2012

Keep Your Hands Off My Nuts - Airlines, Peanut Allergies, and the Law

John G. Browning

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol76/iss4/5

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
I. INTRODUCTION

In June 2010, the Department of Transportation (DOT) issued a Notice of Proposed Rulemaking (NPRM) soliciting public comment on a host of weighty consumer rights issues, all under the rubric of "Enhancing Airline Passenger Protections." The NPRM covered such hot-button issues as tarmac delay contingency plans, baggage fees, full fare price advertising and post-

---

* John G. Browning is the founding partner of the Dallas office of Lewis Brisbois Bisgaard & Smith LLP, where he handles a wide variety of civil litigation in state and federal courts. He received his B.A. with general and departmental honors from Rutgers University in 1986 and his J.D. from the University of Texas School of Law in 1989. He is a frequent writer and speaker on legal issues, and has spoken at the SMU Air Law Symposium and the ABA Aviation Litigation Conference in New York.

purchase price increases, oversold flights and the “bumping” of passengers, and flight status changes.\textsuperscript{2} Yet, out of all of these subjects of significant interest to air travelers, one topic received the overwhelming majority of the over 2,100 comments logged by the DOT: peanut allergies.\textsuperscript{3} For decades, the aviation industry has wrestled with the issue of how to protect passengers who suffer from peanut allergies, while simultaneously navigating the legal landscape of potential civil liability for both disability discrimination and personal injury. And while the issue of peanut allergies is a subject of keen interest to consumers (as demonstrated by the public response to the June 2010 NPRM)\textsuperscript{4} and airlines alike, just how likely is meaningful action in light of applicable federal law that limits the DOT’s rule-making authority? In a nutshell, this article will examine the prevalence and pertinent science of peanut allergies, the treatment by airlines of peanut allergy sufferers under the Air Carrier Access Act, the patchwork quilt of peanut allergy policies promulgated by various airlines, the evolving climate of potential civil liability, and the regulatory framework impacting the prospects for legal reform.

II. PEANUT ALLERGIES

Imagine suffering from an allergy to one of the most popular food products on the planet and one commonly associated with air travel—an allergy that is, according to the Mayo Clinic, “one of the most common causes of anaphylaxis.”\textsuperscript{5} Symptoms of anaphylaxis include constricted airways, “swelling of [the] throat” causing difficulty breathing, “rapid pulse,” “[a] severe drop in blood pressure” as the individual goes into shock, and “dizziness” or a “loss of consciousness.”\textsuperscript{6} While the most common trigger for an allergic reaction to peanuts is direct contact—eating peanuts or foods containing peanuts—a reaction can also be caused by cross-contact—the unintended exposure of another

\textsuperscript{2} Id. at 32,318, 32,325, 32,327.


\textsuperscript{4} See Enhancing Airline Passenger Protections, 76 Fed. Reg. at 23,110.


\textsuperscript{6} Id.
food to peanuts during processing or handling.\textsuperscript{7} Even more
important for this discussion, an allergic reaction can result from
inhalation of peanut dust or “aerosols containing peanuts, such as . . . peanut oil cooking spray.”\textsuperscript{8} An environment with close
quarters and recirculated air, such as that on an airplane, can
present a risk of allergic reaction even if the peanuts or peanut
dust are exposed in another section of the cabin.\textsuperscript{9}

Statistics on the prevalence of peanut allergies vary. According
to the American Academy of Allergy, Asthma and Immunology
in Milwaukee, Wisconsin, “[m]ore than [three] million people in the United States report being allergic to peanuts, tree nuts, or both”—that is roughly 1% of the general popula-
tion.\textsuperscript{10} Other studies put the figure at more like .6% to 1.3% of
the population.\textsuperscript{11} The Food Allergy and Anaphylaxis Network,
based in Fairfax, Virginia, maintains that peanut allergies cause
15,000 emergency room visits and around 100 deaths each
year.\textsuperscript{12} Meanwhile, other studies cast a more jaundiced eye on
the level of risk presented by allergic reactions to peanuts. One
physician and Harvard Medical School professor pegs the num-
ber of actual food allergy deaths each year in the United States
at 150 and points out that, out of an estimated thirty million
hospitalizations nationwide each year, just 2,000 are due to food
allergies.\textsuperscript{13} A study by the Centers for Disease Control and Pre-
vention reported a total of eighty-eight deaths among Americans

\textsuperscript{7} Peanut Allergy: Causes, Mayo Clinic, http://www.mayoclinic.com/health/pea-
\textsuperscript{8} Id.
\textsuperscript{9} Tas Anjarwalla, Should Peanuts Be Banned From Planes?, CNN.COM (June 22,
2010), http://articles.cnn.com/2010-06-22/travel/ban.peanuts.planes_1_pea-
nut-allergy-air-carrier-access-act-buffer-zone?_s=PM:TRAVEL.
\textsuperscript{10} Allergy Statistics, Am. Acad. of Allergy, Asthma & Immunology, http://
2, 2010) (citing another source). I use the term “peanut allergy” as referring to
the condition of being allergic to both peanuts and tree nuts (almonds, pistachios, cashews, etc.).
\textsuperscript{11} A. Wesley Burks, Editorial, Early Peanut Consumption: Postpone or Promote?, 123
J. Allergy & Clinical Immunology 424, 424 (2009); Food Allergy Facts and Statis-
tics for the U.S., The Food Allergy & Anaphylaxis Network (FAAN),
of Allergy & Infectious Diseases, Guidelines for the Diagnosis and Mgmt. of
Food Allergy in the U.S. 7 (2010), available at http://www.niaid.nih.gov/top-
ics/foodAllergy/clinical/Documents/FAguidelinesPatient.pdf.
\textsuperscript{12} Managing a Peanut Allergy, PEANUTFACTS.COM, http://www.peanutfacts.com/
\textsuperscript{13} See Nicholas A. Christakis, This Allergies Hysteria Is Just Nuts, 337 BRITISH MED.
J. 1384, 1384 (2008).
during the period from 1979 to 1995 attributed to all food allergies, including peanut allergies.\textsuperscript{14}

Research has indicated that the rate of food allergies in general, and peanut allergies in particular, are higher in children. The most recent estimate from the Centers for Disease Control and Prevention is that three million U.S. children (translating to about 4\% of the youth population) are affected by food allergies such as those to peanuts and milk.\textsuperscript{15} In contrast, a 2011 study funded by the Food Allergy Initiative (a nonprofit founded by parents of children with allergies)\textsuperscript{16} and published in the journal \textit{Pediatrics} found that nearly double that number—roughly six million children or 8\% of the youth population—suffer from food allergies.\textsuperscript{17} Moreover, this survey concluded that about 40\% of effected children have severe reactions.\textsuperscript{18} In addition, certain studies point to a rise in the number of children with food allergies. One 2003 report found that the number of children with peanut allergies doubled from 1997 to 2002.\textsuperscript{19} A study co-sponsored by the Food Allergy Initiative concluded that the rate of food allergies among children actually tripled between 1997 and 2008.\textsuperscript{20}

Are the alarms sounded by concerned parents and food allergy advocates exaggerated? After all, experts point out that 20\% of children with an allergy to peanuts and 10\% of children with an allergy to tree nuts may outgrow it.\textsuperscript{21} Dr. Nicholas Christakis, a professor at Harvard Medical School, calls the response
to peanut allergies "a gross over-reaction to the magnitude of the threat," and he says that well-intentioned efforts to protect children from nuts has created a "cascade of anxiety." Dr. Michael C. Young, author of *The Peanut Allergy Answer Book*, says that while secondary contact—such as simply being in close proximity to peanuts or peanut products—"might pose a risk to an allergic individual, the occurrence of a reaction is rare and" usually "limited to minor symptoms." When direct contact (through ingestion of peanuts or inhalation of peanut dust) occurs, however, the reaction is frequently swift and severe. For a person with a peanut allergy, his or her immune system creates IgE (Immunoglobulin E) antibodies to the food, "causing the body to release histamine and other chemicals which cause the outward symptoms . . . such as hives." "Anaphylaxis can proceed very rapidly"—in as little as minutes after the ingestion of peanuts—and result in lip, tongue, and throat swelling. The constriction of airways and difficulty swallowing and breathing can result in loss of consciousness. Someone suffering from such a severe reaction "must be immediately treated with an injection of epinephrine (adrenaline) and taken to the emergency room." Many of those who suffer from peanut allergies carry a self-injection kit, such as an EpiPen, EpiPen Jr., Anakit, or Twinject. A shot of epinephrine temporarily alleviates the attack's symptoms and gives an individual additional time within which to seek emergency treatment.

Complicating the fact that disputes exist concerning the prevalence of peanut allergies and the actual degree of risk posed is the relative paucity of research on peanut allergic reactions during air travel. The University of Michigan Division of Allergies

---

22 Christakis, *supra* note 13, at 1384.
25 *Id.*
26 *Id.* at 90–91.
28 Plicka, *supra* note 24, at 91.
and Clinical Immunology conducted one such study. However, Dr. Anna Nowak-Wegrzyn, an associate professor of pediatrics at Mt. Sinai School of Medicine’s Jaffe Food Allergy Institute, says that there still has not “been any systematic study of peanut allergic reactions on flights.”

Dr. Scott H. Sicherer, who also studies food allergies at Mt. Sinai, states that the “few limited studies on airline passengers with peanut allergies found a number of people reporting symptoms while flying, but few were severe or life-threatening.” Dr. Sami Bahna of the American College of Allergy, Asthma and Immunology is another voice urging caution about implementing policy changes in the absence of more definitive research. He says: “Unfortunately, life is not risk-free . . . . A minority of people are severely allergic to peanuts, but it is not reasonable or possible to expect schools or airlines to be peanut-free. Consideration should be also given to the freedom of the vast majority of non-allergic persons.”

The Federal Aviation Administration (FAA) itself has studied this issue, at least as part of a larger overall survey. In May 2000, the FAA Civil Aerospace Medical Institute issued a report that considered data from 1996 to 1997 on passenger and crew medical events. It purported to cover roughly 20% of U.S. airline flights during that time period. According to the study, 2.4% of the in-flight medical episodes reported were allergic reac-

---

31 Tas Anjarwalla, supra note 9.
35 Id.
There were no deaths associated with any of these allergic episodes. The vocal response from the consuming public over the severity of the risk to peanut-allergic individuals must be balanced with such factors as the utility of requiring air carriers—most of which have already implemented peanut policies of varying degrees—to undertake additional measures. At the same time, one must consider the relative absence of scientific studies on peanut allergic reactions during air travel, the limitations this places on the prospect for regulatory change, and the extent to which legal protections may already exist for those with peanut allergies and may provide remedies for being discriminated against or for suffering personal injury or death during air travel.

III. EXISTING LEGAL PROTECTIONS FOR THOSE WITH PEANUT ALLERGIES

Assuming that the prevalence of peanut allergies in the general population and the medical risks that such an allergy poses to those afflicted warrant some degree of legal protection, one must consider whether the existing legal and regulatory framework provides such safeguards. The most useful starting point for this consideration is the Air Carrier Access Act of 1986 (ACAA), which prohibits “U.S. and foreign air carriers from discrimination against passengers on the basis of disability.” In Part 382 of the rules implementing the ACAA, the DOT defined an “individual with a disability” as “any individual who has a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.” The rule went on to define “physical . . . impairment” as “[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lym-

36 Id. at 3.
37 Id. at 7–8.
40 Id. § 382.3.
phatic, skin, and endocrine."\textsuperscript{41} Such a definition, the rule went on to spell out, would encompass "such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, drug addiction, and alcoholism."\textsuperscript{42}

Although merely having an allergy of one kind or another generally would not automatically render a person "disabled" in the legal sense, if a person's allergy is of such severity that it substantially limits a major life activity, then that person satisfies the legal definition of an individual with a disability. Part 382 of the rule defines "major life activities" to mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, \textit{breathing}, learning, and working.\textsuperscript{43} In light of the physical reaction manifested in the case of those with severe peanut allergies—anaphylaxis, including constriction of the airways and difficulty breathing and swallowing—a peanut allergy sufferer clearly meets the definition of someone with a physical impairment that can substantially limit a major life activity, namely, breathing.

Under Subpart B of Part 382, carriers cannot "discriminate against any qualified individual with a disability, by reason of such disability, in provision of air transportation."\textsuperscript{44} Not only must they "not require [those] with a disability to accept special services" that are not requested (such as preboarding), but carriers also cannot "take any adverse action against an individual ([such as] refusing to provide transportation) because" that person is asserting rights protected under the rule and the ACA.\textsuperscript{45} If necessary, carriers "must modify [their] policies, practices, and facilities when needed to provide nondiscriminatory service to a particular individual with a disability."\textsuperscript{46} However, airlines are allowed to "require preboarding as a condition of receiving certain seating . . . accommodations."\textsuperscript{47}

This has particular significance with regard to accommodating those disabled by virtue of a severe peanut allergy. In light of the danger posed by exposure to airborne transmission of

\begin{itemize}
  \item \textsuperscript{41} Id. § 382.3(a)(1).
  \item \textsuperscript{42} Id. § 382.3(a)(2).
  \item \textsuperscript{43} Id. § 382.3(b) (emphasis added).
  \item \textsuperscript{44} Id. § 382.11(a)(1).
  \item \textsuperscript{45} Id. § 382.11(a)(2)–(4).
  \item \textsuperscript{46} Id. § 382.13(a).
  \item \textsuperscript{47} Id. § 382.11(a)(2).
\end{itemize}
peanut dust or particles in an aircraft cabin, does a legal basis exist under the ACAA for either establishing peanut-free "buffer zones" or requiring peanut allergy sufferers to preboard and police their seating area to reduce the chance of exposure to peanuts? Reading Part 382, the answer is yes. A considerable portion of the regulations addresses seating and other accommodations for passengers with vision impairments, hearing impairments, mobility restrictions, wheelchairs, service animals, or personal care attendants. Section 382.81 lists the various types of passengers and their disabilities for whom carriers must make seating accommodations (such as providing adjoining seats for personal care attendants or greater legroom for those with an immobilized leg), and peanut allergy sufferers are not discussed. However, section 382.83 details the various ways in which airlines are permitted to "make seating accommodations," including "block[ing] an adequate number of . . . seats" and holding off on assigning them "until [twenty-four] hours before the [flight's] scheduled departure," providing notice to all passengers that seats are subject to reassignment if needed to accommodate those with disabilities, and designating seats "as 'priority seats' for passengers with a disability." Such measures allow carriers to seat passengers who pre-identify themselves as disabled with severe peanut allergies in a manner that minimizes risk of exposure to peanut products. In addition, for those airlines that "do not provide advance seat assignments" to travelers, section 382.83(c) mandates that carriers allow those passengers with a qualifying disability "to board the aircraft before other passengers, including other 'preboarded' passengers, so that the passengers needing seating accommodations can select seats that best meet their needs." Section 382.85 of the rule spells out that "a passenger who self-identifies as having a disability other than" those specifically enumerated in section 382.81—such as those with severe peanut allergies—are nevertheless entitled to these seat assignment accommodations. Finally, air carriers that "wish to . . . [adopt] a different method of providing seating accommodations" than what section 382 specifies—including ways calculated to accommodate peanut allergy

48 See id. §§ 382.1-.159.
49 Id. § 382.81.
50 Id. § 382.83(a).
51 Id. § 382.83(c).
52 Id. § 382.85.
sufferers—can obtain written permission from the DOT pursuant to section 382.83(d).58

Most of section 382’s provisions are directly applicable to those with mobility-related disabilities and consequently include directives for airlines on providing assistance with boarding, deplaning, and stowage of wheelchairs “and other assistive devices.”54 However, there are other provisions that are potentially applicable to those whose disability is a severe peanut allergy. Pursuant to section 382.111, carriers “must provide certain services within the aircraft cabin” that may be “requested by or on behalf of [those] with a disability,” including “[a]ssistance in preparation for eating, such as opening packages and identifying food.”55 For a peanut allergy sufferer wishing to avoid contact with or ingestion of peanuts or peanut products, such help can be vital. Similarly, section 382.121 discusses the right of passengers with disabilities to have certain “mobility aids and other assistive devices” with them in the cabin.56 This section specifically references devices of critical importance to peanut allergy sufferers, such as the epinephrine auto-injector needed to immediately treat an anaphylactic reaction.57 Section 382.121(a)(3) delineates that “[o]ther assistive devices” that a carrier must permit in the cabin include “prescription medications and any medical devices needed to administer them such as syringes [and] auto-injectors.”58 However, there is nothing in section 382 that requires carriers to ensure that an epinephrine auto-injector is available on a flight or to actually supply such a device.59

While most of those with a peanut allergy severe enough to constitute a disability are presumably aware of their condition from either a prior diagnosis or painful experience, carriers cannot “require a passenger with a disability to provide” a medical certificate proving it (except under limited circumstances, such as where the passenger is traveling on a stretcher or “needs medical oxygen during a flight”).60 And while section 382.25 stipulates that passengers with disabilities cannot be required to

53 Id. § 382.83(d).
54 Id. §§ 382.121–131.
55 Id. § 382.111.
56 Id. § 382.121.
57 Id. § 382.121(a)(3).
58 Id.
59 Id. §§ 382.1–159.
60 Id. § 382.23(a)–(b)(1).
provide advance notice to a carrier, section 382.27 allows a carrier to require advance notice (typically forty-eight hours) from a passenger with a disability seeking to obtain certain specific services (such as accommodation for a stretcher or ventilator).\textsuperscript{61} Certainly, a person with a disabilingly severe peanut allergy would be best advised to provide ample notice to a carrier of his or her condition in an effort to ensure all possible accommodation.

The rule implementing the ACAA—without making specific reference to peanut allergies as a type of disability—does embody protections against discrimination that are equally applicable to those with severe peanut allergies as they are to passengers with vision impairments, mobility restrictions, and other types of disabilities. As far back as 1998, the DOT took the position that passengers with severe peanut allergies have a qualifying disability covered by the rule.\textsuperscript{62} Accordingly, the DOT advised the ten largest U.S. airlines to make reasonable accommodations for peanut allergy sufferers.\textsuperscript{63} These efforts culminated in the DOT’s August 2, 1998, guidance letter to members of the airline industry under its jurisdiction.\textsuperscript{64} In it, the DOT stopped short of requiring that airlines ban peanuts entirely, but it did strongly suggest that airlines, if given advance notice, should provide a “peanut-free ‘buffer zone’” in the immediate vicinity of a passenger with a medically-documented severe allergy to peanuts (specifically, the rows in front of and behind the passenger in question).\textsuperscript{65} This, the DOT asserted, would not only be a “reasonable accommodation for the passenger’s disability,” but one which would not pose “an undue burden on the airline.”\textsuperscript{66}

At this point, the issue of peanut allergies and how airlines should deal with them took on the status of a political football. “Peanuts are the [twelfth] most valuable cash crop grown in the United States with a farm value of over one billion U.S. dol-

\textsuperscript{61} Id. §§ 382.25–27.
\textsuperscript{64} Id.
\textsuperscript{65} Id.; Doheny, supra note 62.
\textsuperscript{66} Enhancing Airline Passenger Protections, supra note 1, at 32,332.
and peanut farmers and processors enjoy a coveted relationship as a snack provider to the airline industry. In 2009 alone, for example, Southwest Airlines and Delta Air Lines each served approximately ninety-two million bags of peanuts. Lobbyists for trade associations like the American Peanut Council, the Georgia Peanut Commission, or the Peanut & Tree Nut Processors Association and legislators from leading peanut-producing states like Georgia and Alabama remain steadfast in framing the issue as one of protecting the tens of thousands of jobs supported by American peanut growers from uncertain and limited scientific study.

Congressional voices did not take long to make themselves heard after the DOT’s August 2, 1998, guidance letter. On October 9, 1999, Congress flexed its most powerful muscle—the power of the purse strings—with Public Law 106-69, the DOT and Related Agencies Appropriations Act of 2000. Section 346 of this Act presented the DOT with a choice: cease issuing “guidance” to or requirements for air carriers on the subject of peanut allergies or face a cutoff in funding for its Aviation Enforcement Office. Under section 346, none of the funds made available under the Act could be used to require or suggest that airlines “provide a peanut-free buffer zone or any other related peanut-restricted area,” or “restrict the distribution of peanuts.” This congressional prohibition would remain in effect “until [ninety] days after submission to the Congress . . . of a peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact

71 Id.
72 Id.
with very small airborne peanut particles of the kind that passengers might encounter in an aircraft."

The immediate and lasting effect of this law was to set a formidable obstacle in the path of any regulatory agency efforts to ban or limit the serving of peanuts and peanut products on flights subject to the ACAA. Before the DOT could prepare or institute any such ban or restriction, not only would a study first have to take place, but it would have to have a sufficient academic pedigree to pass congressional muster (the peer-review requirement), and it would have to document and conclude that there was a risk of severe reactions by passengers to the type of exposure to peanut products that might occur in an aircraft cabin (the findings requirement). The law does not specify any particular threshold or frequency rate, nor does it define what it considers to be "severe reactions." With these vague parameters, and an ongoing dearth of scientific scrutiny into the issue of peanut allergic reactions among air travelers, it is not surprising that, to date, no such study has occurred.

**IV. RUNNING THE GAMUT OF AIRLINE PEANUT ALLERGY POLICIES**

In the absence of cohesive federal regulation (thanks to the congressionally-mandated prerequisite of a peer-reviewed scientific study), airlines have strived to balance consumer convenience with sensitivity to peanut allergic individuals on a piecemeal basis. Instead of the uniformity and predictability that a clearly defined federal law might impart, the result has been a crazyquilt of widely-deviating policies as each airline has adopted its own individual approach to the peanut issue. The thinking varies considerably. Southwest Airlines, for example, routinely serves peanuts and will not guarantee a peanut-free flight, but it will attempt to suspend peanut service on an entire flight if alerted in advance by an allergic passenger. Its policy states:

> Because it is nearly impossible for persons who have an allergy to peanut dust to avoid triggering a reaction if peanut dust is in the air, Southwest Airlines is unable to guarantee a peanut-free or allergen-free flight. We have procedures in place to assist our

---

73 Id.
Customers with severe allergies to peanut dust and will make every attempt not to serve packaged peanuts on the aircraft when our Customers alert us of their allergy to peanut dust.75

Delta Air Lines also serves peanuts, but will attempt to create peanut-free buffer zones and will allow preboarding cleaning efforts by afflicted passengers.76 In pertinent part, Delta's policy states:

When you notify us that you have a peanut allergy, we'll create a buffer zone of three rows in front of and three rows behind your seat. We'll also advise cabin service to board additional non-peanut snacks, which will allow our flight attendants to serve these snack items to everyone within this area.

Gate agents will be notified in case you'd like to pre-board and cleanse the immediate seating area. We'll do everything we can, but unfortunately we still can't guarantee that the flight will be completely peanut-free.77

There are other elements that factor into an airline's particular policy, including home state politics and the ever-shifting corporate landscape. For example, Northwest Airlines went peanut-free for years after the DOT's 1998 guidance letter.78 However, in late 2008, Northwest was acquired by Atlanta-based Delta, prompting a reversion back to offering peanuts as the two airlines sought to "harmonize" their onboard snack offerings.79 In a letter to a consumer's complaint about the change, the airline explained, "Delta is an Atlanta company, and Georgia is an important producer of peanut products, therefore their policy supports their home state."80 Following the acquisition, Northwest revised the peanut policy on its website to make it clear that while it acknowledges that exposure to "peanuts can result in dire even fatal consequences for customers with the most severe allergies," it cannot guarantee an airborne environment free of peanuts or their dust or oil.81 Like Delta, Northwest recommends that allergic individuals notify the airline in advance so

75 Id.
77 Id.
79 Id.
80 Id.
81 Id.
that a peanut-free buffer zone can be created.  

The airline also shares handy tips, such as taking the first flight of the day when possible (because planes get a more thorough cleaning overnight) and traveling with auto-injectors like an EpiPen.  

However, policies adopted in the wake of corporate mergers do not always last. US Airways had a longstanding policy of not serving peanuts. After its bankruptcy and ensuing fall 2005 merger with America West Airlines, though, US Airways adopted America West’s practice of serving peanuts. Yet by the end of June, 2006, the Arizona-based airline reversed direction on peanuts once again, yielding to concerns voiced by consumers with peanut allergies. Jennifer Tongé, US Airways’ director of customer relations at the time, explained: “It’s a growing concern . . . . It’s still an absolute minority (of passengers) out there, but peanut allergies can be extremely severe.” Tongé also explained that longtime travelers accustomed to flying in a peanut-free environment had peppered the airline with complaints about the post-merger switch. According to her, “They had grown so used to not needing to worry about peanuts being on US Airways flights . . . . Many of them wouldn’t even call to check to make sure there weren’t peanuts.” AirTran Airways, which Southwest Airlines acquired in May 2011, lists no information with regard to its policy on peanut allergies on its website. It remains to be seen if AirTran will adopt Southwest’s policy.

A substantial number of larger air carriers, including American Airlines, Continental Airlines, and United Airlines do not serve peanuts, although they explicitly caution passengers that this does not amount to a peanut-free flying experience. For example, American warns:

American recognizes that some passengers are allergic to peanuts. Although we do not serve peanuts, we do serve other nut products and there may be trace elements of unspecified peanut

---

82 Id.
83 Id.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
91 See infra notes 92, 211, 212, 219 and accompanying text.
ingredients, including peanut oils, in meals and snacks. We make no provisions to be peanut-free.

Additionally, other customers may bring peanuts on board. Therefore, we cannot guarantee customers will not be exposed to peanuts during flight and strongly encourage customers to take all necessary medical precautions to prepare for the possibility of exposure.\(^9\)

Continental Airlines issues a similar warning on its website:

Continental is committed to the safety of its customers, including customers with peanut allergies. We do not serve packaged peanut snacks on our flights; however, some in-cabin food offerings may still contain nuts or trace amounts of nut ingredients, including peanuts. Additionally, other customers may bring peanuts on board. Accordingly, we cannot guarantee the aircraft and food offerings of Continental will be 100% peanut-free. If you have health concerns, we strongly encourage you to take all necessary medical precautions to prepare for the possibility of exposure during flight.\(^9\)

Alaska Airlines had a relatively detailed peanut allergy policy in place as recently as 2004, in which it detailed plans for peanut buffer zones and directed passengers to communicate their requests when making reservations, and again to gate agents and flight attendants.\(^9\) Not wanting to "create false expectations of the aircraft environment," Alaska Airlines would even allow passengers to change their ticket without a change fee or obtain a refund if the airline was unable to provide a requested peanut buffer zone for the desired flight.\(^9\) However, the carrier’s current policy is shorter and seemingly less solicitous of passenger health concerns. While acknowledging customer concerns, it states: "We are unable to guarantee a peanut or allergen-free flight, nor can we prevent other customers from bringing peanuts or products containing peanuts onboard our flights."\(^9\)

Sun Country Airlines, which does not serve peanuts on its flights, offers in a letter to concerned consumers (although not


\(^9\) Id.

posted on its website) a fairly comprehensive discussion of not only nuts but other sources of concern for allergic individuals:

Sun Country does not serve nuts on our flights. However, the presence of residual nuts, nut dust and pet dander on board the aircraft will be impossible to detect or regulate, and there is always a potential that a passenger will still be exposed to these items on every flight, even without any nuts or pets in the passenger cabin. This is because most allergens are carried into the cabin on the clothes of other passengers.

We cannot guarantee an environment free of any allergens, including nuts or animal dander. Therefore, passengers with severe allergies should carefully determine whether they are safe to fly in the cabin environment we can provide.97

V. OTHER AREAS OF POTENTIAL LIABILITY

As a result of the absence of clear-cut federal guidance on the issue of accommodating those with peanut allergies, and the ensuing variations among individual airline policies on the subject, an atmosphere of uncertainty exists with respect to the potential liability of air carriers. The Air Canada experience illustrates the problems inherent in coping with shifting regulatory scrutiny. In January 2010, the Canadian Transport Agency ruled that airlines should implement nut-free buffer zones in order to protect those with severe peanut allergies; in economy-class seating, such a zone would consist of the row where the allergic individual was seated, as well as the row directly behind and the row immediately in front.98 Nine months later, an October 2010 ruling from the agency prompted further refinement, as it directed Air Canada to create such a buffer zone if provided with at least forty-eight hours’ notice by a passenger of his or her nut allergy.99 Air Canada was also ordered not to provide onboard meals or snacks containing peanuts or tree nuts to anyone seated in the buffer zone.100 The agency was responding to two separate complaints, made by passengers Rhonda Nugent and Sophia Huyer, that even after they informed Air Canada of their

99 Id.
100 Id.
allergies, the airline was unable to adequately accommodate their disability.\textsuperscript{101}

Air Canada appealed the ruling on the grounds that it constituted an undue hardship for a flight kitchen to guarantee that meals and snacks would be entirely free of even traces of peanuts.\textsuperscript{102} But in June 2011, the Canadian Transport Agency ruled against the airline, giving it thirty days within which to accommodate allergic passengers by creating a completely nut-free buffer zone when requested.\textsuperscript{103} However, the agency was not wholly unsympathetic to the airline’s position; it agreed that individual responsibility on the part of passengers was also called for.\textsuperscript{104} The decision stated: “The Agency agrees, for example, that carrying and having available wet wipes, sanitizer(s) and Epi-pens . . . would complement the effective accommodation provided by the buffer zone.”\textsuperscript{105} Yet even in an effort to accommodate the severely allergic, Air Canada could not evade harsh criticism. In May 2011, the airline made national news when it denied a seat to nineteen-year-old Matthew Burns of Nova Scotia.\textsuperscript{106} The youth’s mother had booked his travel on Air Canada through a third party rewards service, informing it of Matthew’s severe allergy.\textsuperscript{107} When the young man arrived at Halifax’s Stanfield International Airport (EpiPens and allergy medication in hand) for the flight to Toronto, Air Canada did not permit him to board because of failure to comply with the forty-eight hour notice provision posted on their website (the airline also reserves the right to ask for a medical certificate).\textsuperscript{108}

Although there are no reported U.S. appellate decisions involving legal action taken against airlines by passengers with peanut allergies, there have been a number of cases at the trial court level. Having a clearly stated policy that, even in the absence of serving peanuts, the airline may serve food containing peanut ingredients is no bar to lawsuits being filed. Two 2008 cases, both originally filed in state court but later removed to federal court and ultimately dismissed on similar grounds, are

\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id.
KEEP YOUR HANDS OFF MY NUTS

particularly apt representatives of these kinds of lawsuits. In Khan v. American Airlines, Inc., New York ophthalmologist Dr. Tehmina Haque sued American Airlines in Manhattan State Supreme Court for allegedly endangering her severely allergic four-year-old son Ryahn Khan by serving peanuts on an April 18, 2008, flight from New York to Los Angeles.\textsuperscript{109} The adult passenger and her son alleged that advance notice of young Ryahn’s peanut allergy was given to the airline and that both a boarding agent and a purser assured her that nuts would not be served on the flight—purported statements that ultimately turned out to be incorrect.\textsuperscript{110} Although the minor plaintiff did not actually suffer any adverse physical reaction, Dr. Haque asserted causes of action for intentional infliction of emotional distress for the alleged misinformation, along with the “belittling” and “aggressive tone” that the flight attendants reportedly took when informing Dr. Haque that nuts would be served on the flight after all.\textsuperscript{111} The plaintiffs claimed that this emotional distress was also due to the airline’s alleged breach of its own policy and that the airline violated their civil rights under 42 U.S.C. § 1983.\textsuperscript{112}

After the case was removed to federal court, American Airlines filed a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), and the court granted it.\textsuperscript{113} The court held that the intentional infliction of emotional distress claims were preempted by the Airline Deregulation Act of 1978, specifically § 41713(b)(1).\textsuperscript{114} Statements by airline employees in response to queries about food service, the court reasoned, related to “service of an air carrier” within § 41713(b)(1)’s meaning.\textsuperscript{115} Similarly, the claims of alleged rude and unprofessional conduct by airline employees related to “service,” since the flight attendants’ communications with Dr. Haque were responsive to questions and requests involving food service.\textsuperscript{116} Furthermore, the court held that the claims of emotional distress from the airline’s purported breach of its own policy were similarly preempted by § 41713(b)(1) since the

\textsuperscript{110} \textit{Id.} at *2–4.
\textsuperscript{111} \textit{Id.} at *1, 11–13.
\textsuperscript{112} \textit{Id.} at *1.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at *12, 14.
\textsuperscript{115} \textit{Id.}
\textsuperscript{116} \textit{Id.} at *13.
alleged departure from established policy necessarily concerned the "service of an onboard amenity."\textsuperscript{117} As for the § 1983 civil rights claim, the judge ruled that the airline's conduct was not something that could properly be attributed to the state.\textsuperscript{118}

The case of \textit{Panitch v. Continental Airlines} featured slightly different claims but a nearly identical result.\textsuperscript{119} In this instance, the plaintiff was "a teenage female with a severe peanut and tree nut allergy."\textsuperscript{120} Her father contacted Continental's reservation department to book his daughter's flight and requested that either the airline refrain from serving nuts on this flight or that it create a buffer zone for the teen's protection.\textsuperscript{121} The airline refused such accommodation.\textsuperscript{122} The plaintiffs brought suit under the New Jersey Law Against Discrimination (NJLAD) as well as New Jersey common law, arguing that Continental "fail[ed] to provide reasonable accommodations for plaintiff's severe nut allergy."\textsuperscript{123}

Once the case reached federal court, the airline moved for summary judgment arguing that the Airline Deregulation Act, 49 U.S.C. § 41713, preempted plaintiff's claims.\textsuperscript{124} Adopting a broad definition of service like a majority of federal courts have chosen to do, the court held that § 41713 preempted these causes of action since they "related to a price, route, or service."\textsuperscript{125} Reasoning that the term "service" included the "provision of food and drink," the court ruled that both the plaintiffs' common law tort claims and NJLAD claims pertained specifically to Continental's in-flight provisions of meals and snacks and were therefore preempted.\textsuperscript{126}

But while they involved claims of discrimination and not actual injury to an allergic passenger, cases like \textit{Khan} and \textit{Panitch} raise an interesting question: putting aside (for the moment) claims of discrimination against the disabled, what type of personal injury liability might an airline face in the event of injury or death caused by accidental in-flight exposure to peanuts or

\textsuperscript{117} \textit{Id.} at *14-15.
\textsuperscript{118} \textit{Id.} at *20.
\textsuperscript{120} \textit{Id.} at *3.
\textsuperscript{121} \textit{Id.}
\textsuperscript{122} \textit{Id.} at *4.
\textsuperscript{123} \textit{Id.} at *1; see \textit{N.J. Stat. Ann.}, § 10:5-1 to 5-49 (West 2002).
\textsuperscript{124} \textit{Panitch}, 2008 U.S. Dist. LEXIS 28067, at *2.
\textsuperscript{125} \textit{Id.} at *10, 14.
\textsuperscript{126} \textit{Id.} at *14-15.
peanut products? Some potential precedential guidance, at least in the context of a death aboard an international flight, is provided by the 2004 U.S. Supreme Court decision in *Olympic Airways v. Husain.*

On January 4, 1998, Dr. Abid Hanson, a fifty-two-year-old doctor from California, was a passenger on Olympic Airways Flight 417 from Cairo, Egypt (via Athens, Greece) to San Francisco. Dr. Hanson had a longtime severe sensitivity to secondhand smoke, asthma, and a "history of recurrent anaphylactic reactions." Not surprisingly, he requested a non-smoking seat. When he and his family boarded the Boeing 747 aircraft in Athens, Hanson "discovered that their [assigned] seats were located only three rows in front of the . . . smoking section" and also that there was no partition separating the smoking area from the non-smoking section. Hanson's wife, Rubina Husain, informed the flight attendant of her husband's medical condition and requested that he be moved further away from the smoking section. The flight attendant refused, incorrectly stating that there were no empty seats (as the Court would later note, there were in fact eleven other unoccupied seats available). The Hanson family made two more requests to move Dr. Hanson, with increasing urgency, but the flight attendant repeatedly refused. Dr. Hanson went to the front of the cabin in an attempt to get some fresh air, but then collapsed and died, despite being treated with CPR, oxygen, and shots of epinephrine. While an autopsy was not performed (for religious reasons), the federal district court later determined that exposure to smoke during the flight was the primary cause of death.

Dr. Hanson's survivors initially filed a wrongful death lawsuit in California state court, and it was removed to the U.S. District Court for the Northern District of California. The district court found Olympic Airways liable for Dr. Hanson's death, holding that the flight attendant's repeated "refusal to reseat

---

128 Id. at 646–48.
129 Id. at 647.
130 Id.
131 Id.
132 Id. at 647–48.
133 Id. at 647–48 & n.2.
134 Id. at 647–48.
135 Id. at 648.
136 Id. at 648 & n.3.
137 Id. at 648.
Dr. Hanson constituted an ‘accident’ within the meaning of Article 17 of the Warsaw Convention (Article 17). It also found that the flight attendant’s actions were “willful misconduct” in “blatant disregard of industry standards and airline policies,” and therefore were neither “expected nor usual.” The court awarded the family $700,000 in damages. The U.S. Court of Appeals for the Ninth Circuit affirmed. The U.S. Supreme Court upheld the decision in a 6–2 opinion (Justice Breyer took no part). It relied in part on the Court’s earlier holding in Air France v. Saks, a case in which the Court examined “whether a [passenger’s] ‘loss of hearing proximately caused by normal operation of the aircraft’s pressurization system’ [was] an ‘accident.’” In Saks, the Court reasoned that it was the cause of the injury, rather than the occurrence of the injury, that must somehow satisfy the definition of “accident.” Furthermore, the Saks court deferred to the French legal meaning of “accident” which it defined as a “fortuitous, unexpected, unusual, or unintended event.” As a result, in Saks, the Court held that an “accident” within the meaning of Article 17 is “an unexpected or unusual event or happening that is external to the passenger” and not “the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft.” The Court in Saks further emphasized that the term “accident” could encompass intentional and not just unintentional conduct. The Saks court concluded that the passenger’s injury was not an accident, since it was her “own internal reaction” to the normal pressurization of the plane’s cabin.

Analyzing the facts in the Husain case, the Court stated that, as in Saks, for purposes of making the threshold inquiry of whether an “accident” took place, “a plaintiff need only be able

---

138 Id. Article 17 of the Warsaw Convention imposes liability on an air carrier for a passenger’s death or bodily injury caused by an “accident” that occurred in connection with an international flight. Id. at 649.
139 Id. at 648, 663.
141 Olympic Airways, 540 U.S. at 648.
142 Id. at 645, 649.
143 Id. at 650.
145 Id. at 398.
146 Id. at 399–400.
147 Id. at 405–06.
148 See id. at 405.
149 Id. at 394–95, 406.
to prove that 'some link in the chain was an unusual or unex-
pected event external to the passenger.'\textsuperscript{150} The Court rejected
Olympic Airways' argument that since the airline's policies per-
mitted smoking on international flights, Dr. Hanson's death was
the result of his own internal reaction (an asthma attack) to the
normal operation of the aircraft.\textsuperscript{151} Writing for the majority,
Justice Clarence Thomas noted that the reality was "that there
are often multiple interrelated factual events that combine to
cause any given injury."\textsuperscript{152} Indeed, Justice Thomas observed:
"[T]he very fact that multiple events will necessarily combine
and interrelate to cause any particular injury makes it difficult to
define, in any coherent or non-question-begging way, any single
event as the 'injury producing event.'"\textsuperscript{153}

The Court likewise swept aside the airline's contention that
there was no "accident" because the flight attendant's conduct
amounted to a failure to act as opposed to an affirmative act.\textsuperscript{154}
Justice Thomas termed it a "fallacy" that an accident could not
take the form of inaction.\textsuperscript{155} Once again, he referred back to
the Ninth Circuit's holding that the flight attendant's repeated
refusal to reseat Dr. Hanson was "unusual and unexpected,"
which was consistent with the analysis under Article 17 and with
the operative language under \textit{Saks}.\textsuperscript{156}

A spirited dissent from Justice Antonin Scalia took issue with
the majority's interpretation that the \textit{Saks} definition of "acci-
dent"—"an unexpected or unusual event or happening that is
external to the passenger"—"encompass[ed] failures to act like
the flight attendant's refusal to" relocate Dr. Hanson.\textsuperscript{157} It also
took the majority to task for not giving adequate weight to the
courts of Warsaw Convention treaty partners and how they tack-
led the issue of whether a failure to act could constitute an "acci-
dent" for Article 17 purposes.\textsuperscript{158} In particular, Justice Scalia
singled out a British appellate court's reasoning in the \textit{Deep Vein
Thrombosis and Air Travel Group Litigation},\textsuperscript{159} in which the Master

U.S. at 406).
\textsuperscript{151} \textit{Id.}
\textsuperscript{152} \textit{Id.} at 653.
\textsuperscript{153} \textit{Id.}
\textsuperscript{154} \textit{Id.} at 654.
\textsuperscript{155} \textit{Id.} at 656.
\textsuperscript{156} \textit{Id.} at 651 n.6, 652.
\textsuperscript{157} \textit{Id.} at 658–59 (Scalia, J., dissenting).
\textsuperscript{158} \textit{Id.} at 659–60.
\textsuperscript{159} \textit{Id.} at 661.
of the Rolls concluded, “[i]naction is the antithesis of an accident,” as well as the Supreme Court of Victoria, Australia. Justice Scalia concluded, “Tragic though Dr. Hanson’s death may have been, it does not justify the Court’s putting us in needless conflict with other signatories to the Warsaw Convention.”

The Husain case is instructive as to how a fact pattern involving a severe allergic reaction to peanuts on an international flight could very well lead to liability for an airline. Consider the following scenario: a passenger, like Dr. Hanson, gives the airline prior notice of his severely allergic condition and requests appropriate seating arrangements. Once seated, however, the passenger discovers that the airline has failed to establish the peanut-free buffer zone that he expected. His requests to be reseated are not granted, and the passenger experiences a severe anaphylactic reaction resulting in death. Under the Saks and Husain analysis, a court could easily conclude that the passenger’s death—in which a pre-existing medical condition was aggravated by exposure to a normal condition in the aircraft cabin—was an “accident” consistent with the meaning of Article 17. The plaintiff would have to show that some link in the chain of causes was an unusual or unexpected event external to the passenger. The failure to move the passenger to another seat or the failure to establish the peanut-free buffer zone in the first place (assuming the airline had such a policy) could certainly be viewed as the injury-producing event. As the Ninth Circuit opinion in Husain observed, “The failure to act in the face of a known, serious risk satisfies the meaning of ‘accident’ within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane.”

Given the ongoing examination of the risks faced by peanut-allergic individuals (as demonstrated by the ever varying policies

---


161 Quantas Ltd. v Povey [2003] VSCA 227, 17 (Austl.), 2003 WL 23000692. “[I]t is not the failure to take the step which is properly to be characterised as an accident but rather its immediate and disastrous consequence whether that be the dangerous landing on the belly of the aircraft or an immediate unexpected and dangerous drop in pressurisation.” Id.

162 Olympic Airways, 540 U.S. at 667 (Scalia, J., dissenting).

163 Husain v. Olympic Airways, 316 F.3d 829, 837 (9th Cir. 2002), aff’d, 540 U.S. 644 (2004).
of airlines) as well as the vocal concerns of peanut allergy sufferers themselves, it would be hard to conceive of this issue as anything other than a "known, serious risk." In addition, the policies that airlines have adopted in response to this risk, however inconsistent they may be, are ample evidence that reasonable alternatives exist that would substantially minimize the risk. For that matter, proposals that have been discussed but not implemented (such as having air carriers keep epinephrine auto-injectors in the cabin, much like certain airlines have equipped themselves with defibrillators) might also qualify as "reasonable alternatives." And, the fact that peanut allergy policies have been in place for years certainly supports the conclusion that they do not unreasonably interfere with the "normal, expected operation of the airplane."

VI. OTHER PEANUT ALLERGY-RELATED LITIGATION

Legal challenges raised by individuals with severe peanut allergies in contexts outside the aviation industry have had, at best, mixed results. While a number of schools and day care centers have voluntarily banned peanuts and peanut byproducts, such as peanut butter, from their cafeterias and classrooms because of the risk to highly allergic children, the accommodation efforts are often unpopular.\textsuperscript{164} In the few reported cases involving peanut allergy claims in an educational setting, courts dismissed the plaintiffs' arguments centered on civil rights violations and Americans with Disabilities Act (ADA) violations. In \textit{McCue v. South Fork Union Elementary School}, U.S. District Judge Oliver Wanger dismissed the claims of Lawrence and Darlene McCue that the school and its principal intentionally harmed the McCues' son by failing to keep him in a nut-free environment.\textsuperscript{165} The court rejected the McCues' contention that their child had been denied his Fourteenth Amendment right to due process by virtue of the school's refusal to banish all nut products from the South Fork Union Elementary campus.\textsuperscript{166} Judge Wanger also dismissed the parents' claims that the school inten-


\textsuperscript{165} McCue v. S. Fork Union Elementary Sch., 766 F. Supp. 2d 1003, 1011 (E.D. Cal. 2011).

\textsuperscript{166} \textit{Id.} at 1009–10.
tionally exposed the boy to nuts after he was given a peanut butter cookie at a school event and was subsequently hospitalized. The court held that “[s]erving a child a peanut butter cookie is not an inherently violent act.”

In *Land v. Baptist Medical Center*, the U.S. Court of Appeals for the Eighth Circuit rejected claims that young Megan Land’s rights under the ADA and the Arkansas Civil Rights Act were violated after the peanut-allergic little girl was exposed to peanut-containing food products at the Baptist Medical Center’s day care center. After Megan suffered two separate episodes of allergic reactions while at day care, the facility refused to provide further day care services to her. The court acknowledged “that eating and breathing are major life activities within the contemplation of the ADA,” and that “whether a major life activity is substantially limited is an individualized[,] . . . fact-specific inquiry.” However, the court noted that Megan Land’s “ability to breathe [was] generally unrestricted,” with the exception of the “limitations she experienced during the two allergic reactions.” Analogizing her situation to other cases where limited episodes of difficulty breathing were held to not meet the definition of disability under the ADA, the court held that Megan’s allergic reaction to peanut-laden foods did not materially affect the “major life activities” of eating and breathing within the ADA’s definition of disability.

This lack of success should not necessarily be interpreted as an indication that individuals suffering from peanut allergies cannot satisfy the ADA’s definition of disability. The U.S. Supreme Court, for example, applied the statute’s definition of disability broadly to cover a woman who, though HIV positive, was asymptomatic. An individual who is perfectly asymptomatic in the absence of peanuts or peanut products will be—once exposed—unable to “perform a basic function that the average person in the general population can perform” (eating and breathing certainly qualify) or will be significantly restricted in

---

167 Id. at 1010–11.
168 Id. at 1010.
170 Id. at 424.
171 Id. at 424–25.
172 Id. at 425.
173 Id. For a useful discussion of *Land* and its implications, see Plicka, *supra* note 24.
“the condition, manner, or duration under which an individual can perform a particular major life activity as compared to an average person in the general population.”\(^{175}\)

Consider, for example, the reasoning of the court in \textit{Fraser v. Goodale}.\(^{176}\) While this case, unlike \textit{Land}, does not itself revolve around an individual with a peanut allergy, dicta in the decision does address peanut allergies.\(^{177}\) In fact, its reasoning and acknowledgment of a peanut allergy’s potential severity stand in stark contrast to the \textit{Land} court’s position. The \textit{Fraser} court concedes that “eating specific types of foods, or eating specific amounts of food, might or might not be a major life activity.”\(^{178}\) As the opinion puts it, “If a person is impaired only from eating chocolate cake, he is not limited in a major life activity because eating chocolate cake is not a major life activity.”\(^{179}\) However, the court notes that “peanut allergies might present a unique situation because so many seemingly innocent foods contain trace amounts of peanuts that could cause severely adverse reactions.”\(^{180}\)

The implications of the most recent amendments to the Americans with Disabilities Act (ADAA) must also be considered. The ADAA significantly broadened the definition of who qualified as having a disability; for example, under the new law, a person who has cancer but is in remission or a person with a condition like hypertension that is controlled by medication can still be regarded as having a disability regardless of their asymptomatic state.\(^{181}\) It stands to reason that an individual whose major life activity of breathing will be substantially impacted by exposure to peanut products, but who is otherwise asymptomatic when not exposed to nuts, can nevertheless be considered to have a disability under the current legal definition.

There are those who may argue that affording greater legal protections for those who are allergic to peanuts makes little sense, since other persons may experience similar hyper-sensitivities but lack such protections. In fairness, accommodations have been made in workplace environments for individuals with

\(^{175}\) Snow v. Ridgeview Med. Ctr., 128 F.3d 1201, 1206 (8th Cir. 1997), abrogated by Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

\(^{176}\) Fraser v. Goodale, 342 F.2d 1032 (9th Cir. 2003).

\(^{177}\) Id. at 1040.

\(^{178}\) Id.

\(^{179}\) Id.

\(^{180}\) Id.

extreme sensitivity to perfumes and colognes. And several years ago, Air Canada banned nearly all animals from the cabins of its aircraft in response to concerns that pet dander could trigger allergy attacks in susceptible passengers. However, there is a marked difference between the degrees of reaction by allergic individuals. Itchy, watery eyes, stuffy nose, and sneezing may accompany exposure to pet dander or fragrances for the hypersensitive. With those who are severely allergic to peanuts and peanut products, the stakes are far higher and can result in anaphylactic shock, an inability to breathe due to constricted airways, and even death.

VII. ONCE MORE INTO THE BREACH—ANOTHER EFFORT AT UNIFORMITY BY THE DOT

The DOT and Related Agencies Appropriations Act of 2000 was a sharp congressional rebuke to the DOT’s efforts to adopt a uniform policy on dealing with peanut allergies among air travelers, and it was also a reminder of who held the purse strings. And while it did not attempt to issue any mandates, on December 31, 2002, the FAA did issue an advisory circular entitled “Management of Passengers Who May Be Sensitive to Allergens.” It was issued in response to one of ten recommendations the National Research Council made in a December 2001 report entitled “The Airliner Cabin Environment and the Health of Passengers and Crew,” which was done in response to the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century. The advisory circular was intended to provide guidance for air carrier passenger-handling procedures for those with allergic sensitivities, and it covered not just peanut allergies but other food allergies, as well as allergic reactions to medications, insect bites, and dog and cat dander. It noted that, for people with peanut allergies, “the unique environment of an airplane passenger cabin can present certain chal-

---


184 U.S. DEP’T OF TRANSP., FED. AVIATION ADMIN., AC 121-36, MANAGEMENT OF PASSENGERS WHO MAY BE SENSITIVE TO ALLERGENS (2002).

185 Id. at 5–6.

186 Id. at 1.
The circular stated that "no airline can guarantee a peanut-free flight," and it counseled passengers who are allergic "to get specific information for that airline"; "wip[e] down the surfaces immediately surrounding [the] seat itself, "such as [the] tray table and armrests"; "inspect[ ] the floor and seat area for peanut residue"; and carry medication such as an epinephrine auto-injector. For air carriers themselves, the advisory circular recommended that they educate their personnel about allergic reactions, "train [them] to respond quickly and properly," and to review what policies the airline already has in place to accommodate peanut-free food requests.

On June 8, 2010, the DOT issued its Notice of Proposed Rulemaking (NPRM) on Enhancing Airline Passenger Protections which solicited comment on, among other things, options "to provide greater access to air travel for . . . individuals with peanut allergies." Why? Perhaps the DOT was emboldened by the fact that so many airlines had adopted some form of a peanut allergy policy since its short-lived 1998 guidance letter. Perhaps it was a case of "out of sight, out of mind;" in its NPRM, the DOT noted that with respect to the threat of having its funding cut off by Congress, "This specific congressional ban on our involvement in this issue has not appeared recently in any legislation."

So, the DOT proceeded with seeking comment on "whether it would be preferable to maintain the current practice of not prescribing carrier practices concerning the serving of peanuts," as well as three possible alternatives that it was considering:

(1) [completely] [b]anning the serving of peanuts and all peanut products by both U.S. and foreign carriers on flights covered by the DOT's disability rule;

(2) banning the serving of peanuts and all peanut products on all such flights where a passenger with a peanut allergy is on board and has requested a peanut-free flight in advance; or

(3) requiring a peanut-free buffer zone in the immediate area of a passenger with a medically-documented severe allergy to peanuts if passenger has requested a peanut-free flight in advance.

---

187 Id. at 2.
188 Id. at 3.
189 Id.
190 Enhancing Airline Passenger Protections, supra note 1, at 32,318.
191 Id. at 32,332.
192 Id.
In particular, in its NPRM, the DOT expressed interest in hearing public feedback on these proposals, as well as on various questions that might arise in considering the issue of dealing with passengers with peanut allergies. These questions included (1) whether taking specific preparatory steps like carrying an epinephrine auto-injector would sufficiently protect severely allergic individuals; (2) "[w]ho should be responsible for [having] an . . . auto-injector . . . available on a flight—the airline or the passenger"; (3) what "scientific or anecdotal evidence [is there] of serious in-flight medical events [involving] . . . airborne transmission of peanut [dust or] particles"; (4) how broad or narrow should the definition of peanut products or food containing peanut products be; and (5) what is the likelihood of severe adverse reactions from airborne transmission of peanut particles in an aircraft cabin as opposed to actual ingestion.

As discussed earlier in this article, this NPRM solicited comment on a whole host of weighty issues of great concern to air travelers that had received (and which continue to receive) considerable media attention. These included tarmac delays, baggage fees, oversales, full fare advertising, and post-purchase price increases. Yet the overwhelming majority of the public comments received addressed the issue of how airlines should handle passengers with peanut allergies. And of those regarding peanut allergies, most of the consumers responding favored a total ban on peanuts in flight, according to the DOT's summary of comments.

Given this heightened public interest, it must have surprised many consumers when the DOT announced its new rules in April 2011 on topics like tarmac delays, baggage fees, and bumped travelers, but stated that there would be no action taken with regard to peanut allergy policies. Those well-versed in reading political tea leaves might have anticipated this.

193 Id.
194 Id.
195 Id. at 32,320–21, 32,325–31.
197 Id.; see also Enhancing Airline Passenger Protections, supra note 3, at 23,156.
After all, just days after the DOT published its NPRM, the Secretary of Transportation issued a “Clarification of Notice of Proposed Rulemaking” on June 25, 2010.\(^{199}\) This clarification stated that the DOT recognized the limitations placed on it by § 346 of the DOT and Related Agencies Appropriations Act of 2000, particularly its inability to use any funding to “implement, carry out, or enforce any regulation” that requires or encourages an air carrier to “provide a peanut-free buffer zone or . . . restrict the distribution of peanuts”—at least “until [ninety] days after submission to the Congress and the Secretary of a peer-reviewed scientific study that determines that there are severe reactions by passengers to peanuts as a result of contact with very small airborne peanut particles of the kind that passengers might encounter in an aircraft.”\(^{200}\) The clarification concluded by affirming that the DOT “will comply with this requirement.”\(^{201}\)

VIII. CONCLUSION

As the DOT itself observed, Congress has given the DOT mixed signals on the issue of airline passengers with severe peanut allergies. It is a matter of scientific fact that those severely allergic to peanuts, including many children, can experience life-threatening allergic reactions, and actual ingestion of the peanuts is not necessary.\(^{202}\) The ACAA and the rule implementing it were positive steps in prohibiting discrimination by U.S. and foreign air carriers against those travelers with disabilities, since it requires airlines to make reasonable accommodations for such individuals unless doing so would cause an undue burden or require the airline to fundamentally alter its services. Under virtually any statutory definition of “disability,” those who suffer from severe peanut allergies would appear to be protected; after all, a condition that can interfere with or cease a major life activity like breathing should constitute a disability.

Yet at the same time, Congress passed a law like the DOT and Related Agencies Appropriations Act of 2000 in October, 1999. This law was unusual in two aspects. First, although typically funding restrictions last no more than a year, Senator Richard


\(^{200}\) Id. at 36,301.

\(^{201}\) Id.

\(^{202}\) Sicherer, supra note 32, at 189.
Shelby of Alabama (the third largest peanut-producing state in the United States) added wording to this DOT appropriations bill to make it far longer lasting. He worded the restriction to apply to funding "under this Act or any other Act." Second, the DOT restriction applies until ninety days after a peer-reviewed scientific study supporting the dangers of peanut products for air passengers is submitted to Congress and the Secretary of Transportation.

One can certainly accept the fact that a void exists in the scientific literature regarding the risks of severe peanut allergic reactions for air travelers. It is harder to account for the fact that in the intervening twelve years since Congress imposed this restriction, the DOT has neither conducted such a scientific study nor enlisted third parties to do so. In commenting on the DOT’s 2010 NPRM, the nonprofit Food Allergy and Anaphylaxis Network, based in Fairfax, Virginia, offered to conduct a study to test the severity of an airborne reaction to peanut particles. The DOT cited the lack of a peer-reviewed study, but it never indicated that a group such as this had “absolutely offered to work with the DOT to conduct such a study that [they were] more than qualified to do,” according to Chris Weiss, vice president of the Food Allergy and Anaphylaxis Network.

Medical literature, expert opinions, and anecdotal evidence all amply document the existence and prevalence of severe allergic reactions to peanuts and the extent to which such reactions constitute a disability. Moreover, examination of the poten-

---

206 Id.
208 Id.
209 Hope, however, may loom on the horizon. Food allergy researchers at Northwestern University’s Feinberg School of Medicine have made promising advances in possible treatment of peanut allergies, developing an antigen-specific tolerance therapy. The treatment attaches peanut proteins to blood cells, “tricking the immune system into thinking the proteins pose no threat.” See Maudlyne Ihejirika, New Study Shows Promise Against Peanut, Other Food Allergies, CHI. SUN TIMES, http://www.suntimes.com/lifestyles/8144183-423/study-shows-promise-against-peanut-other-food-allergies.html (last updated Nov. 16, 2011).
tial legal exposure faced by air carriers in dealing with those suffering from such a disability (including claims under the Warsaw Convention, as the Husain case illustrates) reveals the importance of having the stability and predictability that only a uniform policy on peanut allergies can bring. Yet despite this, politics has been the overriding factor preventing the DOT from promulgating and enforcing a uniform, cohesive peanut allergy policy applicable to the U.S. and foreign carriers subject to its jurisdiction, instead of the inconsistent patchwork quilt of policies that vary from airline to airline. In order to provide both air carriers and air travelers some measure of predictability and accountability, and to ensure a flying experience that values passenger safety while not discriminating against those with disabilities, the DOT’s first step should be to commission the necessary scientific study of peanut allergy-related risks during flight. Unless the DOT can legislatively circumvent the limitations that are still imposed by the 1999 appropriations bill, such a peer-reviewed study is a necessary precursor to bringing about meaningful change in and uniformity to airline peanut allergy policies (regardless of whatever the final policy may be—a complete ban on all peanut products, establishment of peanut-free buffer zones, and so on).
ALASKA AIRLINES

"Peanut Allergies"

Alaska Airlines acknowledges customer concerns regarding peanut allergies. For this reason, we do not want to create false expectations with regard to the aircraft environment.

- We are unable to guarantee a peanut or allergen-free flight, nor can we prevent other customers from bringing peanuts or products containing peanuts onboard our flights.

Note: Alaska Airlines meals and snacks may contain peanut-related ingredients. We encourage customers who are allergic to peanuts to bring their own food items for travel.”

AMERICAN AIRLINES

"Allergies"

American recognizes that some passengers are allergic to peanuts. Although we do not serve peanuts, we do serve other nut products and there may be trace elements of unspecified peanut ingredients, including peanut oils, in meals and snacks. We make no provisions to be peanut-free.

Additionally, other customers may bring peanuts on board. Therefore, we cannot guarantee customers will not be exposed to peanuts during flight and strongly encourage customers to take all necessary medical precautions to prepare for the possibility of exposure.”

CONTINENTAL AIRLINES

"Information for Customers with Peanut Allergies"

Continental is committed to the safety of its customers, including customers with peanut allergies. We do not serve packaged peanut snacks on our flights; however, some in-cabin food offerings may still contain nuts or trace amounts of nut ingredients, including peanuts. Additionally, other customers may bring peanuts on board. Accordingly, we cannot guarantee the aircraft and food offerings of Continental will be 100% peanut-free. If you have health concerns, we strongly encourage you to

---

210 Policies: Oxygen and Other Special Services, supra note 96.
211 Special Assistance: Allergies, Medications and Meals, supra note 92.
take all necessary medical precautions to prepare for the possibility of exposure during flight.”

DELTA AIR LINES

“Peanut Allergies
When you notify us that you have a peanut allergy, we’ll create a buffer zone of three rows in front of and three rows behind your seat. We’ll also advise cabin service to board additional non-peanut snacks, which will allow our flight attendants to serve these snack items to everyone within this area.

Gate agents will be notified in case you’d like to pre-board and cleanse the immediate seating area. We’ll do everything we can, but unfortunately we still can’t guarantee that the flight will be completely peanut-free.”

FRONTIER AIRLINES

“Allergy (Peanut or Pet)
At Frontier, our concern is for the health and safety of all those who choose to travel with us, including passengers with peanut allergies. Therefore, we do not serve peanuts on our flights. ‘Tree nuts’, such as almonds, cashews, and walnuts, may be served in the snacks available on Frontier flights. Some snack and fresh food offerings we offer may have been packaged in facilities that process peanuts. Additionally, other customers may bring peanuts on board. Accordingly, we cannot guarantee our aircraft and our snack offerings will be 100% ‘peanut-free.’ We encourage customers who are allergic to peanuts to bring your own food items on your flight. Prior to making travel plans with Frontier, we urge you to speak with your health professional regarding risks of onboard exposure to any allergen.”

HAWAIIAN AIRLINES

“Peanut or Nut Allergy
Hawaiian Airlines recognizes that some people are allergic to peanuts or other nut products. Hawaiian Airlines does serve macadamia nuts in the first class cabin and a snack pack with pretzels in the main cabin. Due to last minute equipment

212 Tips for Healthy Travel, supra note 93.
213 Special Concerns, supra note 76.
changes and the possibility that other customers may bring peanuts or other nut products onboard, and because there may be trace elements of unspecified peanut ingredients in other meals and snacks, we cannot guarantee there will not be peanuts or peanut-related products in-flight. Please consider the possibility of exposure on any aircraft, particularly when accepting any inflight meal or snack. We strongly advise passengers to take all necessary medical precautions to prepare for the possibility of exposure.

You may wish to bring your own food items on your flight. Many people take the precaution of carrying epinephrine (Epi-pens) or other suitable anaphylaxis treatment prescribed by their physician that can be self-administered. Please review TSA GUIDELINES regarding the carriage of liquid prescription medication.

If you require a specific dietary meal, which we cannot accommodate, we recommend that you bring your own meal on board.”

JETBLUE AIRWAYS

“Nut Allergies

JetBlue does not serve peanuts and has no immediate plans to serve peanuts; however, we cannot guarantee that our aircraft or snacks will be 100% free of peanuts, peanut material or peanut products.

‘Tree nuts’ such as almonds, cashews, pistachios, walnuts, etc. may be served on JetBlue flights.

There is a possibility that some food items served come from facilities that also manufacture products that may contain peanuts, peanut materials or peanut products.

We cannot prevent other customers from bringing their own peanuts or peanut products onboard and consuming these items inflight. However, we ask that you inform the head Inflight crewmember upon boarding the aircraft of your severe nut allergy. Upon request, an Inflight crewmember will create a buffer zone one row in front and one row behind the allergic person. The Inflight Crewmember will ask Customers seated in the buffer zone to refrain from consuming any nut containing products they have brought onboard and will not serve any nut containing products to these rows.

JetBlue will offer a full refund to customers for whom these conditions make it impossible to travel.”

SOUTHWEST AIRLINES

“Peanut Dust Allergies

Because it is nearly impossible for persons who have an allergy to peanut dust to avoid triggering a reaction if peanut dust is in the air, Southwest Airlines is unable to guarantee a peanut-free or allergen-free flight. We have procedures in place to assist our Customers with severe allergies to peanut dust and will make every attempt not to serve packaged peanuts on the aircraft when our Customers alert us of their allergy to peanut dust.

We ask Customers with peanut dust allergies making reservations over the phone to advise our Customer Representatives of the allergy at the time the reservation is made. If the reservation is made via a travel agent, the Customer should telephone 1-800-I-FLY-SWA (1-800-435-9792) afterward to speak with a Customer Representative. If the reservation is made via southwest.com, the Customer may advise us of the allergy on the ‘Southwest Airlines Payment and Passenger Information’ screen by clicking on the link to ‘Add/Edit Disability Assistance Options’.

We suggest that Customers with peanut dust allergies book travel on early morning flights as our aircraft undergo a thorough cleaning only at the end of the day.

We ask the Customer with the allergy (or someone speaking on the Customer’s behalf) to check in at the departure gate one hour prior to departure and speak with the Customer Service Agent (CSA) regarding the Customer’s allergy. Please allow enough time to park, check luggage and/or receive your boarding pass, and to pass through the security checkpoint. Our CSA will provide the Customer with a Peanut Dust Allergy Document and ask him/her to present the document to the Flight Attendant upon boarding. If the Customer has a connection, the CSA will provide the Customer with two documents, one of which should be retained to present to the Flight Attendant on the connecting flight.

Our CSA will advise the Operations (Boarding) Agent so that service of packaged peanuts can be suspended for that flight. Our Operations Agent will notify the Provisioning and/or Ramp

---

Supervisor to stock the aircraft with a sufficient supply of pretzels or alternate snacks. The Operations Agent will also notify the Flight Attendants of the Customer’s final destination and advise them that we cannot serve packaged peanuts until the Customer deplanes.

As some of our other snack items may contain peanut particles, peanut oil, or have been packaged in a peanut facility, Customers who have allergic reactions to eating/ingesting peanuts should read the ingredients on any packaged snack before consumption. Of course, all Customers are welcome to bring their own snacks with them.

Southwest cannot prevent other Customers from bringing peanuts or products containing peanuts onboard our flights. In addition, Southwest cannot give assurances that remnants of peanuts and/or peanut dust/oil will not remain on the aircraft floor, seats, or tray tables from the flights earlier in the aircraft’s routing.

In addition, Southwest Airlines cannot guarantee that a flight will be free of other allergens such as perfumes, lotions, cleaning solutions, etc. 217

SPIRIT AIRLINES

“What food and drinks does Spirit offer on the plane?

We provide a variety of food and drinks that can be purchased using a debit or credit card (no cash is accepted). Please view our menu here. Please note that we do not offer any special dietary meals; however, our menu selection still provides a range of options that should meet most dietary requirements.

Additionally, we recognize that some customers are allergic to peanuts; however, we do offer peanuts and other nut products onboard for purchase. Other customers may bring peanuts onboard as well. Therefore, we cannot guarantee customers will not be exposed to peanuts during flight and strongly encourage customers to take all necessary medical precautions to prepare for the possibility of exposure.

In an effort to provide excellent service, please alert our gate agents and flight attendants if you do have an allergy, and we will create a peanut-free buffer-zone for you which includes the row you’ll be seated in, the row in front of you, the row behind

217 Customers with Disabilities, supra note 74.
you and the corresponding rows on either side of the aisle as well.”

UNIVERSAL AIRLINES

"Peanut Information"
United is committed to the safety of its customers, including customers with peanut allergies. We do not serve packaged peanut snacks on our flights; however, some in-cabin food offerings may still contain nuts or trace amounts of nut ingredients, including peanuts. Additionally, other customers may bring peanuts on board. Accordingly, we cannot guarantee the aircraft and food offerings of United will be 100% peanut-free. If you have health concerns, we strongly encourage you to take all necessary medical precautions to prepare for the possibility of exposure during flight.”

US AIRWAYS

"Peanut allergies"
US Airways recognizes that some of our passengers are allergic to peanut products. However, due to last-minute aircraft changes and the possibility that other passengers may bring peanuts onboard, we cannot guarantee that no peanut products will be onboard.

Because we cannot accommodate ‘peanut-free’ snack requests and the possibility that peanut-related ingredients may be contained in meals, we encourage passengers to bring their own food items onboard the flight.”

VIRGIN AMERICA

"I have severe allergies, will I be able to fly?"
Virgin America recognizes that some Guests are allergic to nuts or other items, and that exposure can result in dire, or even fatal, consequences for Guests with the most severe allergies. Virgin America cannot guarantee an environment free of any allergens, including peanuts, peanut dust, peanut oil, or peanut remnants. For these reasons Guests with severe allergies should

---

advise Virgin America prior to travel informing us at 877.FLY.VIRGIN (877.359.8474).”

“Do you offer special dietary meals?
We offer a selection of meals and snacks that provide a range of options to meet most dietary requirements. If you have special needs or serious health issues such as severe food allergies, it is recommended that you bring a snack with you.”
