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# CARRY-ON BAGGAGE—ARE THE REGULATIONS DOING THEIR JOB?

TERRY L. TURNER\*

## I. INTRODUCTION

**C**ARRY-ON BAGGAGE HAS been a major concern in the aviation industry for many years. It has continually raised safety, economic and logistical issues. For almost thirty years, the Federal Aviation Administration (FAA) has attempted to regulate carry-on baggage in order to encourage airlines to implement safe carry-on baggage policies and to enforce safety regulations.

In 1967, the FAA promulgated the first of many federal regulations governing carry-on baggage. In addition to proper stowage regulations, these regulations provided guidelines to the airlines regarding control of the size and types of passenger carry-ons permitted in the cabin of an aircraft. Each of these regulations was designed to enhance cabin safety for the airline passenger.

In spite of these regulatory efforts, carry-on baggage continues to create safety concerns. The industry and government continue to seek ways to solve the dilemma. This Article will trace the history of aviation carry-on baggage regulations and the specific problems the regulations have attempted to solve. It will also look at solutions the industry has introduced regarding carry-on baggage. Finally, this Article will analyze whether any of these industry or governmentally conceived measures have been effective by reviewing recent litigation involving cabin injuries caused by falling carry-on baggage.

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## A. BRIEF HISTORY

When the Wright Brothers took to the air in 1903, the least of their concerns was where to safely stow the luggage.<sup>1</sup> Staying in the air was challenge enough. However, from very early on in commercial aviation, baggage service was a factor. As early as 1929, airline service included having a courier meet the arriving passenger and take charge of the luggage.<sup>2</sup>

Competition was tough among the early pioneer airlines (just as it is today), and many did not survive.<sup>3</sup> Each airline endeavored to create an innovative service to give it an edge on its competitors. In one such competitive move, an airline hired the first flight attendants in 1930.<sup>4</sup> These first flight attendants were required to be nurses and baggage agents, having to carry passenger baggage on board the aircraft as part of their duties.<sup>5</sup> One aviation historian recounted that if seats were full, the flight attendants could be found seated on a mailbag or suitcase at the rear of the plane.<sup>6</sup> Another airline was known to have its mechanics stop their other duties to hustle baggage off the aircraft to the passengers in the waiting room.<sup>7</sup> Even in the earliest days of commercial aviation, competition included service, and service included accommodating a passenger's baggage.

During the 1950s, the flying experience changed from catering to the wealthy to competing for the masses.<sup>8</sup> The economic growth and stability following World War II paved the way for airline travel to become a more acceptable and timely way to reach a destination.<sup>9</sup> As large companies decentralized, the airlines started competing for the traveling businessman.<sup>10</sup> As a result of increased business travel, the travel industry started to boom.<sup>11</sup> By the end of the decade, businessmen were starting to combine business and pleasure, and golf bags were

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<sup>1</sup> See FRANK J. TAYLOR, *HIGH HORIZONS* 61, 67, 107 (1964).

<sup>2</sup> See CARL SOLBERG, *CONQUEST OF THE SKIES: A HISTORY OF COMMERCIAL AVIATION IN AMERICA* 110 (1979).

<sup>3</sup> See *id.* at 162.

<sup>4</sup> See *id.* at 211.

<sup>5</sup> See *id.* at 212-14.

<sup>6</sup> See *id.*

<sup>7</sup> See *id.* at 352.

<sup>8</sup> See *id.* at 376.

<sup>9</sup> See *id.*

<sup>10</sup> See *id.*

<sup>11</sup> See *id.* at 377.

beginning to be weighed, along with the briefcases and overnight bags.<sup>12</sup>

By the 1960s, jet travel was common. Between 1955 and 1972, the number of passengers flying commercially grew from 7 million to 32 million per year.<sup>13</sup> Speed became a matter of public convenience and necessity.<sup>14</sup> Prior to the latest telecommunications developments, jet air travel probably had the single greatest impact on our modern society.<sup>15</sup> One author ended his recount of aviation history by stating that the "miracle of flight . . . had been triumphantly turned into a repetitive and unexciting routine. The adventure was over."<sup>16</sup> However, the new challenges of efficiently, safely and competitively moving the masses had really just begun.

#### B. CIVIL AERONAUTICS BOARD OVERSIGHT AND THE EFFECTS OF ITS DEMISE

For many years, the Civil Aeronautics Board (CAB) regulated the business side of the aviation industry by controlling prices, routes and entries into markets.<sup>17</sup> This ensured that each company received its fair share of business in order to survive.<sup>18</sup> However, in 1978, under pressure from airlines to control their own destiny, Congress passed the Airline Deregulation Act of 1978.<sup>19</sup> The stated purpose of the Act was to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services, and for other purposes."<sup>20</sup> As part of the Act, the CAB was phased out. With no regulatory control over prices and routes, competition increased. Both new and old airlines struggled to carve a niche in new and old markets. Not all were successful. However, the Act was seen as being in the public's interest because competition would force the airlines to be more efficient and would lower prices for the consumer.<sup>21</sup>

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<sup>12</sup> See *id.*

<sup>13</sup> See *id.* at 406.

<sup>14</sup> See *id.* at 411.

<sup>15</sup> See *id.*

<sup>16</sup> *Id.* at 413.

<sup>17</sup> See ROBERT M KANE & ALLAN D. VOSE, AIR TRANSPORTATION 14-4 (8th ed. 1982).

<sup>18</sup> See *id.*

<sup>19</sup> See Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705-54 (1978) (codified as amended at 49 U.S.C. §§ 40101-40120 (1994)).

<sup>20</sup> *Id.* at pmbl.

<sup>21</sup> See KANE & VOSE, *supra* note 17, at 14-5.

In many ways, deregulation has accomplished many of its goals. Analysts agree that deregulation has increased and improved plane utilization, passenger load factors and productivity.<sup>22</sup> As air fares came down, air travel increased.<sup>23</sup> However, with this substantial increase in air travel, airlines had to find additional airport space and facilities to handle the increased demands for loading and unloading passengers, turn-around maintenance and air cargo, as well as passenger luggage.<sup>24</sup> Airlines responded to the increased baggage accommodation problem by encouraging passengers to take more on board with them.<sup>25</sup> Ads began to appear in newspapers promoting the advantages of carrying on luggage and the airline's larger, on-board accommodations for these items.<sup>26</sup> It was just a matter of time before the FAA stepped in to impose safety restrictions on how and what could be properly and safely stowed in a passenger cabin.

## II. REGULATORY EFFORTS

The initial rule regulating carry-on baggage was promulgated in 1967 with six amendments following. This regulation and its revisions are summarized below. The 1987 amendment, in particular, will be looked at in depth. Though ten years old, the process leading up to the 1987 revision reveals the burdensome process required to get a new regulation promulgated. It also reveals the different industry interests that still impact strict compliance with the regulation.

### A. THE INITIAL 1967 REGULATION

The first carry-on baggage regulation occurred as part of an effort by the FAA to amend Part 121 to improve emergency evacuation equipment requirements and operating procedures for transport category airplanes.<sup>27</sup> In 1966, the FAA issued a Notice

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<sup>22</sup> See *id.*

<sup>23</sup> See *id.* at 14-15.

<sup>24</sup> See *id.*

<sup>25</sup> See Bill Melvin, Air Line Pilots Association, Chairman of Airworthiness and Performance Division, Remarks at the Carry-On Baggage Seminar (July 11, 1985). This seminar was held as a public meeting following the publishing of the Association of Flight Attendants' Petition for Rulemaking on Carry-On Baggage in the Federal Register.

<sup>26</sup> See *id.*

<sup>27</sup> See Crashworthiness and Passenger Evacuation, 31 Fed. Reg. 10,275 (1966) (to be codified at 14 C.F.R. § 121.589) (proposed July 29, 1966).

of Proposed Rulemaking (NPRM), stating proposed additions to the then current Part 121 and provided supporting documentation for the changes.<sup>28</sup> The proposed changes included a new section entitled "Carry-on Baggage."<sup>29</sup> The administrative process of publishing an NPRM then gave different industry and public interests affected by the proposed rule the opportunity to bring facts and opinions to the attention of the FAA. Through this process, various interests attempted to influence the way in which the rule would be finalized.<sup>30</sup>

The issue of regulating carry-on bags specifically evolved under a discussion of problems associated with crashworthiness and emergency evacuation procedures. The FAA was concerned that dislodged carry-on bags could potentially cause injuries and hamper emergency evacuations during hard and crash landing conditions.<sup>31</sup> The FAA also stated that an increase in carry-on baggage being brought on the aircraft at the last moment as a result of recent industry developments (such as shuttle service and space available student fares) had created a serious safety concern.<sup>32</sup>

In this initial regulatory effort, the FAA recognized that the increase in the number of bags being stowed on and around passenger seats posed a potentially significant danger in an emergency.<sup>33</sup> The FAA proposed to limit carry-on bags to only those carry-ons that could fit under the seat and not slide forward during a crash.<sup>34</sup> This meant that airlines would have to retrofit passenger seats with some type of restraining system. The new regulation was proposed as section 121.589.<sup>35</sup>

After reviewing comments from the public and industry, the FAA issued its final rule amending Part 121 and included the newly codified section 121.589.<sup>36</sup> However, as a result of comments received by the FAA to the proposed amendments, the provisions of the new section were "revised and clarified to permit more effective enforcement."<sup>37</sup> Additionally, the ban

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<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 10,282.

<sup>30</sup> *See id.* at 10,275.

<sup>31</sup> *See id.*

<sup>32</sup> *See id.* at 10,278.

<sup>33</sup> *See id.*

<sup>34</sup> *See id.* at 10,282.

<sup>35</sup> *See id.*

<sup>36</sup> *See* Carry-On Baggage, 14 C.F.R. § 121.589 (1968).

<sup>37</sup> Crashworthiness and Passenger Evacuation Standards, 32 Fed. Reg. 13,255, 13,262 (1967) (to be codified as 14 C.F.R. § 121.589).

against stowing baggage under the seat unless it could be restrained was postponed until April 24, 1969.<sup>38</sup> This gave the industry time to come up with a means of limiting the movement of articles from under cabin passenger seats.<sup>39</sup>

The FAA further stated that it would consider additional revisions to the regulations as state-of-the-art technology allowed them to further increase the possibility of crash survival.<sup>40</sup> In spite of the requests by some commenters to delay the implementation of many of the proposed changes, the FAA thought it in the public interest to get the new rule finalized.<sup>41</sup> Finalizing the rule at that point forced the airlines to work on implementing the changes without further delay.<sup>42</sup>

### B. THE 1969 AMENDMENT

As part of a revision of Part 121 in 1969, the FAA agreed to postpone the compliance date for underseat restraints for carry-on baggage. Several air carriers had been unable to implement the new regulation and needed additional time to make the required changes.<sup>43</sup> The FAA thus published a revision to section 121.589(b), giving the aviation industry a new compliance date of August 24, 1969, and provided for a possible extension to October 24, 1969, by showing "good cause."<sup>44</sup>

### C. THE 1972 AMENDMENT

In 1972, as part of the continuing effort to improve crashworthiness, emergency evacuation requirements, and operating procedures, the FAA made two substantive additions to section 121.589.<sup>45</sup> As the size and passenger capacity of transport category aircraft increased, so did the FAA's concern about crashworthiness and passenger evacuation effectiveness.<sup>46</sup> The need to facilitate a more rapid evacuation from larger aircraft

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<sup>38</sup> See *id.* at 13,268.

<sup>39</sup> See *id.* at 13,262.

<sup>40</sup> See *id.* at 13,255.

<sup>41</sup> See *id.*

<sup>42</sup> See *id.* See also Appendix 1, *infra*, at 595.

<sup>43</sup> See Crashworthiness and Passenger Evacuation, 34 Fed. Reg. 5,543, 5,544 (1969) (to be codified at 14 C.F.R. § 121.589).

<sup>44</sup> See *id.* at 5,545. See also Appendix 2, *infra*, at 596.

<sup>45</sup> See Crashworthiness and Passenger Evacuation Standards, 37 Fed. Reg. 3,964 (1972) (to be codified as 14 C.F.R. § 121.589(a)).

<sup>46</sup> See *id.*

with minimum passenger confusion guided the FAA as it drafted additional, more specific language.<sup>47</sup>

The first of the substantive additions stated that an airplane could not take-off or land without bags being properly stowed.<sup>48</sup> The second addition stated that passengers must comply with instructions given by crewmembers regarding the proper stowage of their carry-ons.<sup>49</sup> Since the compliance date had passed for retrofitting passenger seats with baggage restraints, a new subsection (c) was written to mandate that all seats under which baggage was stowed have a restraining system.<sup>50</sup>

In the preamble to the final rule published in the Federal Register, the FAA noted that numerous comments were received to the initial NPRM.<sup>51</sup> Some commentators still refused to recognize the safety implications of improperly stowed baggage and cited passenger inconvenience in being forced to check bags.<sup>52</sup> However, the FAA strongly disagreed and stated that safety concerns far outweighed passenger inconvenience.<sup>53</sup> Other commentators pointed out that safety restraints should only be mandatory if, in fact, the area under the seat was used to stow carry-ons.<sup>54</sup> The FAA agreed with this comment and adjusted the language of the final regulation.<sup>55</sup>

#### D. THE 1980 AMENDMENT

In the 1980 revision, the FAA again substantively expanded section 121.589.<sup>56</sup> In order to emphasize that the air carrier (and not just the flight attendants) had the ultimate responsibility to ensure that baggage was properly stowed, the FAA added a new sentence to section 121.589(a) specifically placing the responsibility on the air carrier.<sup>57</sup> Under section 121.589(a)(1), the FAA defined what a "suitable" closet, baggage or cargo stowage area meant (placarded for weight, properly restrained, and

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<sup>47</sup> See *id.*

<sup>48</sup> See *id.* at 3,976.

<sup>49</sup> See *id.*

<sup>50</sup> See *id.* See also Appendix 3, *infra*, at 597.

<sup>51</sup> See 37 Fed. Reg. at 3,968.

<sup>52</sup> See *id.*

<sup>53</sup> See *id.*

<sup>54</sup> See *id.*

<sup>55</sup> See *id.*

<sup>56</sup> See Air Carriers Certification, Operations, and Airworthiness, 45 Fed. Reg. 41,586, 41,594 (1980) (to be codified at 14 C.F.R. § 121.589).

<sup>57</sup> See *id.*



emergency equipment not blocked).<sup>58</sup> Section 121.589(b) now stated what the specific restrictions were for carry-on items in the overhead racks.<sup>59</sup> Section 121.589(c) changed “shall comply” to “must comply” regarding a passenger’s affirmative duty to follow crewmembers’ instructions regarding carry-on stowage.<sup>60</sup> Finally, section 121.589(d) required side restraints on all aisle seats where baggage was stowed.<sup>61</sup>

These changes were in response to numerous flight attendant comments. The flight attendants stated that: (1) they were being forced to store baggage that could not be properly stored; (2) boarding agents were not enforcing the carry-on baggage regulations prior to passenger boarding; (3) passengers became irate when challenged; (4) lack of specific regulatory requirements put the flight attendant at odds with passengers, their company and other airline employees; and (5) the burden of compliance with federal regulations should be put on the certificate holder.<sup>62</sup> The rewording of section 121.589(a) and (c) strengthened crew authority and again attempted to prevent air carriers from shifting responsibility for proper stowage of all carry-on baggage to the flight attendants only.<sup>63</sup> Additionally, passengers were now subject to civil penalties if they failed to comply with crewmembers’ instructions regarding the proper stowage of carry-on baggage.<sup>64</sup>

The addition of side restraint requirements on passenger seats for underseat stowage of carry-ons was a result of comments made on the initial regulation requiring forward restraints. The FAA initially thought that side restraints were already being used, but to avoid any question, they specifically spelled out this requirement in the 1980 revision. Originally, the FAA wrote the rule to include side restraints on *each* passenger seat, but then adjusted the rule to apply only to aisle seats in response to industry comments.<sup>65</sup> While some commentators objected to the side restraints as unnecessary, the FAA disagreed. It stated that the side restraints were needed as the then “[c]urrent airline standard operating procedures [were] not ef-

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<sup>58</sup> *See id.*

<sup>59</sup> *See id.*

<sup>60</sup> *See id.*

<sup>61</sup> *See id.*

<sup>62</sup> *See id.* at 41,591.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.*

fective.”<sup>66</sup> Those procedures allowed carry-on baggage to be thrown into the aisles, potentially inflicting injury and hampering a quick evacuation in both a hard and crash landing.<sup>67</sup> Other commentators complained of the cost involved in retrofitting all aisle seats with restraint bars.<sup>68</sup> The FAA stated that in spite of the cost to the airlines, these costs were insignificant in comparison with the safety benefits achieved.<sup>69</sup> However, in an attempt to pacify the strong complaints from the air carriers, the FAA gave the industry three years in which to comply.<sup>70</sup>

Between 1967 and 1980, a great deal of progress was made in furthering cabin safety. With the implementation of the 1980 regulation on carry-on baggage, regulations now detailed specific criteria in four important safety areas: (1) that the airplane not take off or land until every piece of luggage was properly stowed; (2) that all carry-on baggage be properly stowed and what that meant; (3) that crewmembers had the authority to enforce the regulations; and (4) that forward and sideward restraints were required for any luggage placed under a seat.<sup>71</sup>

#### E. THE 1981 AMENDMENT

The 1981 Amendment came about in response to a Petition for Rulemaking by the National Federation of the Blind (NFB).<sup>72</sup> The FAA initially denied the Petition, but later reconsidered and passed section 121.589(e).<sup>73</sup> This subsection designated proper stowage for flexible canes of the blind.<sup>74</sup>

The NFB represented the concerns of the visually impaired community in having their canes stowed far from their reach.<sup>75</sup> Because they relied so heavily on these devices to move about safely, the organization undertook a campaign to pressure the FAA into finding a way to safely stow these canes within reach of the owner.<sup>76</sup> In supporting its Petition, the NFB gave the following statements with supportive documentation: (1) current reg-

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<sup>66</sup> *Id.*

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.*

<sup>70</sup> *See id.* *See also* Appendix 4, *infra*, at 598.

<sup>71</sup> *See* Carry-On Baggage, 14 C.F.R. § 121.589 (1980).

<sup>72</sup> *See* Carry-On Baggage—Flexible Travel Cones, 46 Fed. Reg. 38,048 (1981) (to be codified at 14 C.F.R. § 121.589).

<sup>73</sup> *See id.* at 38,048-50.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.* at 38,048.

<sup>76</sup> *See id.*

ulations created an unreasonable hardship for the blind; (2) such regulations caused humiliating, discriminatory and unnecessary procedures to be set up by the airlines; and (3) a national Civil Aeromedical Institute (CAMI) research report minimized the safety impact of having a cane placed near its owner.<sup>77</sup> As a result, section 121.589(a) was amended, and section 121.589(e) was added, to allow flexible canes to be properly stowed near the passengers.<sup>78</sup> This was the first of two substantive additions to section 121.589 brought about as a result of a Petition submitted by special interest groups affected by the regulation.

#### F. THE 1987 AMENDMENT

The next amendment, and most recent substantive rewrite of section 121.589, came about as a result of a second Petition for Rulemaking,<sup>79</sup> presented by the Association of Flight Attendants (AFA).<sup>80</sup> The AFA-proposed changes were substantial and created much controversy. In the process of writing the final rule resulting from this Petition, the FAA held two public meetings and received hundreds of comments.<sup>81</sup> For this reason, it is helpful to take a deeper look into this particular rulemaking process, as many of the attitudes and problems discussed in 1987 appear to remain pertinent today.

##### 1. *Conditions Leading to AFA's Petition*

In spite of the 1980 regulation's attempt to put more responsibility on the air carriers to deal with carry-on baggage before boarding, enforcement of the carry-on regulations remained lax.<sup>82</sup> The air carriers were under increasing pressure to shorten turnaround time and still achieve on-time departures.<sup>83</sup> As the airlines jockeyed for more passengers, more cities, more gates, more money and lower fares, often the doors to the air-

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<sup>77</sup> See *id.*

<sup>78</sup> See *id.* at 38,051-52. See also Appendix 5, *infra*, at 599.

<sup>79</sup> Association of Flight Attendants' Petition for Rulemaking, No. 24220 (August 23, 1984) (on file with the FAA Office of Rulemaking) [hereinafter AFA Petition].

<sup>80</sup> See *id.* The AFA represented 14 carriers and 21,000 flight attendants in the United States. See *id.*

<sup>81</sup> See *id.*

<sup>82</sup> See *id.*; see also Carry-On Baggage Program, 52 Fed. Reg. 21,472, 21,473 (1987); Transcript of Public Meeting (July 16, 1986) (comments by Roger Flemming, Air Transport Association).

<sup>83</sup> See Transcript of Public Meeting, "Carry-On Baggage Seminar," Docket # 24220 (July 11, 1985) [hereinafter Seminar Transcript].

craft would be closed behind the last boarding passenger.<sup>84</sup> The aircraft would be pushed off its blocks in order to be "on-time," without considering whether passengers were yet seated or carry-on luggage properly stowed.<sup>85</sup> It was not unusual to find a full plane on the taxiway and passengers still moving about the cabin trying to find non-existent stowage space.<sup>86</sup> In such a situation, and under pressure to get in their own seats and buckled-up before takeoff, flight attendants frequently stuffed carry-ons in lavatories and unsecured in closets.<sup>87</sup> As the carry-on baggage problem became increasingly burdensome, AFA, a major flight attendant union, moved to correct the problem.

## 2. AFA's Petition

The AFA first presented its Petition in 1984.<sup>88</sup> In its petition, AFA asked the FAA to make airline enforcement of carry-on luggage regulations stricter and more specific.<sup>89</sup> The Petition asked the FAA to amend the present regulation to include a requirement that air carriers measure and specifically limit the amount of carry-on bags.<sup>90</sup> The Petition's stated purpose was to fulfill the purpose of the existing regulation governing the screening of carry-on baggage and to eliminate the hazards caused by unrestricted carry-on baggage.<sup>91</sup> It asked that the amendment to section 121.589 *require* screening prior to boarding.<sup>92</sup> The union claimed that flight attendants did not have time to monitor and stow all carry-ons and still do their preboarding and boarding duties.<sup>93</sup> The AFA stated that they should not have the sole responsibility of dealing with safe stowage of carry-ons.<sup>94</sup> They also stated that the increasing amounts, sizes and types of items brought on board caused delays and safety hazards.<sup>95</sup> They asked that the FAA adopt the Canadian

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<sup>84</sup> See Flight Attendant Comment Cards, Docket # 24220 [hereinafter Flight Attendant Comments].

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *id.*

<sup>88</sup> See AFA Petition, *supra* note 79; see also Carry-On Baggage Program, 52 Fed. Reg. at 21,472, pmb1.

<sup>89</sup> See AFA Petition, *supra* note 79.

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See *id.*

<sup>93</sup> See *id.* at 7.

<sup>94</sup> See *id.*

<sup>95</sup> See *id.* at 7-9, 16.

Model for screening carry-on luggage.<sup>96</sup> The Canadian Model set up a device with specific dimensions and through which all carry-on bags must pass in order to be taken on board.<sup>97</sup>

The Petition enumerated several safety reasons as justification for making such changes. The Petition stated that strictly controlling carry-on baggage was necessary because such baggage:

- 1) Can block exits and strike passengers and crew during a survivable crash;
- 2) Can dislodge and strike passengers and crew during turbulence;
- 3) Can block access to emergency equipment that is stored in the same compartments as carry-on baggage;
- 4) Can cause bin latches to fail and injury to result from falling bags;
- 5) Can impede evacuation as passengers often try to carry items off aircraft after impact;
- 6) Can affect weight and balance;
- 7) Can block access to life vests under passenger seats;
- 8) Can cause back and hand injuries to flight attendants who are then unable to perform their duties during an emergency;
- 9) Can prevent flight attendants from performing other safety duties prior to take off or landing, and from being at their assigned stations where they can be most effective in an evacuation; and
- 10) Can fuel a cabin fire.<sup>98</sup>

In addition to the above safety reasons, AFA also stated that excess carry-on baggage had an economic impact due to delays and additional fuel needs.<sup>99</sup>

The flight attendant union supported their Petition with hundreds of comment cards filled out by member flight attendants.<sup>100</sup> These cards gave examples of the carry-on problems they dealt with daily.<sup>101</sup> One flight attendant told of a passenger who brought a bicycle on board inside of a garment bag.<sup>102</sup> Several flight attendants spoke of the numerous collapsible strollers

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<sup>96</sup> See *id.* at 9.

<sup>97</sup> See *id.*

<sup>98</sup> *Id.* at 16.

<sup>99</sup> See *id.*

<sup>100</sup> See Flight Attendant Comments, *supra* note 84.

<sup>101</sup> See *id.*

<sup>102</sup> See *id.*

they attempted to stow on each flight.<sup>103</sup> Many of these flight attendants flew on jumbo jets, such as L1011s, and yet they stated that they frequently ran out of carry-on stowage space on the aircraft.<sup>104</sup> They also reported back and other injuries incurred while attempting to assist passengers with their overloaded carry-ons.<sup>105</sup>

The *Federal Register* published a summary of AFA's Petition on September 21, 1984.<sup>106</sup> The FAA received hundreds of favorable comments from the public in response to publicity on the initial petition.<sup>107</sup> The vast majority of the public comments (including those of many businessmen) reflected disgust with the amounts and types of carry-ons being allowed on board, and people pleaded with the FAA to "do something."<sup>108</sup>

### 3. *First Public Meeting*

The FAA held its first public meeting on July 11, 1985, to get comments from the public and industry on AFA's Petition.<sup>109</sup> At the meeting, the FAA distributed its proposed response to AFA's Petition for Rulemaking and asked for comments.<sup>110</sup> The FAA stated it would make changes in response to the Petition, but that the meeting would help it decide what the changes would be, and under what conditions.<sup>111</sup> Just prior to the meeting, airport and aircraft security became a strong focus due to a recent air terrorism incident.<sup>112</sup> Because of political sensitivity and national attention on the subject, it became even more important for the FAA to make a substantive response to the petition.<sup>113</sup>

Several representatives from different industry groups spoke at the meeting, presenting their view of the problem and how they thought the problem could be solved. It is interesting to note that the Air Transportation Association (ATA), an organization that represents most major airlines, and People's Express Airline voiced strong opposition to the proposed amend-

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<sup>103</sup> See *id.*

<sup>104</sup> See *id.*

<sup>105</sup> See *id.*

<sup>106</sup> See Petitions for Rulemaking, 49 Fed. Reg. 37,109 (1984).

<sup>107</sup> See Air Carriers Certification and Operations: Carry-On Baggage Program, 51 Fed. Reg. 19,134 (1986).

<sup>108</sup> See Flight Attendant Comments, *supra* note 84.

<sup>109</sup> See Seminar Transcript, *supra* note 83.

<sup>110</sup> See *id.* (Introductory Comments).

<sup>111</sup> See *id.*

<sup>112</sup> See *id.*

<sup>113</sup> See *id.*

ment.<sup>114</sup> They claimed that the new regulations were cumbersome and costly, and that present regulations were sufficient.<sup>115</sup> They also claimed that the flight attendants were just trying to avoid one of their responsibilities so as to do less work.<sup>116</sup> People's Express, the largest of the new crop of deregulation carriers, stated that the economic impact of the proposed new rules was too great.<sup>117</sup> It argued that these proposed rules would require more time for turnarounds at the gate and more ground personnel.<sup>118</sup> It also stated that there was no correlation between security and carry-on baggage.<sup>119</sup>

Several other interested parties also spoke. An investigator with the Office of Civil Aviation Security enumerated many problems that impacted the ability of screeners to do their job.<sup>120</sup> He stated that limiting the size and number of articles permitted as carry-ons would help security.<sup>121</sup> An AFA representative reiterated its position, stating that the intent of the 1980 regulation was to get boarding agents to screen carry-ons before they came on board, but that it had not happened.<sup>122</sup> Additionally, he stated the FAA and the air carriers were not enforcing the regulations.<sup>123</sup> The Air Line Pilot Association (ALPA), a major union for airline pilots, gave its support for AFA's proposal.<sup>124</sup> It was concerned that the additional carry-on weight was not properly allowed for in the weight and balance under current operating procedures.<sup>125</sup> A representative of the National Transportation Safety Board (NTSB), who had worked on the original 1967 regulation, stated that the meaning versus the spirit of the 1967 regulation had been lost over the years.<sup>126</sup> He stated that the original intent of the carry-on baggage regulation was to prevent injury and interference with emergency evacua-

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<sup>114</sup> See *id.* (comments by Air Transport Association and People's Express Airline).

<sup>115</sup> See *id.*

<sup>116</sup> See *id.* (comments by People's Express Airline).

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> See *id.*

<sup>120</sup> See *id.* (comments by David Leach, Office of Civil Aviation Security).

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* (comments by AFA Representative).

<sup>123</sup> See *id.*

<sup>124</sup> See *id.* (comments by Roger Brooks, ALPA President).

<sup>125</sup> See *id.*

<sup>126</sup> See *id.* (comments by Gerrit Walhout, National Transportation Safety Board).

tions.<sup>127</sup> He was glad to see new rulemaking in progress to further this intent.<sup>128</sup>

During a question and answer period, a representative of a different flight attendant union stated that the regulations were not working because there were no objective criteria set out in the regulations.<sup>129</sup> This representative appeared to sum up the unions' collective thought that it was "ludicrous" to think that the air carriers would now fix the problem, without new regulations, when they had ignored the current regulations for years.<sup>130</sup> The ATA responded by saying that it was the FAA's responsibility to enforce its regulations and that it had not done so.<sup>131</sup> If the FAA would more strictly enforce the regulations, companies who were violating them would pay more attention to compliance.<sup>132</sup> The FAA, in the preamble of its final rule, responded that it did not have personnel for that type of enforcement.<sup>133</sup>

#### 4. *Notice of Proposed Rulemaking*

In response to AFA's Petition, and after considering the many comments received, the FAA issued a Notice of Proposed Rulemaking (NPRM) on May 27, 1986.<sup>134</sup> This Notice proposed that air carriers be required to develop and use an approved carry-on baggage program that would "control, outside the aircraft, the baggage that will be permitted" in the cabin of the aircraft.<sup>135</sup> It also proposed requiring the air carrier to verify that all carry-on luggage was safely stowed prior to passenger doors being closed.<sup>136</sup> It announced a second public meeting where interested parties would be given an opportunity to speak out in response to the NPRM.<sup>137</sup>

In the NPRM's preamble, the FAA noted that there was general support from commentators for tightening carry-on bag-

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<sup>127</sup> See *id.*

<sup>128</sup> See *id.*

<sup>129</sup> See *id.* (comments by Ms. Garcia, Teamster's Representative).

<sup>130</sup> See *id.*

<sup>131</sup> See *id.* (comments by Roger Fleming, Air Transport Association).

<sup>132</sup> See *id.*

<sup>133</sup> See Carry-On Baggage Program, 52 Fed. Reg. 21,472, 21,474 (1987) (to be codified at 14 C.F.R. pt. 121).

<sup>134</sup> See Air Carriers Certification and Operations: Carry-On Baggage Program, 51 Fed. Reg. 19,134 (1986) (to be codified at 14 C.F.R. pt. 121).

<sup>135</sup> *Id.* at 19,135.

<sup>136</sup> See *id.* at 19,134.

<sup>137</sup> See *id.*



gage regulations.<sup>138</sup> These commentators cited safety, inconvenience, and discomfort created by those who carried on excessive baggage.<sup>139</sup> The FAA then proceeded to spell out what the air carrier's carry-on program should include.<sup>140</sup>

### 5. *Second Public Meeting*

The second public meeting was held on July 16, 1986.<sup>141</sup> Again, the air carrier representatives stressed the economic impact and lack of supporting data to show the necessity of additional regulations.<sup>142</sup> An American Airlines official claimed that reducing the workload of the flight attendants and inconveniencing many passengers was not enough to justify new regulations.<sup>143</sup> He stated that the airlines had spent a great deal of money to accommodate passenger carry-on baggage and that the FAA was only responding to the lobbying efforts of AFA.<sup>144</sup>

The AFA was not pleased with the watered-down version of their proposal, and stated that requiring a "carry-on program" was too vague.<sup>145</sup> Due to the expense, it feared that the airlines still did not have sufficient motivation to enforce any program.<sup>146</sup> The ALPA was still concerned with the size and weight of carry-ons and the crashworthiness of the overhead bins.<sup>147</sup> It again commented on weight and balance concerns and cited the Ganger<sup>148</sup> crash as justification.<sup>149</sup> The Association of Professional Flight Attendants suggested that a flight attendant on-board the aircraft (instead of a non-crewmember as suggested by the FAA) would be a more appropriate person to verify proper stowage of carry-ons before the doors of the aircraft were

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<sup>138</sup> See *id.* at 19,134-35.

<sup>139</sup> See *id.*

<sup>140</sup> See *id.* at 19,136-37.

<sup>141</sup> See Transcript of Second Public Meeting, Docket # 24996 (July 16, 1986).

<sup>142</sup> See *id.* (comments by Air Transport Association).

<sup>143</sup> See *id.* (comments by Gene Overbuck, American Airlines).

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* (comments by Association of Flight Attendants).

<sup>146</sup> See *id.*

<sup>147</sup> See *id.* (comments by Air Line Pilots Association).

<sup>148</sup> A military charter crashed in Ganger, Newfoundland, on December 12, 1985. One of the primary causes of the crash was an incorrect weight and balance sheet that did not account for a great deal of additional carry-on baggage. See *Administrator v. Schoppaul*, 7 N.T.S.B. 1195 (1991). A later Advisory Circular 120-27C put out by the FAA made corrections to the standard weight allotted for carry-on baggage.

<sup>149</sup> See Public Meeting, July 16, 1986, ALPA Comments.

shut.<sup>150</sup> Many different parties and interests spoke, and few seemed happy with the FAA's solution.

#### 6. *Final Rule*

The FAA published its final rule on June 5, 1987.<sup>151</sup> In the preamble to the rule, it reviewed the process, different reports and surveys, and different comments that were considered prior to publishing the final version of the regulation.<sup>152</sup> It listed the numerous ways in which excessive carry-ons endangered passengers and crewmembers.<sup>153</sup> The FAA then stated that the configuration of passenger aircraft had changed significantly since the 1967 regulation and that these aircraft now accommodated more carry-ons.<sup>154</sup> It also stated three contributing factors to the significant increase in carry-ons since 1967: (1) slow and unreliable baggage handling; (2) carry-ons save the carriers money; and (3) air carriers used increased cabin space for carry-ons as a selling point.<sup>155</sup>

The FAA stated that seventy-five percent of the comments received from the public supported stricter rules.<sup>156</sup> Among the reasons cited for support was the fear of injury from bags falling from overstuffed overhead bins and the inconvenience of carry-ons blocking aisles during boarding.<sup>157</sup> While many commentators suggested that the FAA should adopt a single standard, the FAA stated that by doing so, they would have to accommodate the lowest common denominator, which would more severely restrict carry-ons than necessary.<sup>158</sup> In response to both union and industry objections, the FAA agreed to make a flight attendant responsible for verification of baggage stowage prior to aircraft doors closing.<sup>159</sup> The ATA objected to the door-closure rule, but the FAA stated that without it, the aircraft would have to return to the gate if improper or inadequate stowage oc-

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<sup>150</sup> See *id.* (comments by Gail Maconery, Association of Professional Flight Attendants).

<sup>151</sup> See Carry-On Baggage Program, 52 Fed. Reg. at 21,472. See also Appendix 6, *infra*, at 600.

<sup>152</sup> See 52 Fed. Reg. at 21,472-76.

<sup>153</sup> See *id.* at 21,472.

<sup>154</sup> See *id.*

<sup>155</sup> See *id.*

<sup>156</sup> See *id.* at 21,473.

<sup>157</sup> See *id.*

<sup>158</sup> See *id.*

<sup>159</sup> See *id.* at 21,472.

curred.<sup>160</sup> This way the carrier would have greater motivation to comply.

In response to ALPA's concern over weight and balance factors, the FAA stated that this was outside the scope of this particular rulemaking.<sup>161</sup> In response to AFA's push for specific criteria regarding size and amount of baggage permitted, the FAA indicated that this should be included in each carrier's carry-on program, and that the program would be meaningless if this was not stated.<sup>162</sup>

The FAA concluded by stating that the final rule was a balance between safety concerns and the convenience of the traveling public.<sup>163</sup> It listed the benefits of the new rule as: (1) prevention of fatalities and injuries resulting from improperly stowed baggage; (2) improved egress from an aircraft in a survivable impact; and (3) fewer injuries from dislodged carry-ons falling and striking passengers during an abrupt deceleration or altitude change.<sup>164</sup> The airline industry was given 180 days from the effective date of the regulation (June 5, 1987) to comply.<sup>165</sup>

#### G. THE 1995 AMENDMENT

The 1995 amendment did not change the substance of section 121.589, but it did extend its applicability to commuter airlines, which had previously been governed by section 135.<sup>166</sup> This was part of the larger amendment, known as "the commuter rule," which was incorporated as a new section 119.<sup>167</sup> Under the new section, the application of Part 121, which has more restrictive requirements, was broadened to include commuter airlines with a passenger seating capacity of ten to thirty seats.<sup>168</sup>

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<sup>160</sup> *See id.*

<sup>161</sup> *See id.* at 21,475.

<sup>162</sup> *See id.*

<sup>163</sup> *See id.*

<sup>164</sup> *See id.*

<sup>165</sup> *See id.*

<sup>166</sup> *See* Commuter Operations and General Certification and Operations Requirements, 60 Fed. Reg. 65,832 (1996) (to be codified at 14 C.F.R. pts. 91, 119, 121, 125, 127, and 135).

<sup>167</sup> *See id.*

<sup>168</sup> *See id.* *See also* Appendix 7, *infra*, at 602.

## H. CURRENT STATUS

Ten years have passed since the last section 121.589 substantive amendment. This, in itself, indicates progress. According to an FAA official, the FAA has no current plans to revise the existing carry-on baggage regulation further.<sup>169</sup> Statistics monitored by a flight attendant union indicate a significant decrease in reported cabin injury incidents involving carry-on baggage.<sup>170</sup> Additionally, requests for the FAA to interpret carry-on baggage regulations have been minimal.<sup>171</sup>

While there has been some improvement in carry-on baggage problems since 1987, it is likely that many of the comments by the different interests represented at the two public meetings reviewed above would be repeated today. As enforcement continues to be lax, it appears the air carriers still do not fully recognize the safety concerns caused by carry-on baggage.<sup>172</sup> This is understandable, as the economic impact on the carriers could be high. As stated earlier, unless passengers choose to bring less baggage with them, a stricter enforcement of the carry-on baggage regulations would require more ground personnel to deal with additional checked baggage. Additionally, it is possible that the longer check-in process due to processing additional baggage could require extended gate time, turnaround time, and additional costs to the airlines. However, it is also very likely that the public would adapt to a longer check-in process and arrive earlier, if they knew that their carry-ons would be strictly monitored at the gate prior to boarding.

No air carrier wants to be the first to strictly monitor carry-ons. It is bad public relations for a carrier if it is stricter than the others. Service is primarily what drives loyalty when the ticket price is the same. The air carriers would like the FAA to be the enforcer and take the brunt of the negative public reaction. At the same time, it is logistically impossible for the FAA to monitor each airline to see if it is strictly enforcing its stated carry-on baggage program. Yet, carry-ons continue to be a subject of

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<sup>169</sup> See Author's unofficial interview with official in FAA Office of Flight Standards (Feb. 1997).

<sup>170</sup> See Author's unofficial interview with an airline industry union representative (Mar. 1997).

<sup>171</sup> See JOSEPH D. KUCHTA, *FEDERAL AVIATION DECISIONS* (Feb. 1997).

<sup>172</sup> See Tim Friend, *Watch Your Head in Jet's Aisle Seat*, USA TODAY, Feb. 6, 1997, at A1.

concern to the airlines and the flight attendants.<sup>173</sup> One air carrier flight attendant supervisor stated that carry-ons continue to be a flight attendant's "biggest nightmare."<sup>174</sup> As a result, this supervisor stated that most air carriers have on-going committees trying to come up with innovative ways to lessen the negative impact of excessive carry-ons.<sup>175</sup> The amount of carry-on baggage brought onboard an airplane is still significant.

### I. INDUSTRY EFFORTS

Since 1987, the airlines have tried to make passengers more aware of the limits they technically impose on passengers at the airport. Carry-on baggage policies are printed on the back of tickets. Airline reservation agents often advise passengers of carry-on limits. Most airlines give verbal reminders during the boarding and landing announcements.<sup>176</sup> Some airlines have even placed cartoon reminders of carry-on safety on their overhead bins.<sup>177</sup> While these different measures may have had some impact, the issue still remains: are these efforts enough?

### III. LITIGATION

One means of evaluating the effectiveness of the current regulation is by considering what effect, if any, section 121.589 has had on tort cases involving injuries caused by falling carry-on baggage since the 1987 revision. Principles of negligence, as well as the regulations and the air carrier's FAA-approved carry-on baggage program, set the standards by which the carrier is evaluated.

Most personal injury cases that occur as a result of falling carry-on baggage are brought as negligence actions. In order to be successful in proving negligence, a plaintiff must prove that the airline had a duty of care to its passengers, that the duty was breached, and that the cause of that breach resulted in plaintiff's injuries.<sup>178</sup> A commercial airline is considered a common carrier and therefore held to the "highest degree of care and

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<sup>173</sup> See Author's telephone interview with flight attendant supervisor for Alaska Airlines (Mar. 1997).

<sup>174</sup> *Id.*

<sup>175</sup> See *id.*

<sup>176</sup> See *Andrews v. United Airlines, Inc.*, 24 F.3d 39, 40-41 (9th Cir. 1994).

<sup>177</sup> See Author's telephone interview with flight attendant supervisor for Alaska Airlines (Mar. 1997).

<sup>178</sup> See *USAir, Inc. v. United States Dep't of the Navy*, 14 F.3d 1410, 1412 (4th Cir. 1994).

skill [under the law] in everything that concerns the safety of its passengers.”<sup>179</sup> Some have described this duty as the “utmost care and the vigilance of a very cautious person towards [its] passengers.”<sup>180</sup> Others have used a more objective standard, stating that this duty is “to ‘take reasonable precautions to protect [patrons] from dangers[,] which are foreseeable from the arrangement or use of [their] property,’ and ‘to protect its passengers from other travelers.’”<sup>181</sup> In either case, the duty of care is established by law at the highest level. Thus, a personal injury claim usually centers around whether the airline breached that duty of care through its actions or omissions. Demonstrating that an air carrier has exercised a sufficient amount of care, in spite of the injury, is the key to protecting the carrier from liability.

In an examination of twenty-one cases decided between 1988 and 1996, thirteen were found to have been decided in favor of the plaintiff and eight in favor of the airline. These cases do not indicate the final disposition of the case unless a party was actually granted summary judgment. However, in over one-half of the cases, the court remanded the case for settlement or trial. In the cases remanded, the court inevitably held that the dispute centered on facts in dispute and that a jury was the appropriate forum. Nevertheless, conflicting results emerge. Among those summary judgment cases remanded and those affirmed, many had similar facts and allegations.

The primary allegations made by plaintiffs regarding the air carrier’s breach of duty included: (1) insufficient monitoring of carry-on stowage during the boarding process; (2) not preventing overloading and improper loading of overhead bins; (3) failing to inspect the bins; (4) inadequate warnings about the dangers caused by carry-ons placed overhead; and (5) failure to act on notice of a dangerous condition caused by placing carry-ons in overhead bins. The airlines often defended themselves by claiming preemption, passenger intervention, or no causal link.

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<sup>179</sup> *Cherone v. Eastern Airlines, Inc.*, Civ. A. No. HAR 87-854, 1988 WL 40568, at \*2 (D. Md. Apr. 18, 1988).

<sup>180</sup> *Andrews*, 24 F.3d at 40 (alterations in the original) (citation omitted).

<sup>181</sup> *Aponte v. Trans World Airlines, Inc.*, No. 94 Civ. 6337 (LMM), 1996 WL 527339, at \*3 (S.D.N.Y. Sept. 16, 1996) (citations omitted).

## A. PREEMPTION

Several airlines unsuccessfully tried to use the doctrine of preemption to circumvent consideration of the merits of the plaintiff's claim. With one exception,<sup>182</sup> the higher courts overturned every summary judgment based on this doctrine. The preemption defense extended from section 1305(a)(1) of the Airline Deregulation Act of 1978, which stated that no state "shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under Title IV of this Act to provide air transportation."<sup>183</sup> In using this defense, airlines claimed that they were immune from any prosecution because any injury incurred as a result of a falling carry-on bag fell under the "services" area of an airline.

In *Zachary v. Northwest Airlines, Inc.*, the only case dismissed under the preemption doctrine, the court reported few details.<sup>184</sup> However, the opinion did state that the court's holding in *Zachary* was based on holdings in two earlier U.S. court of appeals cases applying the preemption doctrine.<sup>185</sup> Upon examination in both cases, however, it is apparent that the court applied preemption to non-negligence claims.<sup>186</sup> Moreover, since 1992, the cases surveyed reveal that no other airline has been successful in using a preemption argument as a basis for dismissal.

As the result of a 1992 Supreme Court opinion regarding the airline preemption issue,<sup>187</sup> subsequent courts have held that Congress intended the preemption from state regulation to protect what services an airline could offer, and that it did not intend to protect air carriers from common law negligence claims.<sup>188</sup> In *Morales v. Trans World Airlines, Inc.*, the Supreme Court discussed the purpose of the preemption clause in the Airline Deregulation Act of 1978 and its appropriate application

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<sup>182</sup> See *Zachary v. Northwest Airlines, Inc.*, No. Civ. A. No. H-90-1999, 1991 WL 487289 (S.D. Tex. Mar. 22, 1991).

<sup>183</sup> 49 U.S.C. § 1305(a)(1) (1978).

<sup>184</sup> See *Zachary*, 1991 WL 487829, at \*1.

<sup>185</sup> See *id.* at \*2 (citing *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989)); *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773, 780 (5th Cir. 1990).

<sup>186</sup> See *O'Carroll*, 863 F.2d at 12 (where a passenger was denied transportation due to intoxication and irregularity with his ticket); *Trans World Airlines*, 897 F.2d at 778-79, 783 (where the state tried to regulate airline advertising).

<sup>187</sup> See *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

<sup>188</sup> See *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 339 (5th Cir. 1995).

to different types of claims against airlines.<sup>189</sup> It stated that the intention of Congress was to prevent states from imposing their own laws on the airlines and prevent the intended economic deregulation.<sup>190</sup>

In *Margolis v. United Airlines*, the court went to great lengths to trace the history of the preemption doctrine and the intent of Congress.<sup>191</sup> The *Margolis* court applied the Supreme Court's holding in *Morales*, stating that the application of federal preemption over state regulations related to airline routes, rates and services, but did not extend to negligence claims brought by individuals.<sup>192</sup> Another court threw out the preemption defense, quoting *Morales* in stating that "some state actions may affect airline . . . services in too tenuous, remote, or peripheral a manner to have a preemptive effect."<sup>193</sup>

#### B. PASSENGER INTERVENTION

Airlines have been most successful in avoiding liability when they can convince the court that other factors over which they had no control caused the accident. Several courts have stated that an airline is "not an insurer of a passenger's safety."<sup>194</sup> In spite of this statement, however, courts have varied on how they apply passenger intervention to the case at bar. Similar facts often brought opposite conclusions. In ten of the cases surveyed, another passenger opened the bin from which the carry-on fell, causing the plaintiff injury. Nevertheless, six courts held that an airline could possibly be held liable and that the question was appropriate for a jury. Four other courts supported the defendant airlines' position that it had no control over a passenger's actions and could not be held liable.

In *Pardo v. Delta Airlines, Inc.*, a camera case fell out of an overhead bin when a passenger opened the bin to retrieve his camera.<sup>195</sup> The court held that Delta was not negligent for an injury caused by the actions of others and granted Delta summary

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<sup>189</sup> See *Morales*, 504 U.S. at 386-87.

<sup>190</sup> See *id.* at 383.

<sup>191</sup> See *Margolis v. United Airlines, Inc.*, 811 F. Supp. 318, 320-21 (E.D. Mich. 1993).

<sup>192</sup> See *id.* at 323 (citations omitted).

<sup>193</sup> *Heller v. Delta Air Lines, Inc.*, No. 92 Civ. 1937, 1993 WL 330093, at \*1 (S.D.N.Y. Aug. 25, 1993) (quoting *Morales*, 504 U.S. at 390).

<sup>194</sup> *Robinson v. Northwest Airlines, Inc.*, No. 94-2392, 1996 WL 117512, at \*2 (6th Cir. Mar. 15, 1996); see also *Schwamb v. Delta Air Lines, Inc.*, 516 So. 2d 452, 462 (La. Ct. App. 1987); *Andrews*, 24 F.3d at 40.

<sup>195</sup> See *Pardo v. Delta Airlines, Inc.*, 767 F. Supp. 26 (D. Puerto Rico 1991).



judgment.<sup>196</sup> The plaintiff had no evidence that the overhead bins were overloaded or improperly loaded. Consequently, the court stated "speculations and conjectures" would not defeat a motion for summary judgment.<sup>197</sup> On the other hand, in *Andrews v. United Airlines, Inc.*, the Ninth Circuit reversed summary judgment for United Airlines and remanded the case for trial when a briefcase fell from an overhead bin, injuring a passenger.<sup>198</sup> The *Andrews* court stated that there was a genuine issue of material fact as to whether an airline "had a duty to do more than warn passengers about the possibility of falling baggage."<sup>199</sup> While *Andrews* made no claim of wrongdoing by airline personnel,<sup>200</sup> the court stated that an airline had a heightened duty as a common carrier to "use the best precautions in practical use 'known to any company exercising the utmost care and diligence in keeping abreast with modern improvement . . .'"<sup>201</sup> It then pointed out that the airline "may not have done everything technology permits and prudence dictates to eliminate [the hazard]."<sup>202</sup>

### C. NO CAUSAL TIE

Often the plaintiff is unable to make the causal tie between the carrier's actions and the actual incident that caused the injury. In another set of cases with similar facts regarding causation, the courts reached opposite conclusions. In two cases where a bin opened on landing for no apparent reason, spilling luggage and causing a passenger injury, one court granted the airline summary judgment<sup>203</sup> while the other court affirmed a jury verdict of negligence for the plaintiff.<sup>204</sup>

In both cases, the plaintiff applied a *res ipsa loquitur* claim. Under this doctrine, negligence could be inferred on the part of the defendant when, in the absence of direct proof, the plaintiff proved that: (1) the injury was unlikely to occur in the absence of negligence; and (2) the means by which the injury occurred

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<sup>196</sup> See *id.* at 29.

<sup>197</sup> *Id.* at 28.

<sup>198</sup> See *Andrews*, 24 F.3d at 40.

<sup>199</sup> *Id.* at 42.

<sup>200</sup> See *id.* at 40.

<sup>201</sup> *Id.* at 42 (citations omitted).

<sup>202</sup> *Id.* at 41.

<sup>203</sup> See *Robinson*, 1996 WL 117512, at \*3.

<sup>204</sup> See *Smith v. Piedmont Airlines, Inc.*, 728 F. Supp. 914 (S.D.N.Y. 1989).

was under the sole control of the defendant.<sup>205</sup> One court held that the closing of the bin was in the exclusive control of the airline.<sup>206</sup> No one had opened it during flight and the flight attendants were the last to check the condition of the overhead bins before descent.<sup>207</sup> The other court held that the bin was not in the exclusive control of the airline, as it was just as possible that a passenger opened the bin while the plane was still taxiing.<sup>208</sup>

#### D. MONITORING/OVERLOADING AND IMPROPER LOADING OF BINS/DUTY TO INSPECT

Several cases have discussed what the duty to prevent overloading or improper loading of overhead compartments entails. In *Ginter v. Trans World Airlines, Inc.*, the court stated an airline's duty was to "observe that passengers were stowing their baggage in a reasonable manner, to provide assistance, as requested, and to make a visual check to assure that compartment doors were closed on takeoff."<sup>209</sup> Moreover, it expressly stated that this duty did not include opening each bin to inspect the contents.<sup>210</sup> However, in *Brosnahan v. Western Airlines, Inc.*, the court stated that an airline had a duty to prevent injury by assisting passengers with the stowing of their carry-ons, even when not asked.<sup>211</sup> In *Brosnahan*, a passenger who was attempting to stow his carry-on bag injured the plaintiff when he dropped the bag on the plaintiff's head. The court stated that an airline had a duty to supervise and assist passengers with the stowage of their carry-ons throughout the boarding process.<sup>212</sup> Nevertheless, in *Baker v. Delta Airlines, Inc.*, the court stated that an airline's negligence liability could be inferred by whether or not a flight attendant assisted in stowage of the carry-on.<sup>213</sup> In *Aponte v. Trans World Airlines, Inc.*, a radio fell from overhead, injuring the plaintiff. The court said that part of the airline's duty was to stop passengers from stowing improper items like radios and ensure that

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<sup>205</sup> See *id.* at 916.

<sup>206</sup> See *id.* at 917-18.

<sup>207</sup> See *id.* at 918.

<sup>208</sup> See *Robinson*, 1996 WL 117512, at \*3.

<sup>209</sup> *Ginter v. Trans World Airlines, Inc.*, 538 N.Y.S.2d 638, 640 (N.Y. App. Div. 1989).

<sup>210</sup> See *id.*

<sup>211</sup> See *Brosnahan v. Western Air Lines, Inc.*, 892 F.2d 730, 734 (8th Cir. 1989).

<sup>212</sup> See *id.* at 733.

<sup>213</sup> See *Baker v. Delta Airlines, Inc.*, No. 03A01-9312-CV-00431, 1994 WL 283858, at \*3 (Tenn. Ct. App. June 28, 1994).

the bins were not overstuffed.<sup>214</sup> This would mean that a crew complement of three to four flight attendants on a full 737 would have to monitor over 140 passengers individually stowing their carry-ons while taking care of other preboarding responsibilities.<sup>215</sup>

Some cases allege a duty to enforce weight requirements as to both individual items placed in overhead bins and total weight placed in a bin. One court stated that an airline had a duty to prevent an overweight bag from being stowed overhead as per a quoted tariff.<sup>216</sup> However, the *Ginter* court noted that there was no industry custom dictating what could or could not be placed in bins overhead, as long as they complied with weight requirements.<sup>217</sup> An FAA official stated that the weight placarded in each of the bins was actually a minimum weight, and that the overhead bins were able to hold a great deal more weight than indicated.<sup>218</sup> Thus, in spite of the FAA's reassurance as to the amount of weight an overhead bin can withstand, there remains a very real concern about the injuries caused by heavy items falling on passengers below. It is also interesting to note that the carry-on baggage regulations do not give any specific guidance as to how an airline should monitor the weight.<sup>219</sup>

#### E. SUFFICIENT WARNINGS

There are recurring themes regarding whether warnings were given, and if given, whether they were sufficient. In *Bravis v. Dunbar*, the court held that the two warnings given by the flight attendants regarding the use of care in removing overhead baggage were sufficient to meet the airline's duty of care.<sup>220</sup> Additionally, in *Haley v. United Airlines, Inc.*, the Fourth Circuit stated that when the passenger knew of the dangers of carry-ons being placed above her due to her own observations and experience, whether or not the airline gave warning was not important.<sup>221</sup> However, other courts have questioned whether warnings, even

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<sup>214</sup> See *Aponte*, 1996 WL 527339, at \*3.

<sup>215</sup> See 14 C.F.R. § 121.391(a)(4) (1997) (requiring one flight attendant for every 50 passengers when seating capacity is over 100).

<sup>216</sup> See *Baker*, 1994 WL 28358, at \*1.

<sup>217</sup> See *Ginter*, 538 N.Y.S.2d at 639.

<sup>218</sup> See Author's unofficial interview with official in FAA Office of Flight Standards (Feb. 1997).

<sup>219</sup> See 14 C.F.R. § 121.589 (1997).

<sup>220</sup> See *Bravis v. Dunbar*, 449 S.E.2d 495, 497 (S.C. Ct. App. 1994).

<sup>221</sup> See *Haley v. United Airlines, Inc.*, Nos. 89-3350, 89-3373, 1991 WL 27153, at \*2 (4th Cir. Mar. 6, 1991).

though given, were sufficient. For example, the *Andrews* court stated that an airline still had a duty to do everything within its power to avoid any foreseeable injury because of its high duty of care as a common carrier.<sup>222</sup>

Because injuries from falling carry-on baggage are a recurring problem for all airlines, many courts see these injuries as foreseeable and probably preventable. Suggested preventive measures have included retrofitting the bins with retaining nets, limiting items placed overhead to lightweight items, and giving significantly stronger direction and warning regarding the dangers of improper loading of carry-ons.<sup>223</sup> However, airlines have claimed that the low incidence of injuries prove that these safety measures would not merit the additional costs.<sup>224</sup> Because the airlines have not implemented more of these suggestions, they apparently do not believe the costs outweigh the benefits.

#### F. NOTICE

Some plaintiffs, as in *Schwamb v. Delta Airlines, Inc.*, tried to claim that because items had fallen out of an overhead compartment and caused injury in the past, the carrier was on notice and thus required to take some kind of preventive action.<sup>225</sup> In *Schwamb*, the plaintiff's expert suggested ways in which several additional warnings could be added to operational procedures at little cost to the carrier.<sup>226</sup> However, in *Cherone v. Eastern Airlines, Inc.*, the court stated that a carrier was liable for the injuries to its passenger only when "the carrier had actual notice of the hazardous condition in time to correct it, and failed to do so . . . ."<sup>227</sup>

#### G. PROPOSED SOLUTIONS

What action should air carriers take in order to carry out their duty of due care to ensure passenger safety while reducing their potential risk of liability from injuries caused by falling carry-on baggage? Charles O. Miller, an expert on aviation safety used by the plaintiff in *Schwamb* presented several suggestions that merit consideration. First, he suggested that the pre-boarding an-

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<sup>222</sup> See *Andrews*, 24 F.3d at 40.

<sup>223</sup> See *id.* at 41; see also *Schwamb*, 516 So. 2d at 463.

<sup>224</sup> See *Andrews*, 24 F.3d at 41.

<sup>225</sup> See *Schwamb*, 516 So. 2d at 462-63.

<sup>226</sup> See *id.* at 463.

<sup>227</sup> *Cherone*, 1988 WL 40568, at \*2.

nouncement include instructions on how carry-on items can be safely stowed.<sup>228</sup> This small addition to flight attendant boarding announcements would cost the air carriers nothing and give passengers common sense reminders about the importance of proper stowage. Mr. Miller's next suggestion was to announce to passengers that they should leave compartments open and have the flight attendants take the responsibility to visually check each compartment as they closed it prior to take-off.<sup>229</sup> Again, the airline would incur no cost. Mr. Miller also suggested that additional warnings be given during the safety briefing prior to take-off, and that warnings be placed on the plastic safety card with pictorial explanations of how to properly stow and remove baggage from overhead bins.<sup>230</sup>

Dr. David Thompson, another expert presented by the plaintiff in *Andrews v. United Airlines*, suggested that bins be retrofitted with baggage nets or that airlines restrict the type of items placed overhead.<sup>231</sup> According to Dr. Thompson, British Airways and Virgin Atlantic Airlines have already implemented baggage nets.<sup>232</sup> However, United countered these suggestions by claiming that injuries resulting from falling carry-ons were rare and that neither the cost to the airline nor the inconvenience to the passengers could be justified.<sup>233</sup> Nonetheless, retrofitting bins with nets continues to be a possibility as manufacturing companies continue to work on making the expense of retrofitting the overhead bins cost effective.<sup>234</sup>

Another suggestion involved the actual monitoring of carry-on weight, along with size and amounts, prior to actual boarding.<sup>235</sup> This suggestion is more problematic. In order to check weight, a scale of some sort would be needed in the jetway prior to boarding. This would cause congestion and impede a smooth boarding process. The process would most likely have to take place in the boarding area and be monitored by the gate agents or other ground personnel. Because implementation of this suggestion would most likely require additional personnel to

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<sup>228</sup> See *Schwamb*, 516 So. 2d at 463.

<sup>229</sup> See *id.*

<sup>230</sup> See *id.*

<sup>231</sup> See *Andrews*, 24 F.3d at 41.

<sup>232</sup> See *id.* at n.1; Kevin Rafferty, *Tricky Thoughts Aloft*, FINANCIAL TIMES, May 2, 1992, at X1.

<sup>233</sup> See *Andrews*, 24 F.3d at 41.

<sup>234</sup> Bridport Aviation Products, in Bridport, England, is manufacturing a stowage bin visor system, which it claims can be installed at minimal cost.

<sup>235</sup> See AFA Petition, *supra* note 79.

work each flight, an airline would incur undesirable, additional costs.

Many of Mr. Miller's suggestions could be implemented with little or no cost to the carrier. Safety cards must be regularly reprinted for each type of aircraft and could conceivably include safety warnings about carry-on stowage. In the past ten years, many of Mr. Miller's suggestions regarding announcements have been implemented. Passengers are regularly instructed in both pre-landing and taxiing announcements to be cautious when opening overhead bins, as items placed within may have shifted.<sup>236</sup> These additional instructions and warnings could educate travelers about potential safety hazards and how to avoid them.

#### IV. CONCLUSION

The fact that very few cases have been published leads one to believe that most complaints are either settled by the airline out of court or are not appealed. It is less expensive to deal with such complaints in this manner than to deal with litigation and negative publicity costs. Additionally, the price the airlines pay in out-of-court settlements is balanced by the price the airlines assume they will pay in lost revenue due to perceived lack of customer service. This assumption is enough to deter any change in the way an airline deals with its carry-on baggage policies.

Airlines today operate as big businesses. Airlines continually look for new ways to attract more business. The current challenge is not so much in getting a passenger from point A to point B, but in getting the passenger to his destination while providing a competitive service and a safe operation at minimum operating cost and risk liability. Because of this stiff competition, airlines have at times closed their eyes to potential safety hazards, and the FAA has had to create new regulations to rectify the problems. While the industry often fights these regulations due to the economic impact on an airline's operation, it also welcomes an outside entity making rules that apply to all.

The competitive nature of the airline industry makes the airlines reluctant to withdraw a service of convenience the public has come to expect. The federal regulations have assisted in curtailing many of the more blatant carry-on baggage problems,

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<sup>236</sup> See *Andrews*, 24 F.3d at 40-41.

but the primary enforcement of the regulations has been left to the individual carriers. Thus, the airlines continue in their endeavor to find creative solutions to excessive carry-on baggage woes, short of actual strict enforcement.

## APPENDIX 1

**§ 121.589 Carry-On Baggage.**

(a) No certificate holder may permit a passenger to carry any article of baggage aboard an airplane unless—

(1) That article is stowed in a suitable baggage or cargo storage compartment, or is stowed as provided in paragraph (c) of § 121.285; or

(2) That article can be stowed under a passenger seat.

(b) After April 24, 1969, no certificate holder may permit a passenger to carry any article of baggage aboard an airplane under paragraph (a)(2) of this section unless that article can be stowed under a passenger seat in such a way that it will not slide forward under crash impacts severe enough to induce the inertia loads specified in § 25.561(b)(3).

Issued in Washington, D.C., on September 15, 1967.



## APPENDIX 2

**§ 121.589 Carry-On Baggage**

....

(b) After August 24, 1969, no certificate holder may permit a passenger to carry any article of baggage aboard an airplane under paragraph (a)(2) of this section unless that article can be stowed under a passenger seat in such a way that it will not slide forward under crash impacts severe enough to induce the ultimate inertia forces specified in § 25.561(b)(3) of this chapter or the requirements of the Civil Air Regulations under which the aircraft was type certificated. A certificate holder may obtain an additional extension of the compliance date but not beyond October 24, 1969, from the air carrier district office charged with the overall supervision of its operation by showing that good cause exists for the extension.

Issued in Washington, D.C., on March 18, 1969.

## APPENDIX 3

**§ 121.589 Carry-On Baggage.**

(a) No certificate holder may permit an airplane to take off or land unless each article of baggage carried aboard by passengers is stowed—

- (1) In a suitable baggage or cargo stowage compartment;
- (2) As provided in paragraph (c) of § 121.285; or
- (3) Under a passenger seat.

(b) Each passenger shall comply with instructions given by crewmembers regarding compliance with paragraph (a) of this section.

(c) Each passenger seat under which baggage is permitted to be stowed shall be fitted with a means to prevent articles of baggage stowed under it from sliding forward under crash impacts severe enough to induce the ultimate inertia forces specified in § 25.561(b)(3) of this chapter or in the emergency landing condition regulations under which the aircraft was type certificated.

Issued in Washington, D.C., on February 15, 1972.

## APPENDIX 4

**§ 121.589 Carry-On Baggage.**

(a) No certificate holder may allow the boarding of carry-on baggage on an aircraft unless the baggage can be stowed in accordance with this section. No certificate holder may allow an aircraft to take off or land unless each article of baggage carried aboard the aircraft is stowed—

(1) In a suitable closet or baggage or cargo stowage compartment placarded for its maximum weight and providing proper restraint for all baggage or cargo stowed within, and in a manner that does not hinder the possible use of any emergency equipment; or

(2) As provided in § 121.285(c); or

(3) Under a passenger seat.

(b) Baggage, other than articles of loose clothing, may not be placed in an overhead rack unless that rack is equipped with approved restraining devices or doors.

(c) Each passenger must comply with instructions given by crewmembers regarding compliance with paragraphs (a) and (b) of this section.

(d) Each passenger seat under which baggage is allowed to be stowed shall be fitted with a means to prevent articles of baggage stowed under it from sliding forward. In addition, after August 31, 1983, each aisle seat shall be fitted with a means to prevent articles or baggage stowed under it from sliding sideward into the aisle under crash impacts severe enough to induce the ultimate inertia forces specified in emergency landing condition regulations under which the aircraft was type certificated.

Effective August 31, 1980.

## APPENDIX 5

**§ 121.589 Carry-On Baggage.**

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(c) Each passenger must comply with instructions given by crewmembers regarding compliance with paragraphs (a), (b), and (e) of this section.

....

(e) In addition to the methods of stowage in paragraph (a), flexible travel canes carried by blind individuals may be stowed—

- (1) Under any series of connected passenger seats in the same row, if the cane does not protrude into an aisle and if the cane is flat on the floor; or
- (2) Between a nonemergency exit window seat and the fuselage, if the cane is flat on the floor; or
- (3) Beneath any two nonemergency exit window seats, if the cane is flat on the floor; or
- (4) In accordance with any other method approved by the administrator.

Issued in Washington, D.C., on June 22, 1981.

## APPENDIX 6

**§ 121.589 Carry-On Baggage.**

(a) No certificate holder may allow the boarding of carry-on baggage on an airplane unless each passenger's baggage has been scanned to control the size and amount carried on board in accordance with an approved carry-on baggage program in its operations specifications. In addition, no passenger may board an airplane if his/her carry-on baggage exceeds the baggage allowance prescribed in the carry-on baggage program in the certificate holder's operations specifications.

(b) No certificate holder may allow all passenger entry doors of an airplane to be closed in preparation for taxi or pushback unless at least one required crewmember has verified that each article of baggage is stowed in accordance with this section and § 121.285(c) of this part.

(c) No certificate holder may allow an airplane to take off or land unless each article of baggage is stowed:

(1) In a suitable closet or baggage or cargo stowage compartment placarded for its maximum weight and providing proper restraint for all baggage or cargo stowed within, and in a manner that does not hinder the possible use of any emergency equipment; or

(2) As provided in § 121.285(c) of this part; or

(3) Under a passenger seat.

(d) Baggage, other than articles of loose clothing, may not be placed in an overhead rack unless that rack is equipped with approved restraining devices or doors.

(e) Each passenger must comply with instructions given by crewmembers regarding compliance with paragraphs (a), (b), (c), (d), and (g) of this section.

(f) Each passenger seat under which baggage is allowed to be stowed shall be fitted with a means to prevent articles of baggage stowed under it from sliding forward. In addition, each aisle seat shall be fitted with a means to prevent articles of baggage stowed under it from sliding sideward into the aisle under crash impacts severe enough to induce the ultimate inertia forces specified in the emergency landing condition regulations under which the airplane was type certificated.

(g) In addition to the methods of stowage in paragraph (c) of this section, flexible travel canes carried by blind individuals may be stowed—

- (1) Under any series of connected passenger seats in the same row, if the cane does not protrude into an aisle and if the cane is flat on the floor; or
- (2) Between a nonemergency exit window seat and the fuselage, if the cane is flat on the floor; or
- (3) Beneath any two nonemergency exit window seats, if the cane is flat on the floor; or
- (4) In accordance with any other method approved by the Administrator.

Issued in Washington, D.C., on May 29, 1987.

## APPENDIX 7

**§ 121.589. Carry-On Baggage.**

. . . .

(b) No certificate holder may allow all passenger entry doors of an airplane to be closed in preparation for taxi or pushback unless at least one required crewmember has verified that each article of baggage is stowed in accordance with this section and § 121.285 (c) and (d) of this part.

(c) No certificate holder may allow an airplane to take off or land unless each article of baggage is stowed:

. . . .

(2) As provided in § 121.285 (c) and (d) of this part; . . . .

Issued in Washington, D.C., on December 12, 1995.

## Comments



