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DISCRIMINATORY BUMPING

The plight of individuals who are left stranded at the airport despite their possession of confirmed airline reservations, *i.e.*, passengers who are "bumped," is becoming distressingly familiar to American air travelers. In times and areas of heavy traffic the frequency of the "bumping" incidents soars. A concomitant trend is emerging, however, as an increasing number of bumped passengers turn to the courts for relief. While the total number of cases remains small,¹ it is significant that the majority have been initiated within the past five years.

The passengers base their claims on section 404(b) of the Federal Aviation Act of 1958:²

(b) No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

These suits are predicated on the theory that the airline not only sold more tickets than it had seats available, resulting in the bumping of the passenger, but also that the defendant airline unjustifiably discriminated against the passenger in so doing.

The sale of tickets for more seats than are available usually results either from an erroneous inventory of seats or from a deliberate policy of overbooking. While either action could lead to discriminatory bumping, the latter, being premeditated and preferential, has attracted greater attention. Despite the inherent inequities of deliberate overbooking, it arose as a unilateral response to a legitimate problem: the "no-show."³ This individual, who reserves a seat but either fails to appear at boarding time or cancels immediately prior thereto, has plagued the airlines for years, particularly

¹ This note cites the vast majority, if not all, of the reported cases.

² 49 U.S.C. § 1374(b) (1970).

³ For an intensive study of the "no-show" and "bumping," see Emergency Reservations Practices Investigation, CAB Docket 26253 (June 10, 1974).

in seasons and regions of extensive air travel.⁴ Airlines, therefore, attempt to compensate for "no-shows" by accepting reservations based upon available seats plus an additional number based upon the projected number of "no-shows." Ironically, this policy has inevitably amplified the "no-shows" situation. Because passengers fear bumping, they tend to make multiple reservations, thereby increasing the airline's need to overbook while decreasing the accuracy of their computed estimates of "no-shows."⁵

These mutually detrimental practices of both airlines and passengers have engendered a number of problems centering around the fundamental issues of who should receive the available seats and what legal recourse is available to the bumped ticket holder. An attendant series of problems evolves from the efforts of the airlines to deal with the "no-show."

Historically, the case of *Fitzgerald v. Pan American World Airways, Inc.*⁶ remains prominent, as it established the existence of a civil remedy based on the anti-discrimination provision of the Civil Aeronautics Act of 1938.⁷ After a temporary stop in Honolulu, Hawaii, the airline had refused to allow the plaintiffs to continue the San Francisco-to-Sydney, Australia flight in their assigned first class seats. The court held that the airline's action was motivated by racial prejudice and therefore a violation of the Civil

⁴ *Id.* Airline figures in 1956 estimated "no-shows" accounted for 17.6% of the total passengers boarded. See AVIATION WEEK, Apr. 2, 1956, at 21. More recently, Pan American World Airways recorded a "no-show" factor of 28% during the Washington's Birthday holiday, 33% for Christmas/New Years, and 26% for July 4. These vacant seats cost the airline \$225,000 in lost revenue. See AVIATION WEEK, Apr. 30, 1973, at 43.

A counter-argument contends that passengers unable to board a capacity booked flight find accommodations on another airplane, thus causing the airlines little or no loss of business from "no-shows." The operant assumption of this logic maintains that travelers rarely decide not to fly at all.

⁵ See Ruppenthal, *Bumping the Passenger*, 190 NATION 551 (1960). In many cases overbooking results from a failure to control the inventory of available seats. Another source of this difficulty comes from overzealous travel agents who report that reservations are confirmed when they are not. Additional causes stem from airline arrival and departure delays that abort connection schedules as well as airline failures to cancel down-line reservations when an initial reservation is missed or cancelled.

⁶ 229 F.2d 499 (2d Cir. 1956). For one of the earliest cases on discriminatory bumping, see *Cowen v. Winters*, 96 F. 929 (6th Cir. 1899).

⁷ 229 F.2d at 501-02. The provision relied on was the Civil Aeronautics Act of 1938, § 404(b), 52 Stat. 993, the predecessor of 49 U.S.C. § 1374(b) (1958). Jurisdiction was based on 28 U.S.C. § 1331 (1952) and 28 U.S.C. § 1337 (1952).

Aeronautics Act.⁸ The impact of *Fitzgerald* is the court's determination that an actionable civil wrong could be *implied* from a statute providing only criminal penalties.⁹ Although the Civil Aeronautics Act prohibited unjust discrimination, it prescribed only criminal penalties¹⁰ and procedures to compel future compliance,¹¹ but no provision enabling one injured by its breach to recover monetary damages.¹² The implied remedy was primarily derived from the theory that a court may adopt as the standard of conduct the text of a legislative statute whose purpose was:

- (a) to protect a class of persons which includes the ones whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.¹³

Thus Congress was seen as having enacted legislation rendering it tortious for airlines to unjustly discriminate against their passengers.

Additional justification for an implied remedy was deduced from the inadequacy of the remedies provided by the Civil Aeronautics Act. Since the criminal penalties would not remunerate the plaintiff for his loss, the plaintiff's only alternative was to file a complaint with the Civil Aeronautics Board (CAB) to compel compliance; *i.e.*, to stop the existing practice. Even if successful, the

⁸ 229 F.2d at 500. Subsequent bumping cases resulted from economic discrimination as well as from failure to follow non-discriminatory bumping procedures. Thus, it is the finding of unjust discrimination rather than the nature of the discrimination that is important. Note also that discrimination may be legitimized; hence, a distinction exists between just and unjust discrimination. See notes 33-35 *infra* and accompanying text.

⁹ 229 F.2d at 501. See also *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33 (1916).

¹⁰ Act of July 14, 1952, ch. 740, § 3, 66 Stat. 629.

¹¹ Act of June 23, 1938, ch. 601, § 1002, 52 Stat. 1018.

¹² 229 F.2d at 500-01. Note that the plaintiff did have a common law remedy. The court, however, was concerned about the uncertainty of satisfactory remedies for such injuries in some state courts. Note also that the argument that a civil remedy could be implied from safety provisions of the Federal Aviation Agency was rejected because of the adequacy of common law tort remedies. *Moungiey v. Brandt*, 250 F. Supp. 445, 452-53 (W.D. Wis. 1966).

¹³ RESTATEMENT (SECOND) OF TORTS § 286 (1965). See also *Reitmeister v. Reitmeister*, 162 F.2d 691, 694 (2d Cir. 1947).

plaintiff's filing of a complaint failed to provide relief for the injury already sustained.

Although there was no mention of punitive damages in *Fitzgerald*, the availability of this remedy surfaced in *Wills v. Trans World Airlines, Inc.*¹⁴ The awarding of punitive damages is particularly significant in these cases since the actual damages borne by a plaintiff typically do not warrant the expense of instigating legal action. In *Wills* the plaintiff possessed a tourist reservation but was bumped from an overbooked flight in favor of a first class passenger who was given the plaintiff's tourist seat contrary to the airline's customary priority seating procedures.¹⁵ The *Wills* court followed the logic of *Fitzgerald* and implied a civil remedy for the airline's violation of the Civil Aeronautics Act's prohibition of unjust discrimination.¹⁶ Of greater import, however, was its award of \$5,000 in punitive damages. The court declared that the airline's *deliberate* practice of selling more tickets than it had seats available constituted malicious or wilful and wanton conduct sufficient to justify an award of punitive damages. Although the amount of punishment reasonable for such a violation is debatable, the award plainly served to penalize the airline for its practice with the apparent intent that the size of the award act as a deterrent to similar conduct in the future.¹⁷

The consequence of an unjust discrimination decision differed somewhat in *Kaplan v. Lufthansa German Airlines*.¹⁸ As in *Wills*, the defendant airline had sold more tickets than there were seats available and, as in *Wills*, the airline had ignored its customary

¹⁴ 200 F. Supp. 360 (S.D. Cal. 1961). As will be shown, the awards of punitive damages in most cases far exceed the amounts for compensatory damages. It must be remembered, however, that the necessity of demonstrating compensatory damages is not a prerequisite to an award of punitive or exemplary damages. *Wardman-Justice Motors, Inc. v. Petrie*, 39 F.2d 512, 516 (D.C. Cir. 1930). The *Wills* court clearly affirms that a State-created cause of action for breach of contract is also available, but is less desirable due to the customary unavailability of punitive damages in contracts cases and the difficulty of proving fraudulent misrepresentation, often a justification for a punitive award. 200 F. Supp. at 365. The court in *Nader v. Allegheny Airlines, Inc.*, had scant reluctance in finding sufficient evidence of intentional misrepresentation to justify an award of punitive damages. 365 F. Supp. 128 (D.D.C. 1973).

¹⁵ 200 F. Supp. at 365.

¹⁶ *Id.* at 367.

¹⁷ *Id.* at 367-68.

¹⁸ 12 Av. Cas. ¶ 17,933 (E.D. Pa. 1973).

priority seating procedures. The court declared that these acts constituted unjust discrimination¹⁹ within the meaning of section 404(b) of the Federal Aviation Act of 1958 and awarded substantial compensatory damages.²⁰ But the moment of *Kaplan* was the pronouncement by the court that since no evidence had disclosed similar past conduct and since the conduct complained of was not shown to be deliberate, punitive damages were undeserved.²¹ *Kaplan* therefore illustrates that overbooking in and of itself does not justify punitive damages; the action of the airline must constitute malicious or wilful and wanton conduct. When read in conjunction with *Wills*, *Kaplan* indicates that a deliberate policy of overbooking constitutes evidence of such conduct,²² but absent a showing of such evidence, punitive damages are unwarranted.

*Mason v. Belieu*²³ represents a unique instance of discriminatory bumping. Plaintiff was denied boarding on a flight from Miami to Tucuman Airport, which served both Panama and the Canal Zone, since the plaintiff had been forcibly deported from the latter. However, the defendants were not permitted to rely on the deportation order since it was known that the plaintiff's destination was Panama rather than the Canal Zone. Nor were the defendants' arguments that the plaintiff fit the "hijacker profile" successful.²⁴ Mason was awarded \$1,000 primarily as compensation for his outrage and humiliation but, quoting *Wills*, the court rejected his claim of punitive damages due to the absence of any proof that the airline acted "wantonly, or oppressively, or with . . . malice."²⁵

Prior to *Wills* the difficulty in proving sufficient actual damages to justify a lawsuit as well as the reluctance of the CAB to enjoin overbooking gave the airlines virtual autonomy in this area.²⁶ Sub-

¹⁹ *Id.* at ¶ 17,935. The court chose not to believe the testimony offered by the defendant that its priority policy has been followed.

²⁰ *Id.* at ¶ 17,934-35.

²¹ *Id.* at ¶ 17,934.

²² See note 17 *supra* and accompanying text.

²³ 13 Av. Cas. ¶ 17,114 (D.D.C. May 10, 1974). Apparently, Mr. Mason had to be forcibly placed on an aircraft bound for Miami, Fla., and then forcibly removed from the airplane. Police officials secured him in a wheel chair so that he could be wheeled rather than carried.

²⁴ *Id.* at ¶ 17,118.

²⁵ *Id.* at ¶ 17,118-19.

²⁶ National Airlines, Inc., Enforcement Proceedings, 31 C.A.B. 390 (1960) and Supplemental Opinion and Order on Reconsideration, 33 C.A.B. 270 (1961).

sequently, this autonomy was somewhat curtailed when the CAB enacted regulations which constrained the airlines to compensate passengers who were bumped.²⁷ These "denied boarding compensation" provisions force the airlines to file tariffs providing payment to a bumped passenger based upon his destination and the connecting flights involved. *Mortimer v. Delta Air Lines*²⁸ raised the issue of whether an action founded upon discriminatory bumping under section 404(b) of the Federal Aviation Act of 1958 frustrated the purpose of these regulations;²⁹ that is, whether the new CAB regulations were the exclusive remedy for a bumped passenger or, on the other hand, whether the bumped passenger who was discriminated against could base his cause of action on the Act. In finding that the CAB regulation did not restrain the use of the Act,³⁰ the *Mortimer* court stated:

[T]he basis of this action is not breach of contract of carriage, which is the basis of denied boarding compensation, but rather violation of the anti-discrimination and preference section of the Federal Aviation Act. Denied boarding compensation is payable to a passenger . . . regardless of whether he has been the victim of discrimination or undue preference.³¹

This holding reflects the wording of the regulation itself:

The tariffs required by this part shall specify that the carrier will tender, on the day and place the denied boarding occurs, compensation in the amount specified above, which, *if accepted* by the passenger, shall constitute liquidated damages for all damages in-

²⁷ 14 C.F.R. § 250.4 (1974) states:

[E]very carrier shall file tariffs providing compensation to a passenger holding confirmed reserved space who presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in and reconfirmation procedures and being acceptable for transportation under the carrier's tariff, and the flight for which the passenger holds confirmed reserved space is unable to accommodate the passenger and departs without him.

Note that the compensation, if accepted, constitutes liquidated damages. 14 C.F.R. § 250.7 (1974).

Determining whether less bumping has occurred as a result of these regulations is impossible but, clearly, the practice has yet to be eliminated. See notes 3 and 4 *supra*.

²⁸ 302 F. Supp. 276 (N.D. Ill. 1969).

²⁹ *Id.* at 280-81.

³⁰ *Id.*

³¹ *Id.* at 281.

curred by the passenger as a result of the carrier's failure to provide the passenger with confirmed reserved space.³²

Consequently, *Mortimer* affirms that any bumped passenger is eligible for denied boarding compensation but, if accepted, the amount of money he will receive is limited to the figure listed in the tariff. The same regulations provide that if the carrier's offer to arrange comparable transportation or alternative travel is accepted by the passenger, he is ineligible for denied boarding compensation.³³ If, however, the airline has unfairly discriminated against the passenger in the process of bumping him, the Act is applicable, and compensatory as well as punitive damages are available to the passenger who accepts neither the denied boarding compensation nor a seat on another flight.³⁴

While no statutory guidelines expressly define unjust discrimination, the *Wills* court clearly felt that the plaintiff, who had reconfirmed his reservation in accordance with the airline's requirement, merited priority over those passengers with later reservations and, "By disregarding plaintiff's priority, the defendant airline unjustly and unreasonably discriminated against him, and thus violated the Act. [49 U.S.C. § 1374(b)]"³⁵

Wills thus indicated that an airline which ignored a passenger's right to precedence could be found to have acted in an unjustifiably discriminatory action. While that court based this priority on the confirmation time of the passenger's reservation, later cases illustrate that this criterion is not necessarily decisive.

In *Stough v. North Central Airlines, Inc.*³⁶ the rule of priorities was clarified. Plaintiffs were two of eight passengers seeking to board a flight on which only six persons could be allowed aboard

³² 14 C.F.R. § 250.7 (1974) (emphasis added).

³³ 14 C.F.R. § 250.6(b) (1974). These regulations raise three questions: (i). If a passenger is discriminatorily bumped and if he has suffered actual damages, does his acceptance of transportation liquidate his damages? (ii). To what extent are the federal courts bound by the regulations in question? (iii). Does the bumped passenger have a duty mitigate his damages by accepting a seat on a later flight?

³⁴ Cf. CAB Order No. 72-7-42, in which T.W.A. was informally charged with failure to distribute written notice explaining denied boarding compensation. T.W.A.'s offer of \$87,000 as a compromise of any penalties that might be imposed and its agreement to a cease and desist order were accepted by the Board.

³⁵ 200 F. Supp. at 365.

³⁶ 55 Ill. App. 2d 338, 204 N.E.2d 792 (1965).

due to weather conditions. The airline was charged with unjust discrimination when it seated two passengers who had purchased tickets later than the plaintiffs. At trial the airline declared that its consistent policy dictated bumping the last passengers to check in for the flight and demonstrated that adherence to this plan effected the bumping of the plaintiffs.³⁷ In holding for the airline the court espoused the rule that the airline was free to establish its priority rules for determining which passengers were bumped so long as they did not subject any particular person to unjust discrimination. When the plaintiffs contended that the airline's customary bumping procedure was discriminatory, the court acknowledged that a policy dependent upon check-in time might not be the most appropriate or optimal but held that if the rule were consistently applied, it subjected no passengers to unjust discrimination.³⁸

This logic is incorporated into the CAB regulations governing bumping.³⁹ By stressing consistency and lack of discrimination rather than a prescribed pattern—like the reservation time preference of *Wills*—the CAB allows the airlines a degree of flexibility while still providing adequate protection for the passenger.

The then unexamined issue of the burden of proof arose in *Archibald v. Pan American World Airways, Inc.*⁴⁰ Plaintiff was denied permission to board despite his confirmed reservation while three other passengers with reservations made subsequent to his were seated.⁴¹ *Archibald* focused on an area that previous cases had neglected by examining what constituted a *prima facie* case under section 404(b) of the Federal Aviation Act of 1958.⁴² After cogently analyzing prior cases, the court in *Archibald* indicated that some over-selling appeared to be an economic necessity due to the

³⁷ *Id.* at —, 204 N.E.2d at 795-97. In *Williams v. Transworld Airlines*, 369 F. Supp. 797 (S.D.N.Y. 1974), the court held that the airline was authorized to refuse transportation to the plaintiff based on information obtained from the F.B.I. that he was a wanted fugitive from justice and could be considered armed and dangerous. Plaintiff failed to prove "unjust discrimination" resulting from his racial and political beliefs and activities. *Id.* at 804.

³⁸ 55 Ill. App. 2d at —, 204 N.E.2d at 797.

³⁹ 14 C.F.R. § 250.3 (1974).

⁴⁰ 460 F.2d 14 (9th Cir. 1972).

⁴¹ *Id.* at 15. The fact that the plaintiff did not cash defendant's voucher for denied boarding compensation saved the cause of action. See 14 C.F.R. § 250.7 (1974).

⁴² 460 F.2d at 16.

"no-show" situation and consequently did not *per se* give rise to an action under section 404(b) of the Act. The court perceived that *Stough* and *Wills* stood for the proposition that even though bumping may seem unjust, its legitimacy can be proven by demonstrating an adherence to established and non-discriminatory policies.⁴³ Yet, it also found that substantial over-selling was evidence of malice to be considered in awarding punitive damages. The court further reasoned that since the passenger had no access to information concerning the airline's bumping processes, "It is not unreasonable to place upon the airline the burden of proving that the discrimination or preference was reasonable by demonstrating company policy and why, in each particular case, one passenger was chosen over another."⁴⁴

Therefore, if a passenger can show that he possessed a confirmed reservation and that passengers with later reservations were seated while he was not or can show a similar preference, a *prima facie* case is established. The burden of proof then passes to the airline to disprove the existence of unjust discrimination. The court derived its decision from the theory that the airline is in the best position to present evidence justifying the selection of one passenger over another. The attendant inference that it is unreasonable to require the plaintiff to define the airline's policy and to detect variations from it seems correct.⁴⁵ Since the airline autonomously established its bumping procedures and since the airline typically initiated the incident as a result of its overbooking, it is equitable that the defendant airline bear the burden of legitimizing its actions.

Summarizing briefly, denied boarding compensation is available in a fact situation wherein a passenger confirms his reservation on a flight yet is unable to board because the airline has oversold. A federal cause of action under section 404(b) of the Federal Aviation Act of 1958 arises if the airline, in determining which passengers may board, violates its seating priority practices or otherwise discriminates against a passenger. The passenger must choose his remedy. If he accepts the relief provided in the regulations, his remedies are limited to those provided therein, and his

⁴³ *Id.*

⁴⁴ *Id.* at 17.

⁴⁵ *Id.* at 16-17. On remand from reversal of a directed verdict for the airline, plaintiffs recovered \$10,000 punitive damages. Civil No. 111-68 (D. Guam, Feb. 7, 1973).

rights under section 404(b) of the Act are foreclosed. If, however, he elects the relief provided by the aforementioned section, he may be awarded the actual damages sustained plus punitive damages, conditioned upon his showing malicious or wilful and wanton misconduct on the part of the airline, such as a deliberate policy of substantial overbooking.

The most celebrated case in the field is *Nader v. Allegheny Airlines, Inc.*⁴⁶ In this case the airline bumped consumer advocate Ralph Nader who was enroute to Hartford, Connecticut to speak at a fund raising rally of the Connecticut Citizens Action Group (CCAG), a public interest organization. Plaintiff Nader, who possessed a confirmed reservation, made out a *prima facie* case by demonstrating that the airline allowed passengers with later or no reservations to have priority over him. The airline failed to show why this discrimination was reasonable.⁴⁷ Although Nader's compensatory damages were nominal, the court held that an award of punitive damages was warranted based upon a combination of three factors. First, it determined that the defendant habitually and systematically accepted substantially more confirmed reservations than it had seats available. Next, it found that the airline deliberately concealed this practice from the public. Finally, the court declared that because it was a common carrier, an airline had a greater obligation to make such a practice known.⁴⁸ While the defendant's policy of overbooking clearly vindicates an award of punitive damages, the issues of concealment of the activity and the nature of a common carrier had not previously been addressed. This is perhaps due to the fact that contractual obligations between airlines and their passengers are usually viewed as being governed by the tariffs filed in accordance with the Civil Aeronautics Act rather than by the common law. Since the tariffs provide compensation for bumped passengers, there is ample authority for the contention that the public is on notice as to the practice of bumping, satisfactorily discharging the airline's duty to the public.⁴⁹

⁴⁶ 365 F. Supp. 128 (D.D.C. 1973).

⁴⁷ *Id.* at 132.

⁴⁸ *Id.* at 130-32. In establishing that overbooking was substantial, the court found the airline bumped 945 persons during April, 1972, the month the incident occurred.

⁴⁹ *E.g.*, *Wilhelmy v. Northwest Airlines, Inc.*, 86 F. Supp. 565 (W.D. Wash. 1949). *Mack v. Eastern Airlines, Inc.*, 87 F. Supp. 113 (D. Mass. 1949). Note,

Nevertheless, the *Nader* court would require a more definitive notice to the public regarding overbooking. It found that notice of overbooking was insufficiently disseminated by the filing of tariffs and that the practice itself was actively concealed.⁵⁰ The failure to provide notice concerning the practice of overbooking would therefore be additional evidence favoring an award of punitive damages.

The *Nader* decision does not necessarily aid the discriminatory bumping plaintiff since his receiving punitive damages depends upon his first proving discrimination and then establishing the presence of malicious or wilful and wanton misconduct via the airline's deliberate overbooking policy. An award of punitive damages would be justified by proving the existence of the policy, as well as the lack of notice. Although the insufficient notice issue may not significantly improve the plaintiff's position, this requirement may have ramifications affecting the interests of all involved. If the filing of tariffs is inadequate, what degree of notice would suffice? If this notification is accomplished, would the resultant overbooking publicity accelerate the "no-shows?" Further, if overbooking becomes an announced policy, would the informed passenger who risks discrimination in riding with the carrier forfeit all damages except denied boarding compensation? Could the passenger be seen as having "assumed the risk" and thus forfeited his statutory remedy? Despite these potential consequences or similar progeny, publication of the policy of overbooking and the punishment of its concealment should be encouraged, if for no other reason than its strong appeal to honesty and fair dealing.

Nader received \$25,000 punitive damages—two and a half times the highest prior award. In making the award the court placed no significance on the fact that the airline had arranged for Nader to board another flight that would have arrived at his destination fifty-five minutes after the scheduled arrival of the original flight;⁵¹ Na-

however, that the tariff must be based on a statutory requirement; it cannot be a hidden trap. *Bernard v. U.S. Aircoach*, 117 F. Supp. 134 (S.D. Cal. 1953).

⁵⁰ 365 F. Supp. at 131.

⁵¹ *Id.* at 130. If Nader had accepted this transportation, he would have been ineligible for denied boarding compensation if:

(b) The carrier arranges for comparable air transportation or for other transportation accepted (i.e., used) by the passenger, which, at the time either such arrangement is made, is planned to arrive

der declined to take this flight, however, and thus arguably failed to mitigate his damages. Moreover, the court held that Nader's reliance on the airline schedule was warranted even though the meeting was to occur only one hour after the planned arrival of his flight. The plaintiff's knowledge that other airlines overbooked was deemed irrelevant with respect to apprising him of the defendant's regular practice or affecting the reasonableness of his reliance.⁵²

In *Nader* the court added another dimension to the area of discriminatory bumping when it found that the CCAG also relied on the plaintiff's reservation and was consequently injured by his being bumped. This reliance was judged reasonable, entitling the group to recover for damages even though not a party to the contract.

It was foreseeable that the Defendant's intentional misrepresentation would be relayed to other members of the public and that they would rely upon the Defendant's representation since the Defendant's duty is to provide the public with reliable air transportation. . . .⁵³

Though CCAG was unable to prove its actual losses with enough specificity to permit recovery of lost donations resulting from the inability of Nader to speak at its rally, this group was awarded \$25,000 punitive damages.⁵⁴

Few topics have generated more controversy than the duty owed to an unforeseeable plaintiff. The court held the airline owed a duty to CCAG because:

- (i) the misrepresentation was knowingly and intentionally made; privity of contract is not required here;
- (ii) CCAG was within the class of foreseeable plaintiffs (the class is determined by the Defendant's legal duty to the public at large both under its license and by its better position to prevent injury

at the airport of the passenger's next stopover or, if none, at the airport of his destination earlier than, or not later than 2 hours after, the time the direct or connecting flight, on which confirmed reserved space is held, is planned to arrive in the case of interstate and overseas air transportation, or 4 hours after such time in the case of foreign air transportation; . . .

14 C.F.R. § 250.6(b) (1974). Note also that Nader was entitled to \$10 compensatory damages.

⁵² 365 F. Supp. at 131.

⁵³ *Id.* at 132.

⁵⁴ *Id.* at 134. CCAG could only prove \$51 in damages.

to the public by a full disclosure of its practices affecting the public);

(iii) CCAG made a reasonable reliance on the misrepresentation and was thereby damaged.⁵⁵

CCAG probably could not have recovered under section 404(b) of the Act because a statute that was designed to protect a particular class of persons from a particular risk or harm creates no duty with respect to another class or risk.⁵⁶ A common law tort action for the intentional misrepresentation or deceit that Nader had a guaranteed reservation is possible, but troublesome questions arise. When intentional misrepresentation is the source of a cause of action, the general rule limits recovery to those the defendants desired to influence. The premise of this principle regards the potential number of persons learning of the misrepresentation and acting accordingly as so extensive that an impossible burden devolves upon the defendant.⁵⁷ Yet an equally strong argument for CCAG dictates that in a confrontation between an innocent plaintiff and a defendant who has obviously deviated from the accepted standards of conduct, the defendant should bear the loss. If the damages awarded to the plaintiff are disproportionate to the airline's fault, they are no less out of proportion to CCAG's innocence.⁵⁸ The *Nader* court adopted the latter theory and augmented it with the contention that an intentional misrepresentation transpired which would be relayed to others who would have justifiably relied upon it.⁵⁹

If *Nader* stands, the spectre of the "unforeseen plaintiff" as a potential visitor to the deliberately overbooking airline adds a new variable in assessing the profitability of the practice. His unpredictability differentiates him from the "no-show" who is extrapolated through computers and the extent of his damages does not

⁵⁵ *Id.* at 133.

⁵⁶ See note 13 *supra* and accompanying text. See also W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 43 (4th ed. 1971).

⁵⁷ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 107 (4th ed. 1971). It is significant that the court based the award to CCAG on the tort of intentional misrepresentation rather than negligent misrepresentation as courts have been less willing to find obligations to third parties for a negligent misrepresentation than when the misrepresentation has been made knowingly, or without belief in its truth, or without regard to its truth or falsity. *Id.*

⁵⁸ *Id.* § 43 at 257.

⁵⁹ 365 F. Supp. at 132.

reside in a tariff. If this phantom plaintiff materializes frequently enough, his very existence could well terminate deliberate overbooking.

While over-selling itself may be reprehensible, the actual impact of the practice is often equivocal as is illustrated by the nominal awards of compensatory damages. Hence, the \$25,000 award for what could have been a fifty-five minute delay in Nader's arrival is unsettling. One key factor, however, is the rationale of punitive damages wherein the punishment directly relates to the defendant's actions and not necessarily to the loss caused the plaintiff. Since the court intends to deter the wrongdoer from similar conduct in the future and to discourage others from engaging in like activities, a greater penalty becomes efficacious. In this light the award is more difficult to dispute.

It is significant that the court in *Mason*⁶⁰ cites *Nader* for the proposition of the airline's duty to third parties because this citation presupposes the *Nader* decision to be a theory demanding attention rather than an aberration. Damages to Mrs. Mason were awarded because of the emotional distress she suffered while waiting for her husband to arrive at the Tucuman Airport. Apparently, information concerning his delay was not conveyed.⁶¹ While the portent of this decision is diminished somewhat by the court's failure to state that the award was based on the tort of intentional misrepresentation, its citation to the *Nader* court's discussion of the intentional misrepresentation issue of that case indicates that this theory was utilized.⁶²

Nader remains the farthest a court has gone in punishing an airline for discriminatory bumping. The amounts of the punitive damages as well as the award to a third party represent extremes which, if unaltered on appeal, could force the airlines to devise new methods for dealing with the "no-show." It should be recalled, however, that curbing this practice was the manifest intent of the *Wills* court and of the CAB regulations—neither of which has been markedly effective as evidenced by the continued prevalence of overbooking.⁶³ As long as the airlines benefit from overbooking,

⁶⁰ 13 Av. Cas. at ¶ 17,118.

⁶¹ *Id.* at ¶ 17,117-18.

⁶² *Id.* at ¶ 17,118.

⁶³ The number of passengers denied boarding was 80,824 in fiscal year (FY)

they will perpetuate the practice or avoid implementing adequate preventive controls.

Notwithstanding the substantial awards of punitive damages, few passengers have sought relief under the provisions of section 404(b). Those who have are hardly a representative sample of American air travelers—Wills, Mortimer, and Nader are attorneys; Fitzgerald is the celebrity Ella Fitzgerald; Kaplan is a physician; Mason's status and behavior are definitely atypical; the records of *Archibald* and *Stough*, however, do not reveal the professions of the plaintiffs. It is possible that the airlines' scrupulous adherence to their priority practices is resulting in fewer instances of unjust discrimination. Or perhaps most bumped passengers are presently satisfied with the denied boarding compensation. But it is equally likely that a general ignorance of the remedy provided by section 404(b) has accounted for the infrequent pursuit of this course. That the cases cited herein represent the vast majority, if not the total, of the reported cases of discriminatory bumping is extraordinary in view of the thousands of bumping incidents and substantiates the notion that the public is unaware of its rights.

If this analysis is accurate, the recent cases of *Archibald*, *Kaplan*, *Nader*, and *Mason* indicate that the significance of section 404(b) is spreading. The publicity from *Nader* alone is still reverberating and will in all likelihood expand the number of discriminatory bumping suits. Another provocative agent may well be the flight reductions caused by the energy crisis and the present inflationary spiral. With additional pressure on the airlines to fill all flights to capacity and the attendant motivation to overbook and then bump, the stranded passenger may find his predicament considerably more irksome and disruptive. Furthermore, a decrease in available flights will surely frustrate the bumped traveler's arrival at his destination within a reasonable time frame and increase the probability that he will not be so readily assuaged by the provisions of the CAB regulation.

Since the "no-show" and bumping are inexorably intertwined, any curative approach must address and accommodate all of the

72 and 75,952 in FY 73. Of these, the number eligible for denied boarding compensation was 49,572 in FY 72 and 39,000 in FY 73. Note, however, that these figures are small when compared to the number of passengers enplaned on domestic flights: 147 million in FY 72 and 160 million in FY 73. CAB Press Release No. 73-180 (Sept. 24, 1973).

entangled interests. The eradication of overbooking and its consequent discrimination would only be of cosmetic value, for the airlines merit some form of protection against the non-appearing passenger. Similarly, the individual deserves a defense against interference with his traveling plans.

Predictably, the airlines have been a fertile source of ameliorative approaches to the conditions thus discussed. But their recommended remedial processes place a great emphasis upon eradication of the "no-show." One such proposal submitted to the CAB would require a fully paid ticket as a prerequisite for confirming a reservation. Whereas a total refund of cancellations would be permitted prior to the seventy-two hours preceeding departure, passengers cancelling within the stipulated seventy-two hours of departure or not appearing at boarding time would be reimbursed for only seventy-five per cent of their fare.⁶⁴ Another ingenious plan involves the establishment of a third type of ticket—Leisure Class. This ticket would be conditional; if coach seating remains after all other persons are aboard, the Leisure Class passenger would be accommodated. If he could not board, his fare would be refunded and he would receive transportation to his destination in the next available seat without charge.⁶⁵ An engaging feature of this scheme is that the number of conditional tickets sold would be based upon a computerized forecast of "no-shows" on a particular flight. Therefore, it would eliminate the airlines' temptation to overbook while simultaneously assuring the first-class and coach passengers of their seats.⁶⁶

The CAB has devised a regulatory system directed at both overbooking and the "no-show." This plan, if enacted, would institute a fine of up to one hundred dollars for a "no-show" and would triple the existing denied boarding compensation for bumped passengers.⁶⁷ Although the suggested CAB regulation seems harsh, it and the Leisure Class approach contain one essential of any work-

⁶⁴ AVIATION WEEK, Apr. 30, 1973, at 43.

⁶⁵ *Delta Air Lines, Inc. v. Civil Aeronautics Board*, 12 Av. Cas. ¶ 17,121 (D.C. Cir. 1971).

⁶⁶ *Id.* at ¶ 17,122-23. One must deplore the necessity of employing such an elaborate device in order to assure an individual with a confirmed reservation that a seat will in fact be available.

⁶⁷ Emergency Reservations Practices Investigation, CAB Docket 26253, at 15 (June 10, 1974).

able solution: both halves of the problem—overbooking and “no-shows”—are addressed and the appeal of each reduced. Immediate resolution is unlikely to flow magically from paper proposals; affirmative action is now needed. Hopefully, suits like *Wills*, *Archibald*, *Nader*, and *Mason* will provide an impetus for implementation of a feasible plan by attracting attention to the area and spotlighting its blemishes.

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