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## Exploring Airline Contracts of Carriage and European Union Flight Delay Compensation Regulation 261 (EU 261)— A Bumpy But Navigable Ride

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**EXPLORING AIRLINE CONTRACTS OF CARRIAGE AND  
EUROPEAN UNION FLIGHT DELAY COMPENSATION  
REGULATION 261 (EU 261)—A BUMPY  
BUT NAVIGABLE RIDE**

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## I. INTRODUCTION

**W**HEN PASSENGERS BOOK FLIGHTS with commercial airlines, they enter into contracts of carriage with the airline. This article will first examine the nature, scope, and enforceability of contract of carriage provisions involving domestic flights, followed by an examination of cases addressing the enforceability in the United States of a pro-consumer European Union (EU) regulation concerning compensation for flight cancellation, denied boarding, and delay.

## II. DOMESTIC FLIGHTS CONTRACTS OF CARRIAGE

An airline's contract of carriage for domestic flights generally consists of the passenger's ticket, any applicable tariffs filed with the Department of Transportation (DOT), and the airline's Domestic Conditions of Carriage.<sup>1</sup> The airline's Conditions of Carriage will govern many of the issues that may arise before, during, and after a passenger's flight. Therefore, at the onset of a passenger's dispute with an airline, it is extremely important to review the airline's Conditions of Carriage for any provisions that apply. A copy of the Conditions of Carriage can be found on the airline's website, most often within the "Legal" section of the homepage. However, airlines' Conditions of Carriage are amended often, so it is important to obtain the version in effect at the time the claim arose.

Conditions of Carriage provisions that frequently arise in litigation include: (1) the airline does not guarantee timeliness of arrival; (2) the airline is not liable for the failure to make a connection; (3) the circumstances under which airlines may refuse to transport passengers, along with the corresponding recourse of passengers; (4) the airline's right to overbook flights; (5) the protocol for overbooked flights; (6) the recourse of passengers bumped from a flight due to overbooking; (7) the mandatory times by which passengers must be present at the flight's departing gate; (8) the airline's right to cancel late-arriving passengers' reservations, along with the corresponding recourse of such passengers; (9) baggage allowances; (10) baggage fees; (11) baggage limitations of liability; (12) guidelines for the transportation of pets; (13) the airline's responsibilities (or lack

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<sup>1</sup> Airlines refer to their terms and conditions of carriage differently. Airlines use such terms as: Conditions of Carriage, Contract of Carriage, and General Rules Tariff. For ease of reference, terms and conditions of carriage will be uniformly referred to as "Conditions of Carriage" herein.

thereof) for excessive flight delays or cancellations, depending on the cause; and (14) other miscellaneous liability limitations.

Significantly, there is a growing trend among airlines to include various liability limitations in their Conditions of Carriage. For example, some airlines have included liability limitation periods, some as short as six months.<sup>2</sup> Other airlines have included choice of law clauses.<sup>3</sup> One airline has even added a provision limiting its liability for personal injuries to circumstances where the airline is solely liable.<sup>4</sup> There is also a major trend for airlines to prohibit and/or limit the carriage of pets as checked baggage.<sup>5</sup>

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<sup>2</sup> See, e.g., *Contract of Carriage*, SPIRIT AIRLINES 44 (Aug. 2, 2017) (Rule 13.3 requires that an action be brought within six months from the date of the alleged incident), [https://www.spirit.com/Content/Documents/en-US/Contract\\_of\\_Carriage.pdf](https://www.spirit.com/Content/Documents/en-US/Contract_of_Carriage.pdf) [<https://perma.cc/Z9AG-ZMBC>] [hereinafter *Spirit Contract of Carriage*]; *Contract of Carriage*, SOUTHWEST AIRLINES CO. 40 (May 9, 2017) (Rule 10(a)(2) requires that an action be commenced within one year of the carrier's written denial of claim), <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf> [<https://perma.cc/U4XN-VGP5>] [hereinafter *Southwest Contract of Carriage*].

<sup>3</sup> See, e.g., *Conditions of Carriage*, AMERICAN AIRLINES, INC. (last visited Sept. 5, 2017) (explaining under the heading "Choice of Law" that the conditions are governed "in accordance with the laws of the State of Texas."), <https://www.aa.com/i18n/customer-service/support/conditions-of-carriage.jsp> [<https://perma.cc/RE8E-4Y34>] [hereinafter *American Conditions of Carriage*]; *Spirit Contract of Carriage*, *supra* note 2, at 43 (Rule 13.1 contains a federal and/or Florida choice of law provision). While the Federal Aviation Regulations do not address the propriety of choice of law clauses, they do expressly prohibit airlines from including choice of forum clauses. 14 C.F.R. § 253.10 (2017).

<sup>4</sup> See *Contract of Carriage*, UNITED AIRLINES, INC. (last revised June 23, 2017) (referring to Rule 28(F)), <https://www.united.com/web/en-US/content/contract-of-carriage.aspx> [<https://perma.cc/SFJ8-ENBX>] [hereinafter *United Contract of Carriage*].

<sup>5</sup> See, e.g., *Delta Domestic General Rules Tariff*, DELTA AIR LINES, INC. 33 (last modified June 21, 2017) (generally Rule 190(G)(1) prohibits the transport of a pet in the baggage compartment, but with exceptions, or shipped via Delta Cargo), [https://www.delta.com/content/dam/delta-www/pdfs/legal/contract\\_of\\_carriage\\_dom.pdf](https://www.delta.com/content/dam/delta-www/pdfs/legal/contract_of_carriage_dom.pdf) [<https://perma.cc/4WH3-DZP9>] [hereinafter *Delta Domestic General Rules Tariff*]; *United Contract of Carriage*, *supra* note 4 (Rule 23(H) states that animals may be transported via PetSafe® through United's Live Animal Service); *Spirit Contract of Carriage*, *supra* note 2, at 16 (under Rule 6.4, no pets are permitted in the checked baggage compartment); *Southwest Contract of Carriage*, *supra* note 2 (Rule 6(d)(5) specifies that the carrier will not transport pets in cargo compartments); *Contract of Carriage*, JETBLUE AIRWAYS CORP. 13 (last revised May 16, 2017) (Rule 10(D) states that no animal may be transported as checked baggage), [https://www.jetblue.com/p/jetblue\\_coc.pdf](https://www.jetblue.com/p/jetblue_coc.pdf) [<https://perma.cc/R23T-5GTQ>] [hereinafter *JetBlue Contract of Carriage*]; *American Conditions of Carriage*, *supra* note 3 (explaining under the heading "Baggage: Hazardous Items, Firearms, Live Animals: Traveling with Pets" that transportation depends on the ani-

The Federal Aviation Regulations (FARs)<sup>6</sup> play a key role in the ability of airlines to enforce their Conditions of Carriage. For example, as discussed in detail below, the FARs provide the requirements by which airlines must notify passengers about the Conditions of Carriage. The FARs also set the minimum amount by which airlines can limit their liability for damage to baggage, as well as the compensation guidelines when a passenger is bumped from a flight due to overbooking.

A. INCORPORATION OF TERMS AND CONDITIONS INTO  
CONTRACTS OF CARRIAGE BY REFERENCE

Because it is not realistic for airlines to provide the entire Conditions of Carriage to every passenger (the documents are approximately fifty pages long), airlines incorporate many of the contract terms by reference. The FARs expressly authorize airlines to incorporate certain terms by reference. However, in order to do so, airlines must follow certain procedures. The applicable FAR states as follows:

- (a) A ticket or other written instrument that embodies the contract of carriage may incorporate contract terms by reference (i.e., without stating their full text), and if it does so shall contain or be accompanied by notice to the passenger as required by this part. In addition to other remedies at law, an air carrier may not claim the benefit as against the passenger of, and the passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided to that passenger in accordance with this part.
- (b) Each air carrier shall make the full text of each term that it incorporates by reference in a contract of carriage available for public inspection at each of its airport and city ticket offices.
- (c) Each air carrier shall provide free of charge by mail or other delivery service to passengers, upon their request, a copy of the full text of its terms incorporated by reference in the contract. Each carrier shall keep available at all times, free of charge, at all locations where its tickets are sold within the United States information sufficient to enable passengers to order the full text of such terms.<sup>7</sup>

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mals' breed, size, and requirements, or they can be checked or transported with American Airlines Cargo, but some breeds are excluded) [<https://perma.cc/VEY7-GAYD>].

<sup>6</sup> 14 C.F.R. *et seq.*

<sup>7</sup> *Id.* § 253.4.

The FARs go on to state:

[E]ach air carrier shall include on or with a ticket, or other written instrument given to a passenger, that embodies the contract of carriage and incorporates terms by reference in that contract, a conspicuous notice that:

(a) Any terms incorporated by reference are part of the contract, passengers may inspect the full text of each term incorporated by reference at the carrier's airport or city ticket offices, and passengers have the right, upon request at any location where the carrier's tickets are sold within the United States, to receive free of charge by mail or other delivery service the full text of each such incorporated term;

(b) The incorporated terms may include and passengers may obtain from any location where the carrier's tickets are sold within the United States further information concerning:

(1) Limits on the air carrier's liability for personal injury or death of passengers, and for loss, damage, or delay of goods and baggage, including fragile or perishable goods;

(2) Claim restrictions, including time periods within which passengers must file a claim or bring an action against the carrier for its acts or omissions or those of its agents;

(3) Rights of the carrier to change terms of the contract . . . ;

(4) Rules about the reconfirmation of reservations, check-in times, and refusal to carry;

(5) Rights of the carrier and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate air carrier or aircraft, and rerouting.<sup>8</sup>

Thus, the FARs permit an airline to incorporate terms into its Conditions of Carriage by reference as long as the airline: (1) has a copy of the full text of its Conditions of Carriage available for public inspection at the airport; and (2) provides conspicuous notice on or with the ticket that: (a) there are terms incorporated by reference, and (b) that the full text of the Conditions of Carriage are available for inspection at the airport or by delivery upon request.<sup>9</sup> If the airline fails to comply with these requirements, the airline may not be able to enforce the terms of its Conditions of Carriage in a dispute with a passenger in a court of law. Airlines are also required to publish their full Conditions of Carriage on their websites.<sup>10</sup>

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<sup>8</sup> *Id.* § 253.5.

<sup>9</sup> *Id.* § 221.107 (setting forth the comparable requirements for international Conditions of Carriage).

<sup>10</sup> *Id.* § 259.6(c).

Courts have permitted airlines to notify passengers of incorporated terms by reference (i.e., the majority of the terms contained in the Conditions of Carriage) in various ways. For example, courts have enforced an airline's incorporated terms where the airline provided the requisite notice: (1) in the flight reservation confirmation e-mail;<sup>11</sup> (2) on the e-ticket itself;<sup>12</sup> (3) in ticket notices at flight check-in counters (also known as bucket slips);<sup>13</sup> and (4) in ticket jacket inserts.<sup>14</sup> In addition, because of technology changes in the e-ticket age, the DOT has issued a Compliance Statement listing various ways in which an airline can notify ticketless passengers that it has incorporated terms into the Conditions of Carriage by reference in compliance with the FARs.<sup>15</sup> The Compliance Statement lists the following compliant notices to passengers:

- (1) Carriers could have a box or stack of the notice sheets on the countertop at each staffed position at the ticket counter and at each gate . . . , with the box or stack prominently labeled "Consumer Notices."
- (2) Carriers could keep a supply of the notices at a central location within sight of all passengers near the ticket counter and also near the carrier's gates.
- (3) The carrier's agents could simply hand one of the notice sheets to each passenger as they check in at the ticket counter and at the gate, or hand it to every passenger at the ticket counter and at the gates have a supply of the notices in sight in one of the ways described above . . . .
- (4) Carriers could post a sign visible from each position at the ticket counter and at each gate briefly describing the nature of the notice (e.g., "important consumer information") and stating that a copy is available from any counter or gate agent upon request.<sup>16</sup>

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<sup>11</sup> See *Dennis v. Delta Air Lines, Inc.*, No. 10-973, 2011 U.S. Dist. LEXIS 111903, at \*4-5 (E.D.N.Y. Sept. 29, 2011) (notice of incorporated terms in confirmation email from orbitz.com); see also *Henderson v. Airtran Airways, Inc.*, No. 09-973, 2010 U.S. Dist. LEXIS 110201, at \*12-13 (S.D. Ind. Oct. 14, 2010).

<sup>12</sup> See *Vincent v. Nw. Airlines, Inc.*, No. 10-10131, 2010 U.S. Dist. LEXIS 85423, at \*5-8 (E.D. Mich. Aug. 19, 2010).

<sup>13</sup> See *Reed v. Delta Air Lines, Inc.*, No. 10-1053, 2011 U.S. Dist. LEXIS 29872, at \*8 (S.D.N.Y. Mar. 23, 2011).

<sup>14</sup> See *Levy v. Delta Airlines*, No. 02-477, 2004 U.S. Dist. LEXIS 19894, at \*2-3 (S.D.N.Y. Sept. 30, 2004); *Henderson v. Airtran Airways, Inc.*, No. 09-973, 2010 U.S. Dist. LEXIS 110201, at \*9-10 (S.D. Ind. Oct. 14, 2010).

<sup>15</sup> Ticketless Travel: Passenger Notices, 62 Fed. Reg. 19,473, 19,476 (Apr. 22, 1997).

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

The DOT also stated that it would be permissible for airlines to provide the requisite notice in advance of the flight date.<sup>17</sup> This would likely be achieved through confirmation e-mails, etc.<sup>18</sup>

Where the regulatory notice requirements are satisfied, courts have routinely enforced terms of an airline's Conditions of Carriage that are incorporated into passenger tickets by reference, and bound passengers to those terms. Examples of such enforcement include: (1) upholding ninety-day notice of claim and one-year limitation periods that were incorporated into the Conditions of Carriage;<sup>19</sup> (2) an airline's Conditions of Carriage providing the sole recourse for damages arising out of a passenger's failure to make a connecting flight, failure to arrive at the departure gate on time, and unruly behavior;<sup>20</sup> (3) upholding an airline's refusal to transport a passenger and her pet in accordance with the Conditions of Carriage due to the passenger's failure to produce the requisite travel documents;<sup>21</sup> (4) the carrier not being liable for damages arising out of the passenger's unfamiliarity with foreign customs laws as stated in the Conditions of Carriage;<sup>22</sup> (5) an airline's incorporated Conditions of Carriage providing the sole recourse for a passenger's removal from the flight;<sup>23</sup> and (6) an airline's incorporated Conditions of Carriage providing the sole recourse for damages arising out of a passenger's missed connection.<sup>24</sup>

It is significant to note that some courts place an additional non-regulatory requirement that the notice be reasonably communicated to the passenger, especially with regard to enforcing liability limitation periods. For instance, in *Sweitzer v. Pinnacle*

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<sup>17</sup> *Id.*

<sup>18</sup> *See, e.g.,* Dennis v. Delta Air Lines, Inc., No. 10-973, 2011 U.S. Dist. LEXIS 111903, at \*4-5 (E.D.N.Y. Sept. 29, 2011); Lavine v. Am. Airlines, Inc., No. 2917, 2011 Md. App. LEXIS 158, at \*2-3 (Md. Ct. Spec. App. Dec. 1, 2011); *see also* David v. United Airlines, Inc., No. 15-2262, 2016 U.S. Dist. LEXIS 52457, at \*7 (C.D. Cal. Apr. 18, 2016).

<sup>19</sup> Vincent v. Nw. Airlines, Inc., No. 10-10131, 2010 U.S. Dist. LEXIS 85423, at \*4-9 (E.D. Mich. Aug. 19, 2010).

<sup>20</sup> *Dennis*, 2011 U.S. Dist. LEXIS 111903, at \*4-8.

<sup>21</sup> Reed v. Delta Air Lines, Inc., No. 10-1053, 2011 U.S. Dist. LEXIS 29872, at \*8-10 (S.D.N.Y. Mar. 23, 2011).

<sup>22</sup> *See* Edem v. Ethiopian Airlines Enter., No. 08-2597, 2009 U.S. Dist. LEXIS 118951, at \*21-22 (E.D.N.Y. Sept. 30, 2009).

<sup>23</sup> *See* Ruta v. Delta Airlines, Inc., 322 F. Supp. 2d 391, 398-99 (S.D.N.Y. 2004); Norman v. TWA, No. 98-7419, 2000 U.S. Dist. LEXIS 14618, at \*18-19 (S.D.N.Y. Oct. 5, 2000).

<sup>24</sup> *See* Williams v. Am. Airlines, No. 97-6521, 1998 U.S. Dist. LEXIS 5730, at \*2-5 (E.D. Pa. Apr. 9, 1998).



*Airlines, Inc.*,<sup>25</sup> the court applied the reasonable communicativeness test to the notice of Conditions of Carriage where the airline sought to enforce a one-year limitation period. Similarly, in *Henderson*,<sup>26</sup> the court upheld a one-year limitation period contained in the Conditions of Carriage, where the notice of incorporation was reasonably communicated to the passenger. Notably, as discussed *infra*, this standard is more commonly applied to cases involving lost or damaged baggage.<sup>27</sup>

On the other hand, where the regulatory requirements are not satisfied, courts are not hesitant to refuse to enforce airlines' Conditions of Carriage. For example, in *Ron v. Airtran Airways, Inc.*,<sup>28</sup> the plaintiff sought damages as a result of a canceled flight. The airline moved for summary judgment based on the Conditions of Carriage that contractually set the available remedy for canceled flights. However, the court denied the airline summary judgment based on evidence that the full contract was not available for inspection at the airport.<sup>29</sup> In another case, *Sweitzer*,<sup>30</sup> the court refused to enforce the limitation period contained in the Conditions of Carriage because the airline only produced a notice of incorporated terms issued by the ticket issuer (Northwest Airlines), and not the airline who operated the flight (Pinnacle).

## B. BAGGAGE LIABILITY

It is significant to note that the FARs contain separate and distinct notice requirements for an airline's baggage liability limitations. The applicable FAR states:

- [A]n air carrier shall provide to passengers, by conspicuous written material included on or with its ticket, either:
- (a) Notice of any monetary limitation on its baggage liability to passengers; or
  - (b) The following notice: "Federal rules require any limit on an airline's baggage liability to be at least \$3,500 per passenger."<sup>31</sup>

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<sup>25</sup> No. 09-469, 2010 U.S. Dist. LEXIS 46983, at \*7-10 (W.D. Mich. May 13, 2010).

<sup>26</sup> *Henderson v. Airtran Airways, Inc.*, No. 09-973, 2010 U.S. Dist. LEXIS 110201, at \*8-13 (S.D. Ind. Oct. 14, 2010).

<sup>27</sup> For a more detailed discussion of the reasonable communicativeness test, see B. Baggage Liability, *infra*.

<sup>28</sup> 397 S.W.3d 785 (Tex.App.—Houston [14th Dist.] 2013, reh'g overruled).

<sup>29</sup> *Id.* at 789-90.

<sup>30</sup> 2010 U.S. Dist. LEXIS 46983, at \*10.

<sup>31</sup> 14 C.F.R. § 254.5.

Thus, if an airline wishes to limit its liability with respect to baggage, the airline must either provide conspicuous notice on or with the ticket of: (1) any monetary limitation of baggage liability; or (2) the statement: “Federal rules require any limit on an airline’s baggage liability to be at least \$3,500 per passenger.”<sup>32</sup> The \$3,500 minimum is set forth in 14 C.F.R. § 254.4.<sup>33</sup> The minimum amount is amended every two years,<sup>34</sup> so it is important to periodically review the regulation for any increases in the minimum limitation amount.

In considering whether an airline complies with the notice requirements of § 254.5, courts take different approaches from simply enforcing the Regulation, e.g., *Stevenson v. American Airlines, Inc.*<sup>35</sup> and *Delta Air Lines, Inc. v. Barnard*,<sup>36</sup> to applying multi-factor analyses, including the reasonable communicativeness test, released valuation doctrine, or a combination of the two tests.

The predominant analysis utilized by courts throughout the United States appears to be the reasonable communicativeness test.<sup>37</sup> In the reasonable communicativeness test, the “court first reviews the physical characteristics of the ticket itself, including ‘features such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provision in question.’”<sup>38</sup> The court then:

[E]xamines the circumstances surrounding the plaintiff’s purchase and retention of the ticket . . . The surrounding circumstances to be considered include the passenger’s familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket.<sup>39</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* § 254.4.

<sup>34</sup> *Id.* § 254.6.

<sup>35</sup> No. 92-785, 1992 U.S. Dist. LEXIS 20195, at \*5–7 (E.D. Pa. Dec. 23, 1992).

<sup>36</sup> 799 So. 2d 208, 212, 214–15 (Ala. Civ. App. 2001).

<sup>37</sup> *See, e.g., Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 524–25 (5th Cir. 2002); *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360, 1364 (9th Cir. 1987); *Harger v. Spirit Airlines, Inc.*, No. 01-8606, 2003 U.S. Dist. LEXIS 8702, at \*14–18 (N.D. Ill. May 20, 2003); *Balart v. Delta Airlines, Inc.*, No. 00-2092, 2002 U.S. Dist. LEXIS 6798, at \*9–12 (E.D. La. Apr. 8, 2002); *Huang v. Int’l Total Servs.*, No. 94-75368, 1997 U.S. Dist. LEXIS 6053, at \*11–18 (E.D. Mich. Apr. 17, 1997); *Gluckman v. Am. Airlines, Inc.*, 844 F. Supp. 151, 160–63 (S.D.N.Y. 1994).

<sup>38</sup> *Bary v. Delta Airlines, Inc.*, No. 02-5202, 2009 U.S. Dist. LEXIS 94797, at \*50 (E.D.N.Y. Oct. 9, 2009) (quoting *Deiro*, 816 F.2d at 1364).

<sup>39</sup> *Id.* at \*50–51 (quoting *Deiro*, 816 F.2d at 1364).

The court will also consider whether the plaintiff is an experienced commercial air traveler.<sup>40</sup>

The other analysis occasionally used by courts is the released valuation doctrine. Under the released valuation doctrine,

[I]n exchange for a low carriage rate, the passenger-shipper is deemed to have released the carrier from liability beyond a stated amount. The carrier can lawfully limit recovery to an amount less than the actual loss sustained only if it grants its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge. [citation omitted] Therefore, the shipper [passenger] is bound only if he has reasonable notice of the rate structure and is given a fair opportunity to pay the higher rate in order to obtain greater protection.<sup>41</sup>

In other words, the baggage liability limitation notice must be: (1) “set forth in a ‘reasonably communicative’ form, so as to result in a ‘fair, open, just and reasonable agreement’ between carrier and shipper [passenger]; and (2) offer the shipper [passenger] a possibility of higher recovery by paying the carrier a higher rate.”<sup>42</sup> This doctrine would only be applicable in a scenario where the airline is seeking to limit its liability for lost or damaged baggage, as opposed to excluding liability entirely.

In addition to limiting exposure for lost or damaged baggage to the statutory minimum of \$3,500, airlines also often seek to exclude liability entirely for certain types of items. Many Conditions of Carriage preclude certain items from being transported in checked baggage, and exclude liability for damage to such items entirely.<sup>43</sup> Such items typically include fragile and precious objects such as jewelry, antiques, artwork, computers, cameras, fine china, etc. There is a dichotomy in the case law as to whether such exclusions are enforceable. Some courts hold that because the FARs set the minimum limitation of liability at

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<sup>40</sup> *Id.* at \*51.

<sup>41</sup> *Deiro*, 816 F.2d at 1365.

<sup>42</sup> *Bary*, 2009 U.S. Dist. LEXIS 94797, at \*52 (quoting *Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 59–60 (2d Cir. 2000)); *see also* *Harger v. Spirit Airlines, Inc.*, No. 01-8606, 2003 U.S. Dist. LEXIS 8702, at \*24–27 (N.D. Ill. May 20, 2003).

<sup>43</sup> Some airlines’ Conditions of Carriage will allow these items in checked baggage if they are declared to the airline in advance and packed sufficiently to safeguard damage (*see, e.g., Delta Domestic General Rules Tariff, supra* note 5, at 32–33 (Rule 190(F) sets forth the carrier’s rules relating to fragile, perishable, or precious items).

\$3,500, airlines cannot entirely exclude liability for specific items.<sup>44</sup> Other courts have upheld the exclusions.<sup>45</sup>

Along the lines of excluding categories of items from checked baggage, a growing trend among airlines is to preclude pets from being checked as baggage. This likely stems from the plethora of cases involving harm to pets as a result of being stowed as checked baggage.<sup>46</sup> Some airlines categorically exclude pets from being stowed in the checked baggage compartment.<sup>47</sup> Other airlines exclude certain breeds that are more prone to suffering from heat exhaustion.<sup>48</sup> Still other airlines will allow pets in their checked baggage compartment, but require passengers to use special services.<sup>49</sup>

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<sup>44</sup> Feature Enters., Inc. v. Cont'l Airlines, Inc., 745 F. Supp. 198, 199 (S.D.N.Y. 1990); see also Demel v. Am. Airlines, Inc., No. 09-5524, 2011 U.S. Dist. LEXIS 13776, at \*12–20 (S.D.N.Y. Feb. 10, 2011) (airline may not exclude liability entirely for specific items under the FARs and federal common law).

<sup>45</sup> Malik v. Cont'l Airlines, 369 F. App'x 588, 589 (5th Cir. 2010); Casas v. Am. Airlines, Inc., 304 F.3d 517, 524–25 (5th Cir. 2002) (liability for lost video camera excluded entirely); Maguire v. Am. Airlines, Inc., 2011 N.Y. slip op. 50625 (N.Y. App. Term 2011) (complete exclusion for damage to camera equipment upheld).

<sup>46</sup> See, e.g., *Deiro*, 816 F.2d at 1361; Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151 (S.D.N.Y. 1994); Stevenson v. Am. Airlines, Inc., No. 92-785, 1992 U.S. Dist. LEXIS 20195 (E.D. Pa. Dec. 23, 1992).

<sup>47</sup> See, e.g., *Spirit Contract of Carriage*, *supra* note 2, at 16 (under Rule 6.4, no pets are permitted in checked baggage compartment); *Southwest Contract of Carriage*, *supra* note 2, at 20 (demonstrating Rule 6(d)(5) is the same as Spirit's Rule 6.4); *JetBlue Contract of Carriage*, *supra* note 5, at 13 (demonstrating Rule 10(D) is the same as Spirit's Rule 6.4).

<sup>48</sup> See, e.g., *American Conditions of Carriage*, *supra* note 3 (explaining under the heading "Baggage: Hazardous Items, Firearms, Live Animals: Traveling with Pets" that no brachycephalic cats or dogs or snub-nosed dogs are accepted as checked baggage) [<https://perma.cc/VEY7-GAYD>]; *Alaska Airlines, Inc. Contract of Carriage*, ALASKA AIRLINES, INC. 41 (last revised July 19, 2017) (stating Rule 15(G)(11)(d) is the same rule as American Airlines' Rule), <https://www.alaskaair.com/-/media/Files/pdf/contract-of-carriage/Alaska-Airlines-Contract-of-Carriage.ashx?lid=07242017&la=en&hash=115D7D834E4185FF0E4C412F2293C3236B4FDFC9> [<https://perma.cc/Z3NP-GD68>] [hereinafter *Alaska Contract of Carriage*].

<sup>49</sup> See, e.g., *Delta Domestic General Rules Tariff*, *supra* note 5, at 33 (Rule 190(G)(1) generally prohibits the transport of a pet in the baggage compartment, but with exceptions); *United Contract of Carriage*, *supra* note 4 (under Rule 23(H), animals may be transported via PetSafe® through United's Live Animal Service); *American Conditions of Carriage*, *supra* note 3 (explaining under the heading "Baggage: Hazardous Items, Firearms, Live Animals: Traveling with Pets" that depending on the animals' breed, size, and requirements, they can be checked or transported with American Airlines Cargo, but some breeds are still excluded) [<https://perma.cc/VEY7-GAYD>].

Finally, claimants must keep in mind that airlines' Conditions of Carriage often contain strict passenger notice requirements for lost or damaged baggage claims. Notice of claim requirements for major airlines are typically in the twenty-four-hour range,<sup>50</sup> but can be as short as four hours for low-cost airlines.<sup>51</sup>

### C. OVERBOOKING AND BUMPING

The FARs, with Conditions of Carriage following suit, contain very specific criteria concerning the involuntary bumping of a passenger from a flight due to overbooking.<sup>52</sup> An airline's Conditions of Carriage generally contain the protocol that an airline must go through when a flight is overbooked and also detail the recourse that passengers are entitled to if they are bumped from a flight due to overbooking. The Conditions of Carriage must comport with the FARs concerning the overbooking of passengers.<sup>53</sup> The applicable FAR states that passengers are generally entitled to receive compensation for bumping<sup>54</sup> under the following framework:

- (1) No compensation is required if the carrier offers alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination not later than one hour after the planned arrival time of the passenger's original flight;
- (2) Compensation shall be 200% of the fare to the passenger's destination or first stopover, with a maximum of \$675, if the carrier offers alternate transportation that, at the time the

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<sup>50</sup> See, e.g., *Delta Domestic General Rules Tariff*, *supra* note 5, at 40 (Rule 190(I)(6) specifies that notice of a claim must be presented within twenty-four hours of the alleged occurrence); *American Conditions of Carriage*, *supra* note 3 (under the heading "Baggage: Liability, Legality, Legal Action, Missing Items, Loss/Delay, Damaged Items," for damaged baggage claims, the passenger must file an initial report prior to leaving the airport or within twenty-four hours of receiving the baggage); *United Contract of Carriage*, *supra* note 4 (under Rule 28(K)(1)(d), a preliminary notice of claim must be submitted within twenty-four hours).

<sup>51</sup> See, e.g., *Spirit Contract of Carriage*, *supra* note 2, at 19 (Rule 7.3.5 states 4 hours); *Southwest Contract of Carriage*, *supra* note 2, at 29 (Rule 7(i)(8)(i) states 4 hours); *JetBlue Contract of Carriage*, *supra* note 5, at 25 (Rule 22A states 4 hours).

<sup>52</sup> 14 C.F.R. § 250 *et seq.*

<sup>53</sup> *Id.*

<sup>54</sup> It is significant to note that the statutory compensation for bumped passengers is only for passengers who are involuntarily bumped from a flight completely. It does not apply to passengers who are merely bumped from certain sections of a flight, such as first or business class. Under such circumstances, passengers are limited to only the remedies set forth in the Conditions of Carriage. See, e.g., *Delta Air Lines, Inc. v. Black*, 116 S.W.3d 745, 754-55 (Tex. 2003).

arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination more than one hour but less than two hours after the planned arrival time of the passenger's original flight; and

- (3) Compensation shall be 400% of the fare to the passenger's destination or first stopover, with a maximum of \$1,350, if the carrier does not offer alternate transportation that, at the time the arrangement is made, is planned to arrive at the airport of the passenger's first stopover, or if none, the airport of the passenger's final destination less than two hours after the planned arrival time of the passenger's original flight.<sup>55</sup>

This compensation framework must be presented to passengers in accordance with 14 C.F.R. § 250.9.<sup>56</sup>

However, under the FARs, passengers are entitled to refuse the compensation offered by the airline, and seek to recover damages in court or through some other manner.<sup>57</sup> If passengers seek to recover damages in court, they must do so in a state breach of contract action, as the FARs do not provide a federal right of action for overbooking compensation.<sup>58</sup> If a passenger declines an airline's compensation offer and proceeds to court, the "bumped passenger is entitled to contract damages upon no greater proof than facts establishing (1) ticket purchase, (2) involuntary denial of boarding within the meaning of the federal regulations, (3) non-acceptance of an airline's offer of compensation, and (4) damages."<sup>59</sup> However, according to case law, passengers bumped due to overbooking are only entitled to damages within contemplation by the airline.<sup>60</sup> Under the Conditions of Carriage and applicable FARs, airlines only anticipate being liable for the maximum amount of compensation due to bumped passengers under § 250.5 (\$1,350.00) and the maximum amount of baggage liability (\$3,500.00), assuming the passengers' bags are not promptly returned when the passenger is bumped.<sup>61</sup> Therefore, it can be argued that the maximum

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<sup>55</sup> 14 C.F.R. § 250.5(a).

<sup>56</sup> *Id.* § 250.9.

<sup>57</sup> *Id.* § 250.9(b); *West v. Nw. Airlines, Inc.*, 995 F.2d 148, 152 (9th Cir. 1993).

<sup>58</sup> *See, e.g., Kalick v. Nw. Airlines Corp.*, 372 F. App'x 317, 320 (3d Cir. 2010).

<sup>59</sup> *Stone v. Cont'l Airlines*, 804 N.Y.S.2d 652, 656 (N.Y. Civ. Ct. 2005).

<sup>60</sup> *Id.* at 657.

<sup>61</sup> *Id.* at 657–58.

amount that an airline could be liable to a bumped passenger due to overbooking is \$4,850.00.<sup>62</sup>

#### D. DOMESTIC FLIGHTS CONCLUSION

Thus, as demonstrated by the foregoing, when involved with litigation against an airline, it is extremely important to review the airline's Conditions of Carriage. If there are terms and conditions that apply to a passenger's claims, the next step is to review all notices that the airline may have provided to the passenger regarding the incorporation of terms by reference or limitations of liability, particularly with respect to baggage. The enforceability of the Conditions of Carriage could depend on the adequacy of such notices.

### III. EU REGULATION 261 CONCERNING FLIGHT CANCELLATION, DENIED BOARDING, AND DELAY

#### A. INTRODUCTION—EU REGULATION 261

For flights to, from, and within European Union Member States, the rights of passengers are governed not only by the Conditions of Carriage, but also by a pro-consumer regulation, Regulation (EC) No 261/2004 (EU 261).<sup>63</sup> However, the viability of passenger claims brought in U.S. courts will likely turn on whether EU 261 was incorporated into the Conditions of Carriage.

The European Parliament and the Council of the European Union implemented the consumer protection initiative, EU 261, on February 11, 2004, to establish common rules throughout the European Union on compensation and assistance to passengers in the event of being denied boarding, flight cancellation, or long flight delays.<sup>64</sup> EU 261 requires that air passengers be financially compensated if their flight is canceled or overbooked, unless the cancellation is caused by extraordinary circumstances which could not have been avoided even if all rea-

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<sup>62</sup> *See id.*

<sup>63</sup> EU Regulation 261/2004, 2004 O.J. (L 46) 1(EC) [hereinafter EU 261], <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0261:en:HTML> [<https://perma.cc/JZ4T-3ALB>].

<sup>64</sup> *See also* Interpretive Guidelines on Regulation (EC) No 261/2004 dated 10 June 2016, [http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016XC0615\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016XC0615(01)&from=EN) [<https://perma.cc/EH6A-YWE8>]. The European Commission explains a number of provisions of EU 261, particularly in light of relevant EU court cases.

sonable measures had been taken.<sup>65</sup> While the actual text of the regulation requires airlines to compensate air passengers only for *cancelled* flights, the European Court of Justice has extended the entitlement to flight delays greater than three hours.<sup>66</sup>

EU 261 may be applicable to air departures and arrivals involving EU Member States. However, there is no requirement that the claimant be an EU citizen to receive compensation. At present, the 28 EU Member States are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.<sup>67</sup> The applicability of EU 261 also depends upon whether the air carrier is an EU “Community Carrier,” that is, an “air carrier with a valid operating license granted by a Member State.”<sup>68</sup>

The following chart shows the types of flights which are and are not subject to EU 261.<sup>69</sup>

Routing	EU Airline (Subject to EU 261?)	Non-EU Airline (Subject to EU 261?)
From outside EU to outside EU	No	No
From outside EU to inside EU	Yes	No
From inside EU to outside EU	Yes	Yes
From inside EU to inside EU	Yes	Yes

The most likely itinerary that will give rise to an EU 261 claim in the United States is either (1) a flight from inside the EU to the United States, or (2) a flight from the United States to the EU. While EU 261 is applicable to both EU and non-EU carriers flying from the EU to the United States, or an EU carrier flying from the United States to the EU, *it is not applicable to a U.S. carrier flying from the United States to the EU.* As will be discussed

<sup>65</sup> EU 261 art. 5(3).

<sup>66</sup> Joined Cases C-402/07 & C-432/07, *Sturgeon v. Condor Flugdienst GmbH*, 2009 E.C.R. I-10923, I-10979-80, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62007CJ0402> [<https://perma.cc/87AQ-DKAM>].

<sup>67</sup> See Official Website of the European Union at [https://europa.eu/european-union/about-eu/countries\\_en](https://europa.eu/european-union/about-eu/countries_en) [<https://perma.cc/C87V-ZZ5A>].

<sup>68</sup> EU 261 art. 2 Definitions (c).

<sup>69</sup> See EU 261 art. 3.



*infra*, just because EU 261 may give rise to a claim by a U.S. claimant does not mean that the claim will be judicially enforced by an American court.

#### B. COMPENSATION UNDER EU 261

EU 261 provides that a passenger is entitled to compensation<sup>70</sup> as follows:

1. *For canceled flights, denial of boarding, and flights delayed by three hours or more to the point of destination:*
  - €250 for flights of 1,500 kms or less
  - €400 for all other internal EU flights, and all other flights between 1,500–3,500 kms
  - €600 for all other flights over 3,500 kms
2. *For canceled flights and flights delayed by five hours or more:*
  - rights to reimbursement or re-routing
3. *For canceled flights and flights delayed by two hours or more (depending on the distance):*
  - rights to care (refreshments, meals, hotel accommodation, etc.)

If the carrier offers re-routing in the event of a cancellation, denied boarding, or delay, then the above amounts can be discounted by 50%.<sup>71</sup>

It should be noted that the right to compensation under EU 261 is subject to an “extraordinary circumstances” defense, so that carriers are not obliged to pay compensation if they can “prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.”<sup>72</sup> This defense is applicable to cancellations through the express wording of EU 261 art. 5(3) (Cancellation), and to delays through European Court of Justice case law.<sup>73</sup>

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<sup>70</sup> EU 261 art. 7.

<sup>71</sup> EU 261 art. 7.2.

<sup>72</sup> *Kruger v. Virgin Atl. Airways, Ltd.*, 976 F. Supp. 2d 290, 313 (E.D.N.Y. 2013) (District Judge adopted the Report and Recommendation of the Magistrate) (quoting Case C-12/11, *McDonagh v. Ryanair Ltd.*, 2013 O.J. (C86) 2).

<sup>73</sup> *Joined Cases C-581/10 and C-629/10, Nelson v. Deutsche Lufthansa AG, TUI Travel plc, v. Civil Aviation Authority*, <http://curia.europa.eu/juris/document/document.jsf?text=docid=128861&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=301049> [<https://perma.cc/B8NW-QZEU>].

## C. EU 261 LITIGATION IN THE UNITED STATES

In recent years, passengers with unresolved claims for compensation under EU 261 for delay or cancellation have commenced actions in the United States to enforce their rights rather than resolving them through the EU-based national enforcement bodies contemplated in Article 16 of EU 261,<sup>74</sup> or bringing suit in the European Union. In early 2011, a flurry of putative class action passenger lawsuits were commenced in the Northern District of Illinois against multiple air carriers alleging violations of EU 261 and seeking applicable compensation. After years of litigation and multiple decisions from various judges in the Northern District of Illinois, the legal theories coalesced and a concise body of law emerged that largely favors the air carriers. The decisions fall into two distinct categories, depending on whether EU 261 was incorporated into the carrier's Conditions of Carriage. If EU 261 *was not* incorporated into the Conditions of Carriage, the key issue was whether EU 261, by its own terms, created a private right of action in American courts that would sanction a direct claim under EU 261. If EU 261 *was* incorporated into the Conditions of Carriage, the courts had to decide breach of contract claims based on the language of the Conditions of Carriage.

1. *Private Right of Action Decisions*

With respect to causes of action seeking compensation directly under EU 261, the carriers uniformly prevailed. In *Lozano v. United Cont'l Holdings, Inc.*,<sup>75</sup> *Volodarskiy v. Delta Air Lines, Inc.*,<sup>76</sup> *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*,<sup>77</sup> *Polinovsky v. Deutsche Lufthansa, AG*,<sup>78</sup> *Gurevich v. Compagnia Aereas Italiana, SPA*,<sup>79</sup> and *Bergman v. United Airlines, Inc.*,<sup>80</sup> the various judges considered causes of action for direct claims for compensation under EU 261. The courts grappled with the question of

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<sup>74</sup> A list of National Enforcement Bodies under EU 261 is located online. See [http://ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/2004\\_261\\_national\\_enforcement\\_bodies.pdf](http://ec.europa.eu/transport/sites/transport/files/themes/passengers/air/doc/2004_261_national_enforcement_bodies.pdf).

<sup>75</sup> No. 11-8258, 2013 U.S. Dist. LEXIS 138241 (N.D. Ill. Sept. 26, 2013) (Nordberg, J.).

<sup>76</sup> 987 F. Supp. 2d 784 (N.D. Ill. 2013) (Chang, J.).

<sup>77</sup> 17 F. Supp. 3d 743 (N.D. Ill. 2014) (Durkin, J.).

<sup>78</sup> No. 11-780, 2014 U.S. Dist. LEXIS 31735 (N.D. Ill. Mar. 12, 2014) (Coleman, J.).

<sup>79</sup> No. 11-1890, Order [Dkt. No. 105] (N.D. Ill. Mar. 18, 2014) (granting motion to reconsider direct claim to enforce EU 261) (Coleman, J.).

<sup>80</sup> No. 12-7040, Order [Dkt. No. 46] (N.D. Ill. June 18, 2014) (Tharp, J.).

whether the EU intended for EU 261 to be applied extraterritorially by specifically allowing passengers to file claims under the regulation in courts outside of the EU.<sup>81</sup> After considering the language of EU 261, the courts consistently concluded that direct actions to enforce EU 261 rights are limited to courts in EU Member States. This rationale was adopted by the Seventh Circuit in its review of Judge Chang's decision in *Volodarskiy*.<sup>82</sup> After reviewing the text of EU 261, the court concluded that "EU 261 is not judicially enforceable outside the courts of EU Member States."<sup>83</sup> Based on the foregoing decisions, there is now very strong support for the notion that there is no private right of action under EU 261 in U.S. courts.<sup>84</sup>

## 2. *Breach-of-Contract Decisions*

With respect to causes of actions alleging that air carriers expressly incorporated EU 261 into their Conditions of Carriage, the threshold issue that various judges in the Northern District

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<sup>81</sup> The air carriers also argued that the claims were preempted by the Airline Deregulation Act (ADA) and the Montreal Convention. In *Lozano*, Judge Nordberg declined to address the preemption arguments as superfluous after deciding that EU 261 was not enforceable outside the courts of EU Member States. *Lozano v. United Cont'l Holdings, Inc.*, No. 11-8258, 2013 U.S. Dist. LEXIS 138241, at \*4 (N.D. Ill. Sept. 26, 2013). In *Volodarskiy*, Judge Chang considered the alternative argument of whether the ADA and the Montreal Convention would preempt the claims. Judge Chang concluded that the ADA does not expressly preempt a direct EU 261 claim because the ADA's definition of the word "State" does not include foreign countries and also concluded that the plaintiff's claims were not inconsistent with the Montreal Convention. *Volodarskiy*, 987 F. Supp. 2d at 793-94. In *Giannopoulos*, Judge Durkin also considered the alternative ADA preemption argument and agreed with Judge Chang that the ADA does not expressly preempt a direct EU 261 claim. *Giannopoulos*, 17 F. Supp. 3d at 751-52. However, Judge Durkin found that the ADA impliedly preempts a direct cause of action brought under EU 261. *Id.* In *Kruger v. Virgin Atl. Airways, Ltd.*, 976 F. Supp. 2d 290, 312-13 (E.D.N.Y. 2013), the court dismissed the plaintiffs' EU 261 claims on ADA preemption grounds because EU 261 was not incorporated into the contract of carriage.

<sup>82</sup> *Volodarskiy v. Delta Air Lines, Inc.*, 784 F.3d 349 (7th Cir. 2015).

<sup>83</sup> *Id.* at 357.

<sup>84</sup> In *Dochak v. Polskie Linie Lotnicze Lot S.A.*, No. 15-4344, 2016 U.S. Dist. LEXIS 69632 (N.D. Ill. May 27, 2016) (J. Kendall), a case decided after the Seventh Circuit's decision in *Volodarskiy*, the plaintiffs recognized that a direct claim under EU 261 is not available in the United States, so they asserted the nuanced argument that the air carrier failed to comply with the provisions of EU 261 that had been incorporated into the conditions of carriage. However, the court found that EU 261, although mentioned in the contract of carriage, was not incorporated into the contract of carriage. *Id.* at \*12.

of Illinois had to resolve was whether the ADA<sup>85</sup> preemption applies. The rule emerged that ADA preemption does not apply because the contractual obligation is a self-imposed obligation.<sup>86</sup>

In *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*,<sup>87</sup> and *Polinovsky v. Deutsche Lufthansa, AG*,<sup>88</sup> the air carriers argued that the plaintiffs' breach of contract causes of action should be dismissed because they were preempted by the ADA. The air carriers argued that state law causes of action are preempted by the ADA when two elements are present: (1) the claim relates to airline prices, routes, or services; and (2) the claim involves the enactment or enforcement of a state law, regulation, or provision, including state common law.<sup>89</sup> The air carriers argued that both elements were present.

However, the plaintiffs argued that the exception to ADA preemption established in *American Airlines v. Wolens*<sup>90</sup> exempted their claims from dismissal. In *Wolens*, the Supreme Court articulated an exception to ADA preemption for routine breach of contract claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings."<sup>91</sup> To avoid ADA preemption under *Wolens*, a breach of contract claim must be based on the parties' own contract, with no enlargement or enhancement through state laws or policies external to the agreement.<sup>92</sup> The plaintiffs argued that because the air carriers' conditions of carriage contained an agreement to pay compensation according to EU 261, the *Wolens* exception applied. The courts agreed with the plaintiffs that the *Wolens* exception to preemption applied because the air carriers agreed to pay EU 261 compensation in their conditions of carriage.<sup>93</sup>

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<sup>85</sup> 49 U.S.C. § 41713 (2012).

<sup>86</sup> *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*, No. 11-775, 2011 U.S. Dist. LEXIS 82304 (N.D. Ill. July 27, 2011); *Polinovsky v. Deutsche Lufthansa, AG*, No. 11-780, 2012 U.S. Dist. LEXIS 44363 (N.D. Ill. Mar. 30, 2012).

<sup>87</sup> 2011 U.S. Dist. LEXIS 82304.

<sup>88</sup> 2012 U.S. Dist. LEXIS 44363.

<sup>89</sup> *Id.* at \*6 (citing *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1432 (7th Cir. 1996); *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 607 (7th Cir. 2000)).

<sup>90</sup> 513 U.S. 219 (1995).

<sup>91</sup> *Wolens*, 513 U.S. at 228.

<sup>92</sup> *Id.* at 233.

<sup>93</sup> In other cases, breach of contract claims were preempted because the air carrier's conditions of carriage did not expressly incorporate EU 261. See *Polinovsky v. British Airways, PLC*, No. 11-779, 2012 U.S. Dist. LEXIS 64059 (N.D. Ill. Mar. 30, 2012) (no explicit reference to EU 261 in the carrier's Conditions of Carriage, and generic reference to "by any law which may apply," is insufficient to

In addition, the *Giannopoulos* and *Polinovsky* courts also rejected the air carriers' argument that the plaintiffs' claims were preempted by the Montreal Convention.<sup>94</sup> Under Seventh Circuit precedent, state law claims are not preempted by the Montreal Convention if the claims are not inconsistent with the Convention.<sup>95</sup> In its 2012 decision, the *Giannopoulos* court considered the issue of whether EU 261 compensation is "punitive, exemplary or any other non-compensatory damages" which are prohibited by Montreal Convention Article 29.<sup>96</sup> The court concluded that since one of the purposes of EU 261 is to compensate passengers "and the fact that standardized damages can be considered a form of compensation," the court rejected that EU 261 payments are punitive in nature.<sup>97</sup> Accordingly, because the compensation scheme of EU 261 is not inconsistent with Article 29 of the Montreal Convention, claims under EU 261 are not preempted by the Montreal Convention.<sup>98</sup>

Even in cases where plaintiffs can make an initial showing that EU 261 was expressly incorporated into their Conditions of Carriage, the road to recovery is often bumpy. In *Gurevich v. Compagnia Aereas Italiana, SPA*,<sup>99</sup> the passengers' tickets for travel between Chicago and Rome included a statement of the conditions of their contract with Alitalia, and that statement incorporated by reference the airline's "General Conditions of Carriage." Those general conditions provided that, in accordance with EU regulations, Alitalia would pay compensation to

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trigger the *Wolens* exception); *Lozano v. United Cont'l Holdings, Inc.*, No. 11-8258, 2012 U.S. Dist. LEXIS 132589 (N.D. Ill. Sept. 17, 2012) (no explicit reference to EU 261 in carrier's Conditions of Carriage, and the mere posting of a notice concerning EU 261 on the carrier's website is insufficient to incorporate EU 261 into the Conditions of Carriage).

<sup>94</sup> See Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

<sup>95</sup> *Giannopoulos v. Iberia Lineas Aereas de Espana, S.A.*, No. 11-775, 2012 U.S. Dist. LEXIS 156446, at \*9-10 (N.D. Ill. Nov. 1, 2012) (the court considered the claims of another set of class action plaintiffs (the Varsamis plaintiffs) and found that the Montreal Convention does not prohibit recovery under EU 261); *Polinovsky v. Deutsche Lufthansa, AG*, No. 11-780, 2012 U.S. Dist. LEXIS 44363, at \*10-12 (N.D. Ill. Mar. 30, 2012).

<sup>96</sup> *Giannopoulos*, 2012 U.S. Dist. LEXIS 156446, at \*12.

<sup>97</sup> *Id.* at \*18.

<sup>98</sup> The *Giannopoulos* and *Polinovsky* plaintiffs eventually accepted Rule 68 Offers of Judgment from the respective air carriers. *Giannopoulos*, 11-775, Dkt. No. 262 (N.D. Ill. Mar. 20, 2014); *Polinovsky*, No. 11-780, Dkt. No. 201 (N.D. Ill. June 4, 2014).

<sup>99</sup> No. 11-1890, 2012 Dist. LEXIS 190098 (N.D. Ill. Jan. 17, 2012).

passengers in case of cancellation. However, Alitalia had previously filed a tariff with the U.S. DOT stating that its General Conditions of Carriage *did not* apply to transportation between domestic locations and places outside the United States. Faced with a conflict between the filed tariff and the General Conditions of Carriage, the provisions of the tariff trumped the General Conditions of Carriage because a validly filed international tariff has the force and effect of a statute, and is binding on passengers and shippers even if its terms are not included in the transportation documents.<sup>100</sup> Thus, the district court dismissed the Gureviches' claim. Undeterred, the Gureviches filed a Third-Party Complaint with the DOT challenging the tariff.<sup>101</sup> While the DOT upheld the validity of the tariff, it was none too pleased with Alitalia. It found Alitalia's contradictory statements in the General Conditions of Carriage and tariff to be an unfair and deceptive trade practice.<sup>102</sup> The DOT ordered that Alitalia cease and desist from similar violations and assessed a compromise civil penalty of \$125,000.<sup>103</sup> While the DOT Order did not resuscitate the Gureviches' claim in the district court, the parties eventually entered into a confidential settlement agreement.<sup>104</sup>

Last year, the Seventh Circuit affirmed two district court decisions dismissing plaintiffs' claims which were based on breach of contract, but where the underlying flights involved code share agreements.<sup>105</sup> The twist of the code sharing agreements<sup>106</sup> proved fatal to the plaintiffs.

In the case of *Baumeister*, plaintiff Baumeister bought a pair of tickets from Lufthansa, with an itinerary of Stuttgart to Munich to San Francisco. The first leg, Stuttgart to Munich, was to be flown not by Lufthansa, but by a German airline (since defunct)

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<sup>100</sup> *St. Paul Ins. Co. v. Venezuelan Int'l Airways, Inc.*, 807 F.2d 1543, 1548–49 (11th Cir. 1987); *Tishman & Lipp, Inc. v. Delta Air Lines*, 413 F.2d 1401, 1403–04 (2d Cir. 1969).

<sup>101</sup> *Gurevich v. Compagnia Aerea Italiana, SPA*, DOT Docket OST 2012-0040 Order 2013-3-12, <https://www.regulations.gov/document?D=DOT-OST-2012-0040-0007> [<https://perma.cc/FJ5U-TDKV>] [select "View the live page"].

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Gurevich v. Compagnia Aereas Italiana, SPA*, No. 14-1816, Dkt No. 29 (7th Cir. Sept. 16, 2015).

<sup>105</sup> *Baumeister v. Deutsche Lufthansa, AG*, 811 F.3d 963 (7th Cir. 2016).

<sup>106</sup> Code sharing is generally understood to mean a marketing arrangement in which an airline places its designator code on a flight operated by another airline, and sells tickets for that flight. *See, e.g.*, <https://www.transportation.gov/policy/aviation-policy/licensing/code-sharing> [<https://perma.cc/486R-6HSV>].

named Augsburg Airways.<sup>107</sup> However, that first flight was canceled, and though Lufthansa arranged for substitute transportation from Stuttgart to San Francisco, Baumeister arrived more than seventeen hours after he was originally scheduled to arrive. Because EU 261 obligates the *operating* carrier to provide compensation (Augsburg Airways), rather than Lufthansa which issued the tickets, the dismissal of the claims against Lufthansa was affirmed.<sup>108</sup>

In the case of *Varsamis* (also decided in the *Baumeister* decision), the action was not against the carrier that issued the tickets (American Airlines), but against the operating carrier, Iberia Lineas Aereas de Espana (Iberia). The two plaintiffs purchased roundtrip tickets from American Airlines: outbound Dallas to Madrid to Venice and returning Rome to Madrid to Dallas, with the Rome to Madrid leg to be flown by Iberia. All was fine on the outbound journey, but on the return, a delay of the Rome to Madrid flight caused the plaintiffs to miss their flight from Madrid to Dallas. Re-routed on a flight through Amsterdam, the plaintiffs arrived almost twenty-one hours after they were originally scheduled to arrive. The case turned on the fact that the plaintiffs had a contract with American Airlines (which *did not* incorporate EU 261 into the contract of carriage) and not with the operating carrier, Iberia (which *did* incorporate EU 261 into the contract of carriage).<sup>109</sup> Consequently the dismissal of the claims against Iberia was affirmed.<sup>110</sup>

The Seventh Circuit's decision in *Baumeister* raised an interesting question. The court, *sua sponte*, pondered: "it can be questioned how a promise to abide by [EU 261] could be enforced in U.S. courts given our holding in *Volodarskiy* that the regulation can be enforced only in European courts or agencies."<sup>111</sup> Because the parties did not brief the issue, nor would its resolution have changed the outcome of the appeal, the Seventh Circuit did not address the issue. However, it is certainly possible

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<sup>107</sup> Baumeister initially asserted an administrative claim with the regulatory body charged with enforcing EU 261 in Germany, but that claim was dismissed when the regulator learned that Lufthansa was not the operating carrier on the flight between Stuttgart and Munich. The operating carrier on the affected leg was Augsburg Airways, not Lufthansa. *Baumeister*, 811 F.3d at 966.

<sup>108</sup> *Id.* at 966–67.

<sup>109</sup> *Id.* at 968.

<sup>110</sup> The decision pointed out that the "Varsamises could have sued Iberia in Europe for violation of EU 261, but did not." *Id.* at 969.

<sup>111</sup> *Id.* at 966.

that the Seventh Circuit may address this question in a future decision.

In a case decided one month after the Seventh Circuit's decision in *Baumeister*, the plaintiff in *Bytska v. Swiss Int'l Air Lines, Ltd.*<sup>112</sup> alleged that Swiss International Air Lines, Ltd. (Swiss) and Ukraine International Airlines (UIA) incorporated EU 261 into their Conditions of Carriage. However, after reviewing each air carrier's Conditions of Carriage, the district court concluded that EU 261 was not incorporated into either carrier's Conditions of Carriage. Therefore, it dismissed the causes of action against Swiss and UIA based on breach of contract, while also noting that a direct action under EU 261 is not viable outside of the courts of EU Member States.

#### D. EU 261 CONCLUSION

After six years of litigation, mostly in the U.S. District Court for the Northern District of Illinois as well as in the Seventh Circuit, the above cases provide a roadmap for navigating EU 261 claims in the United States. For a claim to survive, it must be based on something more than a direct claim under EU 261.<sup>113</sup> Rather, the claimant will need to demonstrate that it has a contract with the operating carrier, and that EU 261 is incorporated into that contract of carriage.<sup>114</sup> Even then, a few bumps can be encountered, for example, where a tariff conflicts with the provisions of the contract of carriage.<sup>115</sup>

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<sup>112</sup> No. 15-483, 2016 U.S. Dist. LEXIS 26245 (N.D. Ill. Mar. 1, 2016).

<sup>113</sup> *Volodarskiy v. Delta Air Lines, Inc.*, 784 F.3d 349 (7th Cir. 2015).

<sup>114</sup> *See Baumeister v. Deutsche Lufthansa, AG*, 811 F.3d 963 (7th Cir. 2016).

<sup>115</sup> *Gurevich v. Compagnia Aereas Italiana, SPA*, No. 11-1890, 2012 Dist. LEXIS 190098 (N.D. Ill. Jan. 17, 2012).