷ N.Y. Gen. Bus. Law § 251-g(1).

⁸ N.Y. Gen. Bus. Law § 251-g(2).

⁹ *Id.*

turn, would be able to refer complaints to the state Attorney General, who could seek fines of up to \$1,000 a passenger for “failure to provide required services to stranded passengers.”¹⁰

The law went into effect on Jan. 1, 2008, but the Air Transport Association of America took preemptive action and filed suit in the United States District Court for the Northern District of New York, seeking declaratory and injunctive relief before the state had a chance to enforce the law.¹¹ The Association argued that the New York law was preempted by the Airline Deregulation Act of 1978 (“ADA”) and that it violated the Commerce and Supremacy clauses of the United States Constitution.¹²

However, the district court refused to grant the preliminary injunction and instead granted summary judgment to the State of New York, even though the state’s lawyers had not yet filed a summary judgment motion.¹³ At the heart of the case is the proper interpretation of the ADA’s preemption provision, which declares that States may not enact any law “related to any price, route, or service of an air carrier,” the operative word being “service.”¹⁴ The ADA does not define the term “service” and various federal circuits have conflicting positions on what an airline “service” was intended to mean.¹⁵

The district court in this case reasoned that the Passenger’s Bill of Rights was a health and public safety law, “one of the most established areas of state police power,” and ought not to be preempted by an airline deregulation law.¹⁶ The court reasoned that Congress’ purpose in enacting the ADA in the 1970s was “to encourage. . .an air transportation system which relied on competitive market forces to determine the quality, variety, and price of air services,” to create the “realistic threat of competition, facilitate entry

¹⁰ Joe Sharkey, *Airlines to Use Courts to Thwart a Movement*, N.Y. TIMES, Dec. 18, 2007, at C6.

¹¹ *Air Transp. Ass’n of Am.*, 2008 WL 763163, at *1.

¹² *Id.*

¹³ *Air Transp. Ass’n of Am. v. Cuomo*, 528 F. Supp. 2d 62, 69 (N.D.N.Y. Dec. 20, 2007).

¹⁴ 49 U.S.C. § 41713(b)(1).

¹⁵ *Air Transp. Ass’n of Am.*, 528 F. Supp. 2d at 66.

¹⁶ *Id.* at 65.

into markets by qualified firms and develop market incentives to lower costs and better efficient.”¹⁷

The court stated that “[f]resh air, water, sanitation and food are necessities in the extreme situation in which this act applies. It threatens the public health to contain people on grounded airplanes for hours without these necessities, particularly, though not exclusively, if passengers include diabetics, young children, the sick or the frail.”¹⁸ The goal of preemption was to insulate the airline industry from state economic regulations, but state health and safety regulations implicate different concerns.¹⁹

However, the Air Transport Association of America appealed the district court’s ruling, and the Second Circuit reversed, holding that the ADA’s preemption of state laws regulating “services” did indeed apply to the New York Airline Passengers’ Bill of Rights.²⁰ The Second Circuit determined that, while the term “service” remains undefined, it had “little difficulty concluding that requiring airlines to provide food, water, electricity, and restrooms to passengers during lengthy ground delays relates to the service of an air carrier.”²¹ The Second Circuit found that a majority of circuits have construed “service” to refer to “the provision or anticipated provision of labor from the airline to its passengers and encompasses matters such as boarding procedures, baggage handling, and food and drink – matters incidental to and distinct from the actual transportation of passengers.”²² The Court did concede that that the Third and Ninth Circuits have reached a more narrow definition of “service.”²³ Those circuits construe the term to refer only to “the prices, origins and destinations of the point-to-point transportation or passengers, cargo or mail,” but not to include things like “an airline’s provision of in-flight beverages, personal assistance to passengers, the handling of luggage, and similar amenities.”²⁴ However, the Court reasoned that those circuits’ interpretations were inconsistent with a recent U.S.

¹⁷ *Id.* at 66.

¹⁸ *Id.* at 65-66.

¹⁹ *Id.* at 66.

²⁰ *Air Transp. Ass’n of Am.*, 2008 WL 763163, at *6.

²¹ *Id.* at *3.

²² *Id.* at *4.

²³ *Id.*

²⁴ *Id.*

Supreme Court decision, *Rowe v. New Hampshire Motor Transport Association*.²⁵

In *Rowe*, the Supreme Court analyzed the preemption provision of the Federal Aviation Administration Authorization Act (“FAAA”), which is identically worded to that of the ADA.²⁶ At issue in that case was whether a preemption on state laws relating to “services” applied to a Maine law that required tobacco retailers shipping their products to use a delivery service that included an age verification system to stop minors from obtaining cigarettes.²⁷ The Supreme Court held such a law to be preempted, reasoning that preemption applies a state law whenever it “ha[s] a connection with, or reference to . . . services. . . even if a state law’s effect on . . . services is only indirect.”²⁸ The Second Circuit noted that the Supreme Court in *Rowe* declined to read into the FAAA preemption provision an exception for “protecting the public health,” so the circuit judges held the same reasoning should apply to the ADA’s preemption provision.²⁹

The Second Circuit reasoned that “[a]lthough the goals of the PBR are laudable and the circumstances motivating its enactment deplorable, only the federal government has the authority to enact such a law.”³⁰ The court also suggested that the Passengers’ Bill of Rights may also be impliedly preempted by the Federal Aviation Act (“FAA”), which “was enacted to create a ‘uniform system of federal regulation’ in the field of air safety.”³¹ The court stated if any regulations governed public health for passengers stranded on an airport’s tarmac, the FAA may be the sole authority.³² The court detailed a long list of similar FAA regulations, from the mandated contents of airplane first aid kits to the required ventilation of airplane compartments for carbon monoxide safety.³³

²⁵ *Id.*; *Rowe v. N.H. Motor Transp. Ass’n*, 128 S. Ct. 989 (2008).

²⁶ *Air Transp. Ass’n of Am.*, 2008 WL 763163, at *3; U.S.C. § 14501(c)(1).

²⁷ *Rowe*, 128 S. Ct. at 993-94.

²⁸ *Id.* at 995.

²⁹ *Air Transp. Ass’n of Am.*, 2008 WL 763163, at *4-5.

³⁰ *Id.* at *6.

³¹ *Id.* at *5 (quoting *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 639 (1973)).

³² *Id.*

³³ *Id.*

The court stated that conflicting state regulations regarding treatment of passengers during takeoff delays could lead to interminable confusion for airline carriers trying to comply with the law.³⁴ The court stated: “If New York’s view regarding its scope of regulatory authority carried the day, another state could be free to enact a law prohibiting the service of soda on flights departing from its airports, while another [state] could require allergen-free food options on its outbound flights, unraveling the centralized federal framework for air travel.”³⁵

The Second Circuit’s ruling provoked praise from the airline industry and criticism from state legislators and consumer advocates. In a prepared statement, the airline lobbying group said, “the court’s position vindicates the position of the . . . that airline services are regulated by the federal government, and that a patchwork of laws by states and localities would be impractical and harmful to consumer interests.”³⁶ The groups went on to state, “[t]his clear and decisive ruling sends a strong message to other states that are considering similar legislation.”³⁷

Gianaris, the bill’s co-sponsor, said the ruling was one in a long line of court decisions siding with corporate interests over consumer needs.³⁸ “One would struggle to find examples as outrageous as those faces by passenger[s] on these planes,” he said.³⁹ Prior to the ruling, Gianaris said the bill had been written very carefully to avoid interfering with federal regulatory matters, like requiring airlines to return planes to a gate after a certain period.⁴⁰ “We kept it extremely limited to what we were comfortable that we were allowed to do: Require them to give people a drink and clean the bathroom,” Gianaris said. “That’s within states’ rights because it’s a matter of public health.”⁴¹

³⁴ *Id.*

³⁵ *Id.* at *6.

³⁶ Ken Belson, *Court Rejects State Protections for Air Travelers*, NYTimes.com, March 25, 2008, available at <http://cityroom.blogs.nytimes.com/2008/03/25/us-court-strikes-down-states-air-traveler-protections/> (last visited April 20, 2008).

³⁷ *Id.*

³⁸ Sharkey, *supra* note 10.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

Similar legislation in other states has been put in limbo, as politicians gauge whether their bills could survive a court challenge.⁴² However, the court ruling may not stop the growing consumer movement against airlines stranding passengers on the tarmac.⁴³ The Coalition for an Airline Passengers' Bill of Rights began in 2007 after its founder, Kate Hanni, was among thousands of passengers stranded on their planes for up to eight hours in 2006 because of bad weather in Texas.⁴⁴ The group now has more than 20,000 members lobbying for federal legislation similar to the New York law.⁴⁵ In Congress, Rep. Mike Thompson (D-Calif.) and Sens. Barbara Boxer (D-Calif.) and Olympia Snowe (D-Me.) have taken up Hanni's cause, sponsoring bills in both Houses to create a federal airline passengers' bill of rights.⁴⁶ The U.S. Department of Transportation is also studying proposals to ameliorate conditions during delays.⁴⁷

Thompson told the Washington Post in March that some of the bill's language had made it into the Federal Aviation Administration's reauthorization bill, which passed the U.S. House of Representatives and as of April was still pending before the U.S. Senate.⁴⁸ The bill would require airlines nationally to circulate air and provide food and water to passengers regardless of how long they are kept inside the airplane.⁴⁹ The bill also includes language that would allow passengers to leave the plane after a certain amount of time on the tarmac.⁵⁰

Boxer and other federal lawmakers are pushing for passage of such legislation as soon as possible. "Passenger complaints are up 60 percent," Boxer said in April, "and we have entire fleets of aircraft grounded due to safety violations and concerns. Safety is our first

⁴² Adam Brandolf, *Court Ruling could leave Pa. Air Passengers Stuck*, PITTSBURGH TRIB.-REV., March 26, 2008, at B1.

⁴³ Ahrens, *supra* note 2.

⁴⁴ Sharkey, *supra* note 10.

⁴⁵ *Id.*

⁴⁶ Ahrens, *supra* note 2.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

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priority, and we need to set some basic standards of care for our passengers. . . We need this legislation now.”⁵¹

⁵¹ Press Release, Senator Barbara Boxer, Senators Boxer, Snowe, Schumer, and Lautenberg Call for Senate Action on the Airline Passengers’ Bill of Rights (April 10, 2008).

Calls for More Wireless Regulation Heating Up in Congress

By Thomas A. McCann

Consumer frustration with their wireless companies has led to untold angry phone calls to customer service lines across the country and increasing class action litigation.⁵² Sensing a political opportunity, several federal legislators are attempting to enter the fray now as well, proposing a bevy of new federal laws aimed at improving the quality and consumer friendliness of cell phone service.⁵³

Among the disputed practices the legislators hope to address are mandatory contract extensions, early termination fees and confusing language on billing statements.⁵⁴ Some proposals call for the Federal Communications Commission (“FCC”) to step in, while another proposed bill seeks unprecedented oversight by the Federal Trade Commission (“FTC”).⁵⁵

U.S. Rep. Edward Markey (D-Mass.) introduced draft legislation in February that would require wireless service providers to describe their important terms and charges “in a clear, plain and conspicuous manner” for customers, including the duration of the service plan; the duration of any trial period; the number of minutes in the plan and how the minutes are calculated; the charges for long distance, international calls, directory assistance, receipt of incoming calls and roaming charges, among others; the terms of subsidizing

⁵² Wailin Wong, *Calls for Wireless Regulation Gets Louder*, CHI. TRIB., March 21, 2008, at A1.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*; Richard Martin, *Senate Considers Striking down ‘Common Carrier’ Exception*, INFO. WK., April 14, 2008, available at <http://www.informationweek.com/story/showArticle.jhtml?articleID=270200476> (last visited April 23, 2008).

any wireless customer equipment; and the existence of any early termination fees, service initiation fees or other non-recurring fees.⁵⁶

Markey's proposed legislation emphasizes that there are more than 250 million wireless service subscribers in the United States and that the cell phone has replaced traditional telephone service entirely for many Americans.⁵⁷ The bill's findings note that many consumers find it exceedingly difficult to compare the costs and service differences between the nation's many wireless service carriers because of lack of consistency among contracts and general lack of information.⁵⁸ The bill also notes that service providers typically require customers to sign a two-year contract and charge early termination fees of \$175 or more to stop customers from switching to competitors.⁵⁹

Markey's bill would mandate that all wireless providers offer at least one service plan to consumers that has no early termination fee, and that if a plan does have an early termination fee, that the fee be prorated over the course of the plan.⁶⁰ The bill would require all plans with durations of two years or more to have a termination fee that is reduced by at least half once the contract is halfway completed.⁶¹

The legislation would require that all customers be given a 30-day trial period where the customer can stop service for any reason and not incur a penalty or charge.⁶² The customers also would have to receive a pro rata refund for any charges for use of wireless customer equipment.⁶³ Wireless providers would have to give written notice of any subsequent changes in terms or charges at least 30 days in advance of the change and, if the changes include higher

⁵⁶ U.S. Rep. Edward Markey (D-Mass.), Draft H.R. (as discussed by H. Subcomm. on Telecom. and the Internet, Feb. 27, 2008), *available at* http://markey.house.gov/docs/telecomm/draft_wireless_legislation.pdf (last visited April 23, 2008).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*; Roy Mark, *Markey Floats Wireless Bill of Rights*, eWeek.com, Feb. 27, 2008, *available at* <http://www.eweek.com/c/a/Government/Markey-Floats-Wireless-Bill-of-Rights/> (last visited April 23, 2008).

⁶¹ Mark, *supra* note 60.

⁶² *Id.*

⁶³ *Id.*

rates or more restrictions, the companies again must give customers 30 days to end their contract without any penalty or termination fee.⁶⁴ The bill also would impose strict standards for the content of monthly bills, including requiring companies to state the full monthly service charge on each customer's monthly bill without breaking it up into smaller pieces; to separate and itemize all federal, state or local taxes or charges; and to deliver a bill that is "clearly organized. . .[and] describes in plain language the products and services for which a charge is imposed."⁶⁵

In order to improve mobile service quality, the bill would mandate that every wireless service provider create and make available to consumers a map of the geographic area where the provider is licensed to provide service, showing the coverage area of the wireless service and any known outdoor service gaps.⁶⁶ According to the bill, the map must have sufficient detail to identify "generally the geographic areas where commercial mobile service is not predicted to be regularly available."⁶⁷ The map would have to be furnished to customers whenever a customer requests one or whenever the company signs up a new customer. The provider would also have to provide a service map on its Internet website.⁶⁸

Finally, under Markey's proposed legislation, each of the nation's wireless service providers would have to provide semi-annual reports to the FCC which would include, among other things, the percentage of the potential geographic market where the provider currently offers service, an assessment of the provider's average outdoor signal strength within designated geographic areas, an assessment of dropped calls within designated areas, and the identification of any known coverage gaps in those areas.⁶⁹ The FCC would be charged with crafting more detailed regulations on the matter, specifying which geographic areas to focus on, and establishing an Internet site for conveying the semi-annual reports to the public.⁷⁰

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Mark, *supra* note 60.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

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In the U.S. Senate, Sen. Amy Klobuchar introduced similar legislation in 2007, called the Cell Phone Consumer Empowerment Act, which also included provisions on pro-rating early termination fees and other restrictions on wireless service contracts.⁷¹ Also, Sen. Mark Pryor (D-Ark.) has floated legislation which would amend the Communications Act of 1934 to establish a uniform set of customer service and consumer protection requirements for wireless service providers.⁷² “This bill begins an important debate on building uniform, comprehensive rules that provide a fair, transparent and quality wireless service to consumers across the nation,” Pryor told the Senate floor in October 2007. “[The] rules must be comprehensive and address a broad range of issues, including disclosures of contract terms and conditions, service-area maps, trail periods and early termination fees.”⁷³

In the latest federal attempt to increase regulation of the wireless industry, two U.S. senators introduced legislation in April 2008 that would put wireless carriers for the first time under the authority of the Federal Trade Commission (“FTC”).⁷⁴ The bill, sponsored by U.S. Sen. Daniel Inouye (D-Haw.), chairman of the Senate Commerce Committee, and U.S. Sen. Byron Dorgan (D-N.D.), would repeal the FTC’s “common carrier exception,” which has been around since the 1930s and has traditionally exempted big telecommunications firms from FTC regulation.⁷⁵

Testifying before the Senate Commerce Committee in April, FTC Chairman William Kovacic said that the common carrier exception was now obsolete, a relic from a time when telecommunications companies were highly regulated under other laws.⁷⁶ “Technological advances have blurred the traditional boundaries between telecommunications, entertainment, and technology,” Kovacic said. “As the Internet and telecommunications industries continue to converge, the . . . exception is likely to frustrate

⁷¹ Martin, *supra* note 55.

⁷² S.2171, 110th Cong. § 2 (2008).

⁷³ 153 Cong. Rec. s12938-01 (daily ed. Oct. 16, 2007) (statement of Sen. Pryor).

⁷⁴ Martin, *supra* note 55.

⁷⁵ S.2831, 110th Cong., § 14 (2008).

⁷⁶ Martin, *supra* note 55.

the FTC's ability to stop deceptive and unfair acts and practices and unfair methods of competition."⁷⁷

On the state level, the Florida Attorney General in February fined AT&T Mobility \$3 million for billing customers for "third-party ring tones" and other services that were misleadingly advertised as free.⁷⁸ Also, in Illinois, State Rep. Susanna Mendoza has tried to pass legislation to free customers from their wireless contracts if their cell phones break repeatedly.⁷⁹

The raft of federal legislative proposals and state action has frustrated wireless service providers like Sprint Nextel and AT&T, most of which have tried to institute reforms themselves to preempt any threatened government regulations.⁸⁰ The CTIA, the wireless industry's trade group, says it is open to light national regulation but insists that it has tried hard to improve customer service, and federal regulation may do more harm than good.⁸¹ "We believe regulation is best applied on the federal level so it applies to everyone, and at one time in a consistent manner," CTIA spokesman Joe Farren told the Chicago Tribune. "But [it] is something that should be applied only when necessary – when there's some kind of market failure."⁸²

According to the Council of Better Business Bureaus, the cell phone industry fields the most complaints out of the 3,800 industries the council tracks. However, the council also says that the wireless industry has a better rate of resolving complaints than other industries on average.⁸³ The industry says that fierce and increasing competition among companies also will keep them responsive to consumers, citing that wireless companies have acted on their own to allow number portability and that most major providers have now rolled out unlimited voice and data plans.⁸⁴ However, the increased industry competition is one of the main reasons companies have resorted to early termination fees in the first place.⁸⁵

⁷⁷ *Id.*

⁷⁸ Wong, *supra* note 52.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ Wong, *supra* note 52.

⁸⁴ *Id.*

⁸⁵ *Id.*

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Customers evidently are interested in stricter regulation of their cell phone companies. When State Rep. Mendoza introduced her Illinois legislation, she said she was shocked at the constituent response. She told the Chicago Tribune, “This one little issue probably got more calls to my office than any other issue I’ve ever worked on.”⁸⁶

⁸⁶ *Id.*