Overbooking and Denied Boarding: Legal Response in the Last Decade

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INTRODUCTION

COMMERCIAL AIR TRAVEL performs an increasingly important function in our society as passengers rely extensively on airlines for business and leisure activities. Passengers want the flexibility to change travel plans at will, without paying for the reservations they cancel or change. Although the demand for their services is great, the airlines face stiff competition among themselves for passengers, particularly since deregulation. Airlines want to book flights to capacity to improve the profitability of their operations. The tension between the passengers’ need for reliable but flexible travel arrangements and the airlines’ need to fly with capacity loads has caused the familiar practice of “bumping.” Bumping occurs when boarding is denied due to overbooking. The bumped passenger usually accepts compensation from the airline, but may instead seek redress in the courts for his frustration and inconvenience. This paper reviews the response of the legal system to the bumping problem and gives the current practitioner a grasp of the traditional remedies, current regulations and viable causes of action since de-

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1 See generally Tice, Overbooking of Airline Reservations in View of Nader v. Allegheny Airlines, Inc: The Opening of Pandora’s Box, 43 J. AIR L. & COM. 1, 2 (1977).
2 See 14 C.F.R. § 250.9(b) (1988). This section specifically provides under “Passenger’s Options” that the bumped passenger may decline payment of compensation and “seek to recover damages in a court of law or in some other manner.” Id.
regulation. Section I gives a general overview of the problem. Section II discusses legal responses through 1976 with particular attention to discrimination as a cause of action. Section III presents a brief summary of the landmark case *Nader v. Allegheny Airlines, Inc.*, which established airline liability for fraudulent misrepresentation of its overbooking and bumping practices. Section IV examines legal responses since *Nader* through four subsections, grouped by cause of action, including misrepresentation, discrimination, breach of contract, and emotional distress. A fifth subsection mentions bumping cases caused by circumstances not related to overbooking which must be considered before proceeding with an action. Section V draws conclusions about the probable continued success of legal prosecution for bumping.

I. OVERBOOKING OVERVIEW

Airlines have practiced overbooking since the post-World War II boom in commercial air travel, with the inevitable result that some passengers are denied seats. The root of the overbooking problem is that a certain number of passengers do not make the flight and do not cancel their reservations in time for them to be resold.

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3 See infra notes 9-24 and accompanying text for the general overview of the bumping problem.
4 See infra notes 25-66 and accompanying text for discussion of the legal responses to bumping.
5 See infra notes 67-112 and accompanying text for the summary of *Nader v. Allegheny Airlines, Inc.*
7 See infra notes 275-293 and accompanying text. These causes of action are generally beyond the scope of this paper but may lead to further research.
8 See infra notes 294-303 and accompanying text, which draw conclusions about the bumping problem.
10 See Tice, *supra* note 1, at 1-12 for a thorough discussion of the practice of overbooking from the airlines' point of view. Included are airline practices and
However, these customers want the flexibility to change their plans without financial penalty. Other factors which contribute to overbooking are travel agency error, multiple bookings, and failure to cancel downline reservations.\textsuperscript{11} Airlines respond to an anticipated number of "no-shows" by booking more reservations than the flight has seats.\textsuperscript{12} Although these overbookings are based on statistical predictions (the "booking curve"),\textsuperscript{13} for any given flight more persons may arrive with confirmed reservations than there are seats on the airplane. Some passengers are then "bumped" or denied permission to board.

The Civil Aeronautics Board (CAB), which regulated the airlines until abolished by deregulation,\textsuperscript{14} allowed the airlines to overbook by neither expressly prohibiting nor regulating overbooking.\textsuperscript{15} Allowing overbooking helped airlines to mitigate losses caused by "no-shows."\textsuperscript{16} The CAB tried to protect the passenger by requiring the air-

\textsuperscript{11} Heister, Discriminatory Bumping, 40 J. AIR L. & COM. 533, 534 n.5 (1974). For example travel agents may report airline reservations confirmed when in fact they are not, leading to uncertainty by the airline as to whether the flight is overbooked. \textit{Id.} at 534 n.5. Passengers may attempt to avoid bumping by making reservations on several consecutive flights, which leads the airlines to compensate by overbooking. \textit{Id.} at 534. Finally, airlines may fail to cancel downline reservations, those reservations which form separate legs of a multiflight trip, after the initial reservation is missed. \textit{Id.} at 534 n.5. Airlines overbook to compensate for all these errors in an effort to avoid vacant seats on flights. \textit{See also} Tice, supra note 1, at 5, for additional discussion of these factors.

\textsuperscript{12} Heister, \textit{supra} note 11, at 534; \textit{see also} Tice, \textit{supra} note 1, at 1, 3 n.7.

\textsuperscript{13} Tice, \textit{supra} note 1, at 3. The booking curve, determined for each flight, is a statistical correlation between the number of reservations and the number of passengers who actually show up for a flight, based on past experience with that flight. \textit{Id.}


\textsuperscript{15} Tice, \textit{supra} note 1, at 8-9.

\textsuperscript{16} \textit{Id.} at 8.
lines to file tariffs\textsuperscript{17} stating their boarding priority rules.\textsuperscript{18} These rules set forth the procedures for determining which passengers were bumped and required the airline to compensate the bumped passengers with money, tickets for another flight, or alternative travel arrangements,\textsuperscript{19} referred to as "denied boarding compensation." The acceptance of denied boarding compensation constituted liquidated damages, preventing the passenger from pursuing other legal remedies.\textsuperscript{20} The CAB regulated only the manner of bumping and compensation, but allowed overbooking to continue unabated. Deregulation transferred the tariffs incorporating the boarding priority rules to the Office of the Secretary, Department of Transportation, effective January 1, 1985.\textsuperscript{21} Thus, deregulation perpetuated the CAB's approach to overbooking.

Statistics reflect that since deregulation the problem may have become worse rather than better.\textsuperscript{22} The rate of bumpings in 1987 was 20.46 per 10,000 passengers,\textsuperscript{23} compared with 6.0 per 10,000 in 1975 and 10.0 per 10,000 in 1968.\textsuperscript{24} Statistical summaries and booking

\textsuperscript{17} Tariffs are written rules and regulations promulgated by the carrier which govern rights and liabilities of airlines and passengers. Hitchcock, \textit{Today and Tomorrow: The Rights and Remedies of Airline Passengers}, TRIAL, Aug. 1981, at 34. Tariffs are very long documents, 25,000 to 50,000 pages, which are incorporated by reference into the conditions of contract attached to airline tickets. \textit{Id.}

\textsuperscript{18} \textit{Tice, supra} note 1, at 9 n.40.

\textsuperscript{19} \textit{Id.} at 9.

\textsuperscript{20} \textit{Id.} at 10 n.45 (citing 14 C.F.R. § 250.5 (1975)).


\textsuperscript{22} Compare statistics in \textit{Tice, supra} note 1, at 4 with those in \textit{Overbookings Rise—Contrary to Predictions}, Wall St. J., Mar. 7, 1988, at 37, col. 2. \textit{Tice} reported statistics from \textit{Aviation Daily} for years 1968 through 1975 showing numbers of persons denied boarding per 10,000 enplanements. \textit{Tice, supra} note 1, at 4 n.12. The \textit{Wall Street Journal} gave statistics by airline for 1987.

\textsuperscript{23} \textit{Overbookings Rise—Contrary to Predictions, supra} note 22, at 37, col. 2. Combined voluntary/involuntary bumping statistics from the Department of Transportation reflected that overbookings were at 19.97 per 10,000 enplanements in 1986 and 20.46 in 1987. \textit{Id.} A breakdown by airline shows large variation in the bumping problem among carriers in 1987: United Airlines' rate was 29.3; Eastern, 28.6; Continental, 25.9; Piedmont, 25.7; U.S. Air, 22.4; Northwest, 20.6; TWA, 19.1; American, 18.8; Pan Am, 17.9; and Delta, 6.1 (all figures are per 10,000 passengers). \textit{Id.}

\textsuperscript{24} \textit{Tice, supra} note 1, at 4. The bumping rate industry-wide per 10,000 passen-
curve explanations do little to placate the disgruntled passenger whose schedule is disrupted and whose arrangements are forcibly altered without warning. Although in most instances passengers accept either a later flight or compensation in return for being bumped, some passengers take the airline to court for monetary or punitive motives.

II. EARLY LEGAL RESPONSES

In response to a suit brought by a bumped passenger, the courts applied traditional legal principles and statutory provisions to determine whether the bumped passenger was entitled to relief, and, if so, how to correctly measure damages. The common law provided contract and tort theories of recovery, but federal antidiscrimination statutes provided the initial source for one of the most successful causes of action. *Fitzgerald v. Pan American World Airways* 25 was the landmark case establishing a cause of action for airline discrimination under the Civil Aeronautics Act of 1938 (CAA).26 Pan American denied singer Ella Fitzgerald seating in the first-class section on a flight in Hawaii.27 Fitzgerald, her secretary and her accompanist originally boarded the plane in San Francisco in first-class seats, with a final destination of Sydney, Aus-
tralia. On a stopover in Hawaii, they temporarily left the plane and the airline agent refused to let them resume their first-class seats. Fitzgerald alleged the airline’s refusal to allow them to reboard was willful, malicious, and motivated by racial prejudice, subjecting them to unjust discrimination. The CAA prohibited unjust discrimination by providing penalties enforceable by the government. Under the CAA, the court implied a private right of action by the wronged individual with a remedy of monetary damages. Although Fitzgerald was technically a case of bumping based on racial discrimination, the decision established important precedent which later courts used in the overbooking situation.

The cause of action found in Fitzgerald did not remain restricted to racial discrimination. Other courts soon expanded the cause of action to include any unjust discrimination in seating passengers. In Wills v. Trans World Airlines, Inc., a California court concluded that an airline’s failure to follow its customary seating procedures resulted in unjust discrimination. The airline agent bumped Wills from his confirmed seat in tourist class in favor of a passenger with a first-class reservation, in violation of the airline’s own boarding priority rules. Follow-

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28 Id.
29 Id.
30 Id.
31 Id. at 501. The Fitzgerald court cited language in Reitmeister v. Reitmeister, 162 F.2d 691, 694 (2d Cir. 1947) which construed a criminal statute, "enacted for the protection of a specified class, as creating a civil right in members of the class, although the only express sanctions are criminal." Fitzgerald, 229 F.2d at 501. For a more thorough discussion of the Fitzgerald case and the creation of a civil remedy from a criminal statute, see Heister, supra note 11, at 535.
32 Heister, supra note 11, at 535.
33 See generally the discussion of unjust discrimination in Heister, supra note 11. Heister’s article provides a detailed analysis of the historical development of the unjust discrimination cause of action through 1974. This paper gives only a summary to avoid needless duplication of Heister’s efforts.
35 Id. at 365.
36 Id. The court said the airline “arbitrarily and capriciously” gave the plaintiff’s tourist seat “to a first-class passenger who, even under the airline’s established procedure in event of oversales, was not entitled to it. By disregarding
ing the reasoning of the *Fitzgerald* decision, the court held that a civil remedy based on the CAA's discrimination provision could be read into the statute by implication.\(^7\)

Even more significantly, the court awarded punitive damages against the airline.\(^8\) The court found that the deliberate practice of overbooking constituted willful or wanton conduct necessary for such an award, and allowed a punitive recovery of $5,000.\(^9\) In addition, the *Wills* court acknowledged that a cause of action existed for breach of contract.\(^40\) Since contract damages were limited to ticket price with no exemplary damages allowed, the discrimination charge provided a better recovery.\(^41\) Thus, *Fitzgerald* and *Wills* established a remedy for the bumped passenger who could prove some discriminatory action by the airline.\(^42\) The court also extended the possibility of punitive damages for the overbooking practice itself.\(^43\)

The Civil Aeronautics Board (CAB) promulgated regulations that implied acceptance of overbooking practices by specifying procedures for the airlines to follow when they bumped a passenger.\(^44\) The CAB required airlines to provide compensation for bumped passengers who complied with the airline ticketing, check-in, and reconfirma-

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plaintiff's priority, the defendant airline unjustly and unreasonably discriminated against him, and thus violated the act." *Id.*

\(^7\) *Id.* at 363-64, 367.

\(^8\) *Id.* at 367-68; Heister, supra note 11, at 536.

\(^9\) *Wills*, 200 F. Supp. at 367-68. The court found evidence that there "had been substantial overselling of reservations for defendant's domestic flights" which indicated that "defendant wantonly precipitated the very circumstances which necessitated discriminatory removal of excess confirmed passengers from its flights." *Id.*

\(^40\) *Id.* at 365. The court recognized that an alternative to the discrimination claim was an action in state courts for breach of contract, under which the passenger would "rarely be able to prove actual damage commensurate with the wrong, nor as a rule would be entitled to exemplary damages." *Id.*

\(^41\) *Id.*

\(^42\) See *id.*; *Fitzgerald*, 229 F.2d at 502.

\(^43\) *Wills*, 200 F.Supp. at 367-68. Both *Fitzgerald* and *Wills* were based on the CAA, which Congress replaced with the Federal Aviation Act of 1958. The 1958 Act retained the antidiscrimination provision of the CAA in section 404(b). See supra note 26 for the text of the antidiscrimination provisions of both acts.

tion procedures. Alternatively, the airline could provide comparable alternate travel arrangements. Either compensation or alternative travel arrangements, if accepted, would constitute liquidated damages. Mortimer v. Delta Air Lines addressed the effect of these regulations on the established discrimination and contractual causes of action and possible punitive damage recovery. The Mortimer court held that the compensation required by the CAB did not provide the exclusive remedy available to a bumped passenger. The passenger could choose either to accept the compensation or to decline it and pursue alternative legal remedies. Any bumped passenger was entitled to the denied boarding compensation whether discrimination was involved or not. However, if the passenger was

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45 14 C.F.R. § 250.4 (1974) required that "every carrier shall file tariffs providing compensation to a passenger holding confirmed reserved space who presents himself for carriage at the appropriate time and place, having complied fully with the carrier's requirements as to ticketing, check-in, and reconfirmation procedures, and being acceptable for transportation under the carrier's tariff . . . ." Heister, supra note 11, at 538 n.27. Although the 1988 provisions differ in language, see infra notes 121-136 and accompanying text, the principle is the same.

46 14 C.F.R. § 250.6(b) (1974). This section stated,

A passenger shall not be eligible for denied boarding compensation if: . . . (b) The carrier arranges for alternate means of transportation, which, at the time such arrangement is made, is planned to arrive at the passenger's next point of stopover earlier than, or not later than two hours after, the time the flight, for which confirmed reserved space is held, is planned to arrive . . . .


47 14 C.F.R. § 250.7 (1974). This regulation states that "the carrier will tender, on the day and place the denied boarding occurs, compensation . . . which, if accepted by the passenger, shall constitute liquidated damages for all damages incurred by the passenger as a result of the carrier's failure to provide the passenger with confirmed reserved space." Heister, supra note 11, at 538-39; see also Mortimer, 302 F. Supp. at 282.

48 302 F. Supp. at 279, 282.

49 Id. at 280-81.

50 Id. at 281.

51 Id. The court clarified that if a flight is "inadvertently oversold the passenger with the least priority, who is barred from the flight, is entitled to denied boarding compensation . . . even though no discriminatory or unfair treatment has been practiced against him." Id.

52 Id. at 282.
subjected to unjust discrimination and declined the compensation, he preserved his cause of action under the antidiscrimination provision of section 404(b) of the Federal Aviation Act of 1958 and could still obtain punitive damages.\footnote{Id. The court noted that the need for punitive damages to deter similar future acts was of "little significance in justifying their award" since an administrative agency could ensure that end. \textit{Id.} However, punitive awards might be available where "necessary to provide a meaningful remedy for serious disregard for civil rights." \textit{Id.}}

Later refinements in procedure and proof, however, tended to restrict recovery. The court in \textit{Stough v. North Central Airlines}\footnote{55 Ill. App. 2d 338, 204 N.E.2d 792 (1965).} held the airline was not liable even though it seated two passengers who bought tickets later than the bumped plaintiffs.\footnote{\textit{Id.} at 338, 204 N.E.2d at 797.} The airline showed that its established policy was to bump passengers who were last to check in and that it adhered to that policy.\footnote{\textit{Id.} at 338, 204 N.E.2d at 796.} Thus, an airline could establish its own rules for priority in boarding as long as the rules reflected no unjust discrimination in themselves. Then, if the airline applied its rules consistently, no unjust discrimination resulted.\footnote{\textit{Id.} at 338, 204 N.E.2d at 797. "[T]he procedures which defendant followed, when uniformly applied to all passengers, is [sic] not illustrative of discriminatory conduct condemned by the Act." \textit{Id.} at 338, 204 N.E.2d at 797.}

Another court addressed burden of proof problems in a discrimination case. The court in \textit{Archibald v. Pan American World Airways, Inc.}\footnote{460 F.2d 14 (9th Cir. 1972).} concluded that a passenger could establish a prima facie case of unjust discrimination under section 404(b) of the Federal Aviation Act of 1958,\footnote{49 U.S.C. § 1374(b), repealed by Airline Deregulation Act, Pub. L. No. 95-504, § 1551(a)(2)(B), 92 Stat. 1905 (1982) (effective Jan. 1, 1983); see supra note 26 quoting language of antidiscrimination provision.} by showing that he had a confirmed reservation and that the airline seated another passenger in preference to him.\footnote{\textit{Archibald}, 460 F.2d at 17.} In making this prima facie case, the passenger did not need to initially establish that the airline violated its
boarding policy. Upon this showing, the burden of proof shifted to the airline to establish its boarding rules and its compliance with them in that particular case. If the airline established compliance, there was not discrimination under the statute.

Finally, the court in *Kaplan v. Lufthansa Airlines* limited the award of punitive damages for overbooking. The airline overbooked and then did not adhere to its own boarding priority rules, which prioritized seating in order of earliest confirmed reservations. The agent seated three passengers with later booking dates ahead of the Kaplans. The court found this act constituted unjust discrimination. Although previous courts had indicated that overbooking itself could be willful conduct sufficient for punitive awards, the *Kaplan* court barred punitive damages because there was no showing of deliberate and similar past conduct.

Prior to 1978, the legal system granted passengers some relief by allowing a statutory cause of action for unjust discrimination with a possibility of punitive damages. In addition, the courts preserved those rights in the face of CAB regulations. However, the legal system neutralized the full effects of those passenger rights by accepting airline overbooking as a necessary practice, allowing the airlines to generate their own boarding priority rules which were published only in tariff forms on file with the CAB, and restricting punitive damages.

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61 *Id.* The court found that "the passenger is able to prove that he possessed a confirmed reservation . . . and that this priority was not honored. This suffices to establish that a preference or discrimination has occurred." *Id.*

62 *Id.* The plaintiffs in *Archibald* were awarded punitive damages after remand upon the principles established. *Heister, supra* note 11, at 541 n.45.

63 12 Av. Cas. (CCH) 17,933 (E.D. Pa. 1973).

64 *Id.* at 17,935.

65 *Wills,* 200 F. Supp. at 367-68.

66 *Kaplan,* 12 Av. Cas. at 17,934.
III. **Nader Establishes Another Claim: The Rise and Fall of Fraudulent Misrepresentation**

Although early challenges to bumping used the antidiscrimination statutes, consumer advocate Ralph Nader used common-law misrepresentation to challenge an overbooking practice which resulted in his own bumping.\(^6^7\) In 1972, Allegheny Airlines denied Nader seating on a flight from Washington D.C. to Hartford, Connecticut where he was to speak at a fund raising rally for the Connecticut Citizens Action Group (CCAG).\(^6^8\) The airline agent refused to determine whether anyone with standby status had been allowed to board in preference to Mr. Nader, who had a confirmed reservation, and refused to ask for volunteers to give Nader a seat.\(^6^9\) The airline then offered alternate travel arrangements which would have caused Nader to miss his noon engagement, so Nader declined.\(^7^0\) Nader and the CCAG joined as co-plaintiffs against the airline,\(^7^1\) alleging unjust discrimination in denial of boarding and fraudulent misrepresentation in selling a “confirmed” reservation when the carrier deliberately and regularly overbooked flights.\(^7^2\) The resulting

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\(^{67}\) Nader v. Allegheny Airlines, Inc., 365 F. Supp. 128 (D.D.C. 1973) [hereinafter *Nader I*] (holding airline liable on discrimination and fraudulent misrepresentation charges to Nader and to third party consumer group and awarding punitive damages), *rev'd*, 512 F.2d 527 (D.C. Cir. 1975) (reversing and remanding discrimination claim for lack of evidence, reversing misrepresentation claim because CAB had primary jurisdiction, and holding third party consumer group too remote from transaction to recover damages), *rev'd in part*, 426 U.S. 290 (1976) (reviewing only the issue of CAB's primary jurisdiction over the misrepresentation claim and holding CAB did not have primary jurisdiction).

\(^{68}\) *Nader I*, 365 F. Supp. at 130.

\(^{69}\) *Id.*

\(^{70}\) *Id.* Instead of his original arrival time of 11:15 a.m., the alternate flight would have arrived at 12:10 p.m. The rally began at 12:15 p.m. with 1,000 persons in attendance. The crowd dwindled to 200 by the time Nader arrived. *Id.*

\(^{71}\) *Id.* at 129.

\(^{72}\) The unjust discrimination claim was based on Federal Aviation Act of 1958 § 404(b), 49 U.S.C. § 1374(b), *repealed by Airline Deregulation Act, Pub. L. No. 95-504, § 1551(a)(2)(B), 92 Stat. 1905 (1982) (effective Jan. 1, 1983).* *Nader I* at 132. The Federal Aviation Act section 1106 provided a savings clause: “Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.” 49 U.S.C. app. § 1506 (1982). Thus plaintiffs could bring both
litigation became the first bumping case to reach the United States Supreme Court.

The trial court held for Nader on the discrimination charge under section 404(b) of the Federal Aviation Act of 195873 and for both Nader and the CCAG on common-law misrepresentation.74 The court held that substantial overbooking without disclosure of the practice to the public constituted wanton, malicious behavior toward the passenger and the consumer group. The court awarded Nader compensatory damages of $10 and punitive damages of $25,000.75 The CCAG received $51 in nominal damages and $25,000 in punitives.76

On appeal, the United States Court of Appeals for the D.C. Circuit reversed and remanded upon several grounds.77 The court agreed that Nader had established a prima facie case of discrimination,78 but concluded that the evidence did not clearly show that Allegheny failed to follow its own boarding priority rules.79 The appellate court remanded for further findings on Allegheny’s boarding rules and the gate agent’s credibility.80 The court reversed the recovery by the CCAG as well, holding that the organization was too remote from the transaction and, thus, was not within the class of persons protected by statutory discrimination claims and common law claims for the same incident. See Tice, supra note 1, at 12 n.59.


74 Nader I, 365 F. Supp. at 132. In its finding of fact, the district court concluded that Allegheny Airlines’ overbooking practices were “substantial.” Id. at 130. It cited statistics indicating that in April of 1972 Allegheny bumped 945 persons, including 48 on the Washington-Hartford route alone. Id. at 130-31. From January 1969 to August 1972, a total of 15,929 persons with confirmed reservations were denied boarding on Allegheny flights due to overbooking. Id.

75 Id. at 134.

76 Id.


78 Id. at 539.

79 Id. at 540. The airline’s manual supported the evidence that the agent did comply with the gate check-in procedures. Id.

80 Id. at 541.
the statute. The court of appeals also stated with respect to the misrepresentation claim that the CAB, as regulatory agency, had primary jurisdiction to determine whether Allegheny had fraudulently misrepresented its overbooking practice. It stayed the district court action pending a determination by the CAB. If the overbooking practices proved to be deceptive, the trial court upon remand also had to consider Allegheny's good faith defense that the airline believed overbooking to be condoned by the CAB.

The Supreme Court granted certiorari solely on the issue of whether the CAB had primary jurisdiction over the fraudulent misrepresentation claim. Reversing the appellate decision, the Court held that the common-law claim could proceed without CAB’s initial finding of deception. In making this determination, the Court looked to the savings clause of the Federal Aviation Act of 1958. The Court stated that the CAB powers were to be supplemental to common-law causes of action, with the CAB able to provide an injunctive remedy to protect the public interest against deceptive practices or unfair com-

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**n1** Id. at 549. The CCAG was a "member of a vast indeterminate class that may be equated with the public itself." Id. "[F]oreseeability is not the test to be used in determining the class of third persons who may recover; otherwise, liability in a case such as this could become indeterminate." Id. The court therefore held that Allegheny's duty did not extend to CCAG. Id.

**n2** Id. at 544.

**n3** Id. at 546.

**n4** Id. at 551-52.


**n6** Id. at 301-02.

**n7** Id. at 298; see Federal Aviation Act of 1958 § 1106, 49 U.S.C. app. § 1506 (1982); see supra note 72 for the text of section 1106.

**n8** Nader III, 426 U.S. at 301 (interpreting the Federal Aviation Act of 1958 § 411, 49 U.S.C. app. § 1381 (1982)). This section provided that:

The Board may . . . investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier . . . is engaged in such unfair or deceptive practices . . . it shall order such air carrier . . . to cease and desist from such practices or methods of competition.

Id. at 296 n.7.
petition. Because the failure to disclose overbooking did not involve a tariff practice or similar technical question of fact uniquely within the CAB’s expertise, the CAB did not have primary jurisdiction on the discrimination or the misrepresentation claims. In summary, the Supreme Court left in place the common-law cause of action for misrepresentation without intervention by the CAB. The Court did not disturb the statutory discrimination claim with its established elements and burden of proof, nor did it resurrect the third party claim by the CCAG which had been denied by the court of appeals as too remote.

Thus, after the Nader Supreme Court decision, the bumped passenger had a choice of several remedies depending on his circumstances. He could elect to accept denied boarding compensation or alternate travel arrangements on a contractual theory. Either choice would constitute liquidated damages and foreclose further common-law action. In the alternative, the bumped passenger could decline the compensation and pursue either the unjust discrimination claim as provided by statute, or a common-law claim for misrepresentation, with compensatory and punitive damages available.

After the Supreme Court decision, Nader went back to the district court for reconsideration. Five years after its initial decision, the district court incorporated the decisions of the two higher courts and gave a detailed explanation of discrimination and fraudulent misrepresentation.

On the 404(b) discrimination claim, the district court again recognized that Nader established his prima facie case by showing that he had a confirmed reservation, had complied with preboarding conditions, and that the car-

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89 Id. at 301.
90 Id. at 305.
91 See Tice, supra note 1, at 18-19, for detailed evaluation of Nader I, Nader II, and Nader III.
93 Id. at 172. Compliance with preboarding conditions is a requirement which
rier refused to honor his reservation. Nader further showed that the airline did not honor his reservation because the flight was oversold. The burden of proof then shifted to the airline to prove compliance with its boarding priority rules. Carefully comparing the Allegheny Passenger Service Manual with the gate agent's testimony, the court found that the airline failed to prove by a preponderance of the evidence that it complied with its own rules. The court therefore held Allegheny liable for violation of section 404(b) of the Federal Aviation Act of 1958 and allowed Nader to recover compensatory damages. Enumerating the elements of the common-law tort of fraudulent misrepresentation, the court concluded that Nader had proved each one by preponderance of the

The courts applied strictly in finding that plaintiffs have established a prima facie case. The preboarding conditions established by airlines are contained in tariffs filed with the CAB (since deregulation with the Department of Transportation). Preboarding conditions generally require that passengers check in at the gate a certain length of time prior to departure, which ranges up to an hour before international flights. Those passengers who are not checked in by that time are considered "no-shows" and their seats are then available for other passengers. See, e.g., Wolgel v. Mexicana Airlines, 3 Av. L. Rep. (CCH) (21 Av. Cas.) ¶ 17,317, 17,319 (Feb. 29, 1988), infra notes 196-207 and accompanying text, for strict application of compliance with preboarding arrival time. For current regulations, see 14 C.F.R. § 250.6(a) (1988).

Another reason for bumping which is excepted by current regulations is lack of space caused by a substitution of equipment required for operational or safety reasons. 14 C.F.R. § 250.6(b) (1988). Bumping due to a substitution of equipment for safety reasons would not be grounds for a suit by the passenger. Id.

Although gate agent McDonald testified that he had followed Allegheny's boarding priority procedure, the court found that two internal memoranda, prepared by Allegheny within a week after the Nader bumping, contradicted McDonald's testimony, making it neither credible nor trustworthy. Id. at 173. These memoranda showed that two persons were boarded who had boarding priorities lower than Nader, one who had been wait-listed and one who had been cancelled initially as a "no-show". Id.

The actual amount of compensatory damages was still limited to ten dollars, which equalled the extra cost of a later ticket and long-distance telephone calls. Id.

Elements required by the court for the plaintiff to recover are: "(1) A false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation." Id.
The airline at no time, either through tariffs, advertising, or other communication, disclosed to the public its practice of overbooking. The airline's non-disclosure of its overbooking procedures gave air travelers a false expectation of their chance of having a seat on a given flight.

The court then applied to the airline a general duty in a business transaction not to suppress or conceal material facts. If the airline made any representation at all about its reservation system, the court required full and fair disclosure of all airline records and procedures, including overbooking. Finally, the court rejected Allegheny's "good faith" defense which asserted that the airline believed its policy of overbooking to be lawful and sanctioned by the CAB. The court again found Nader entitled to an award of punitive damages, but lowered the amount to $15,000.

Allegheny Airlines appealed the decision on the fraudulent misrepresentation claim and the punitive damage

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100 Id.
101 Id.
102 Id.
103 Id. at 175. The court recognized that in its jurisdiction one who speaks is under a well-established duty "'not only to state truly what he tells,' but also not to 'suppress or conceal any facts within his own knowledge which materially qualify those stated. If he speaks at all he must make full and fair disclosure.'" Id. (citations omitted).
104 Id.
105 Id. at 177. In 1967, the CAB rejected a proposed rule that required airlines to give passengers twelve-hour notice of an overbooked condition of a flight. The airline argued that the CAB's rejection of this rule implied that general nondisclosure was an acceptable practice. Id. The CAB, however, rejected the proposed rule because it felt such short notice would create confusion, alarm, bitterness, and cancellations. Id. The court stated that general disclosure would not give rise to these same problems and concluded that the CAB's rejection of the proposed twelve-hour notice rule "in no way sanctioned the absolute and wanton failure of Allegheny to provide any notice of its overbooking practice while continuing to assure passengers that they had 'confirmed reservations.'" Id.
106 Id. at 178-79. The court lowered the award from the original $25,000 to $15,000 after considering the entire record and the airline's "good faith" arguments. Id. The court found the lower amount to be adequate to punish the airline and deter similar behavior in the future. Id. The court, however, also recognized that this amount of punitive damages would not compensate Nader for the attorney's fees incurred in the extensive litigation of the case. Id.
award. The D.C. Circuit again reversed the trial court's judgment on misrepresentation. The court of appeals held that the trial court was clearly erroneous in its decision because the evidence failed to sustain two elements of the fraudulent misrepresentation cause of action. The airline lacked intent to deceive Nader because overbooking was public information, openly discussed. The airline's failure to disclose overbooking did not play a material and substantial part in leading Nader to book Allegheny's flight because Nader was aware of overbooking and was also aware that he could not rely on a confirmed reservation as a guarantee. The court of appeals also reversed the punitive damage award, although the decision on misrepresentation obviated the need for damages. The court found that Allegheny's behavior was not willful, wanton or malicious because the CAB had expressed approval of overbooking. The final disposition of the Nader case established that a cause of action for fraudulent misrepresentation was possible, but plaintiffs were unlikely to satisfy the elements of the claim because of the CAB regulations. The lasting significance of the litigation probably lies in the affirmation by the Supreme Court that common law remedies are still available to passengers who do not accept compensation.

108 Id. at 1036-37.
109 Id.
110 Id. at 1037. Nader "knew the facts" of bumping, having been bumped in April 1972 by American Airlines, two days before making his Allegheny reservations, and in 1971 by Eastern Airlines. Id.
111 Id. at 1035. The court noted that the Civil Aeronautics Board "publicly and formally expressed its approval" of overbooking by declining to issue a rule requiring airlines to give notice of an overbooked flight. Id.
112 See Magathan & Franks, Domestic Airline Passenger Remedies, 48 J. AIR L. & COM. 647, 659 (1983). Magathan and Franks noted that in light of the public information about overbooking, and the discussion among carriers and by the CAB, future recovery based on misrepresentation was "probably stillborn." Id. at 660.
IV. LEGAL RESPONSE AFTER NADER: MANY OPTIONS, LITTLE MONEY

With the definitive acceptance of a common law claim by the Nader court and the apparent availability of punitive damages, airlines were concerned about a significant increase in litigation and the possibility of large punitive damage awards.\textsuperscript{113} The possibility of consequential damages for missed business appointments, social engagements, or family affairs seemed equally threatening.\textsuperscript{114} From the opposite perspective, the passage of the Airline Deregulation Act in 1978 encouraged some consumer groups to expect more responsiveness from the airlines due to the planned abandonment of the tariff system of regulations.\textsuperscript{115} Whether, in fact, the legal system shifted toward either the airline or the consumer requires examination of current case law on the available causes of action and remedies. A brief summary of the changes in the regulations is necessary background for an understanding of the cases.

A. Regulations Currently Applicable to Overbooking

Congress deregulated the airline industry with the Airline Deregulation Act of 1978.\textsuperscript{116} The Act amended the Federal Aviation Act of 1958, repealing section 404(b), the basis for the discrimination claim.\textsuperscript{117} The plan under deregulation included phasing out most economic regulation by 1983 and terminating the Civil Aeronautics Board

\textsuperscript{113} See Tice, supra note 1, at 22-33. Tice was legal assistant at Texas International Airlines when writing this article. His sections titled, "The Spectre of Pandora's Box: Carriers are Subject to Punitive Damages for both Discrimination and Misrepresentation," \textit{id.} at 22, and "The Ultimate Liability: Consequential Damages," \textit{id.} at 30, reflect the airlines' grave concern over the possibility of litigation by every bumped passenger.

\textsuperscript{114} \textit{Id.} at 30-33.

\textsuperscript{115} Hitchcock, supra note 17. Hitchcock was an associate director of the Aviation Consumer Action Project in Washington, D.C. He felt that the tariff system was anticonsumer in practice, and that cancellation of the tariffs would "mak[e] it easier for aggrieved passengers to pursue their claims in court." \textit{Id.} at 34.


by 1985.\textsuperscript{118} Congress did, however, maintain the oversales regulations promulgated by the CAB, including requirements for denied boarding compensation, which were collected in 14 C.F.R. section 250.\textsuperscript{119} The Office of the Secretary, Department of Transportation, assumed administration of these regulations after the CAB ceased to exist.\textsuperscript{120} Thus 14 C.F.R. section 250, entitled "Oversales", still regulates airline conduct and passenger rights.

As these regulations currently exist, in the event of an oversold flight, the carrier must first request volunteers to give up their seats in return for denied boarding compensation.\textsuperscript{121} If there are not enough volunteers, the carrier may then deny boarding to other passengers based on the carrier's own boarding priority rules.\textsuperscript{122} It must establish these boarding priority rules so as not to discriminate against anyone.\textsuperscript{123} The carrier must file tariffs specifying compensation for denied boarding equal to double the ticket price up to $400.\textsuperscript{124} If the carrier also arranges comparable air transportation or other transportation which gets the passenger to his destination within two hours of his originally scheduled arrival time, the maximum compensation is $200.\textsuperscript{125}

\textsuperscript{118} Id.
\textsuperscript{119} Magathan & Franks, supra note 112, at 655.
\textsuperscript{120} 14 C.F.R. § 250 editorial note (1988) (List of Sections Affected). The List of C.F.R. Sections Affected appears at the end of each Code part.
\textsuperscript{121} 14 C.F.R. § 250.2(b)(a) (1988). This section defines a "volunteer" as "[a] person who responds to the carrier's request for volunteers and who willingly accepts the carriers' offer of compensation, in any amount, in exchange for relinquishing the confirmed reserved space." Id.
\textsuperscript{122} 14 C.F.R. § 205.2(b) (1988).
\textsuperscript{123} 14 C.F.R. § 250.3 (1988). The nondiscrimination of this section is similar in wording to the antidiscrimination provision of the Federal Aviation Act of 1958 section 404(b). See supra note 26 for that text. The current regulation provides that boarding rules and criteria "[s]hall not make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust or unreasonable prejudice or disadvantage in any respect whatsoever." 14 C.F.R. § 250.3(a) (1988).
\textsuperscript{124} 14 C.F.R. § 250.4 (1988). The airlines may also offer free or reduced rate air transportation in lieu of cash payment. 14 C.F.R. § 250.5(b) (1988). The actual amount of compensation is specified in section 250.5(a).
\textsuperscript{125} 14 C.F.R. § 250.5(a) (1988).
In some situations, a passenger denied boarding invol-
untarily from an oversold flight may not be eligible for
denied boarding compensation.126 A passenger is not eli-
gible for denied boarding compensation if he has not
 complied with the airline's procedures for ticketing, re-
confirmation, check-in, or if he does not meet the airline's
criteria for acceptability for transportation.127 Nor is com-
pensation required if bumping is caused by substituting
equipment of lesser capacity for operational or safety rea-
sons.128 If the airline offers the passenger a seat in a sec-
tion of the airplane other than the one ticketed the
passenger is not entitled to compensation if he refuses the
offer.129 Finally, if the airline arranges for alternate trans-
portation which arrives within one hour of the originally
scheduled arrival time, the carrier is not required to com-
pensate the passenger.130

The airline must provide a detailed written explanation
denied boarding compensation and boarding priorities
to all passengers who are denied boarding involun-
tarily.131 Although the explanation need not specify that
the compensation constitutes liquidated damages, it must
state that the passenger has a right to refuse compensa-
tion and bring private legal action.132 As of 1986, the air-

126 14 C.F.R. § 250.6 (1988).
127 14 C.F.R. § 250.6(a) (1988). The regulation does not define “acceptability
for transportation.”
128 14 C.F.R. § 250.6(b) (1988).
129 14 C.F.R. § 250.6(c) (1988). Note, however, that if a passenger is seated in a
section for which a lower fare is charged, he shall be entitled to an appropriate
refund. Id.
130 14 C.F.R. § 250.6(d) (1988). If the alternate flight is scheduled to arrive
more than one hour after the original arrival time, but not more than two hours
after, the airline must offer compensation equal to the ticket price in addition to
the flight, up to a maximum of two hundred dollars. 14 C.F.R. § 250.5(a) (1988).
131 14 C.F.R. § 250.9(a) (1988). The written statement prescribed by the regu-
lation includes an explanation of denied boarding compensation, an explanation
of the procedure of requesting volunteers to give up their seats, an explanation
of compensation for involuntary denied boarding, an explanation of the amount
of compensation to be paid, method of payment, and a statement of the passenger’s
options. 14 C.F.R. § 250.9(b) (1988). Significantly, the airline must also include a
summary of the airline’s boarding priority rules, written “in a manner to be un-
derstandable to the average passenger.” Id.
132 14 C.F.R. § 250.8(b) (1988). To make it clear that the passenger may either
lines must file quarterly reports with the Department of Transportation of the number of passengers denied boarding.\textsuperscript{135} In addition, airlines must give public notice of the deliberate practice of overbooking by posting an explanation of this practice on clearly visible signs with lettering one quarter inch high\textsuperscript{134} and by including an explanation with each ticket sold.\textsuperscript{135} The regulation dictates the exact wording of the public disclosure notices.\textsuperscript{136} Thus, in the last decade, the regulations have more precisely defined both the obligation of air carriers to disclose the practice of overbooking and the procedures an airline must follow when bumping does occur. On the other hand, the regulations still have not restricted the practice of overselling itself.

B. Case Law On Overbooking

A number of passengers have filed suit against airlines for bumping in the last ten years. Most passengers make multiple allegations in their complaints, but significant discussion tends to center on certain claims. For convenience, the cases examined in this article are grouped by the most viable claim in each case.

\begin{flushleft}
accept compensation or bring suit, the written statement must include under passenger's options a statement that "the passenger may decline the payment and seek to recover damages in a court of law or in some other manner." \textit{Id.}
\end{flushleft}

\textsuperscript{135} 14 C.F.R. § 250.10 (1988).

\textsuperscript{134} 14 C.F.R. § 250.11(a) (1988). The notice must state that "[a]irline flights may be overbooked and there is a slight chance that a seat will not be available on a flight for which a person has a confirmed reservation." \textit{Id.} The notice also includes a summary of the denied boarding compensation procedures. \textit{Id.}

\textsuperscript{135} 14 C.F.R. § 250.11(b) (1988).

\textsuperscript{136} 14 C.F.R. § 250.11(a) (1988). Compliance with this regulation could effectively foreclose claims for fraudulent misrepresentation after October 16, 1984, the date the regulation was promulgated. See, e.g., Mendelson v. Trans World Airlines, Inc., 120 Misc. 2d 429, 466 N.Y.S.2d 168, 171 (Sup. Ct. 1983) (holding that as TWA fully complied with CAB regulations governing disclosure, no cause of action could be maintained for fraudulent misrepresentation and false advertising). For further discussion of Mendelson, see \textit{infra} notes 150-154 and accompanying text.
1. Misrepresentation

Following the Nader decision, plaintiffs in a bumping case frequently brought multiple causes of action including both discrimination and misrepresentation. Misrepresentation claims have proven difficult to sustain if the passenger accepted denied boarding compensation or alternate travel arrangements. Two decisions by United States Courts of Appeal in 1980 affirmed lower court decisions that accepting compensation or alternate travel arrangements forecloses misrepresentation claims. In Christensen v. Northwest Airlines,¹³⁷ the Ninth Circuit reviewed a case in which Christensen and her two children were bumped in Spokane on the first leg of a flight to Hawaii. Northwest Airlines promptly arranged alternate travel so that the family arrived one hour and thirty-eight minutes after the originally scheduled arrival time.¹³⁸ The trial court concluded that the then existing CAB provision¹³⁹ deeming denied boarding compensation to be liquidated damages also applied to alternate travel arrangements.¹⁴⁰ The court held that the plaintiff made a binding election so that common-law remedies were no

¹³⁷ 633 F.2d 529 (9th Cir. 1980) [hereinafter Christensen II]; see infra note 140 and accompanying text for discussion of Christensen v. Northwest Airlines, Inc., 455 F. Supp. 492 (D. Haw. 1978) [hereinafter Christensen I], aff'd, 633 F.2d 529 (9th Cir. 1980).

¹³⁸ Christensen II, 633 F.2d at 530.

¹³⁹ Id. The regulations applicable at the time were 14 C.F.R. §§ 250.6, 250.7 (1974). Section 250.6 provided that "a passenger [was] ineligible for denied boarding compensation if the carrier arrange[d] transportation accepted by the passenger which is scheduled to arrive at the passenger's destination within two hours of the planned arrival time of the originally scheduled flight." See Christensen II, 633 F.2d at 530 n.1 for the text of the regulation as it existed in 1974. Section 250.7 provided that acceptance of denied boarding compensation constituted liquidated damages for all damages incurred by the passenger as a result of the denial of boarding. Id.

¹⁴⁰ Christensen I, 455 F.Supp. at 494. The trial court followed Rousseff v. Western Airlines, Inc., 409 F. Supp. 1262, 1263 (C.D. Cal. 1976), which held that acceptance and use of rerouted tickets constituted liquidated damages for all damages suffered by the plaintiff, including those for unjust discrimination and infliction of emotional harm. See also Roman v. Delta Airlines, Inc., 441 F. Supp. 1160, 1165-66 (N.D. Ill. 1977) (holding that passenger's acceptance of denied boarding compensation barred both statutory and common law claims).
longer available to her for other damages caused by being bumped from her flight. The court of appeals specifically affirmed this holding and construed the acceptance of alternative air transportation to be equivalent to the acceptance of denied boarding compensation.

The Eighth Circuit reached the same conclusion in Wasserman v. Trans World Airlines. Wasserman had arrived at 7:50 a.m. for his 8:00 a.m. flight, by which time passengers in line had already boarded. The airline did not tender denied boarding compensation, but arranged alternate travel which arrived within two hours of the scheduled arrival time. The trial court relied on the Christensen district court decision to find Wasserman's state law claim for misrepresentation barred as a matter of law because of his acceptance of liquidated damages. The Eighth Circuit affirmed, although not in the same strong language the Ninth Circuit used in Christensen. The Eighth Circuit simply used a "clearly erroneous" standard to find that the judge had correctly applied the relevant

\[\textit{Christensen I, 455 F. Supp. at 494. Christensen alleged that the airline agents were rude and discourteous, that the incident left her "greatly anguished and upset, rendered anxious, nervous, angry and ill," and she then prayed for $25,000 general damages and $25,000 punitive damages. Id. at 493.}\]

\[\textit{Christensen II, 633 F.2d at 530. The court stated that its interpretation was consistent with comments to 14 C.F.R. section 250.6(b) which said that the regulation gave the passenger the option of accepting denied boarding compensation or other transportation arriving at the specified time. Id. (citing comments to C.A.B. Order No. ER-588, 44 Fed. Reg. 14,282 (1969)).}\]

\[\textit{Id. The court found that her tort claim for humiliation and embarrassment could not be heard in federal court. Although Christensen sued for damages exceeding the $10,000 minimum for diversity jurisdiction under 28 U.S.C. section 1332, the court found that she did not make this claim for damages in good faith. Id. at 530-31.}\]

\[\textit{Wasserman I, 486 F. Supp. at 195.}\]

\[\textit{Wasserman II, 632 F.2d at 69, 71 (8th Cir. 1980) [hereinafter Wasserman II]; see infra note 145 and accompanying text for a discussion of Wasserman v. Trans World Airlines, 486 F. Supp. 194 (W.D. Mo. 1980) [hereinafter Wasserman I], aff'd, 632 F.2d 69 (8th Cir. 1980).}\]

\[\textit{Wasserman I, 486 F. Supp. at 195.}\]

\[\textit{Wasserman I, 486 F. Supp. at 195.}\]

\[\textit{Id. at 196.}\]

\[\textit{Id. at 198. The court also cited Rousseff, 409 F. Supp. at 1262, in support of its holding that acceptance of alternate travel as liquidated damages barred a plaintiff's federal and state law claims. Wasserman I, 486 F. Supp. at 198.}\]

\[\textit{Wasserman I, 486 F. Supp. at 195.}\]

\[\textit{Id. at 197. In addition, this court found both federal and state tort claims barred. Id. at 198.}\]
Thus, because the claims were barred by the liquidated damages clause specified by the regulations, both courts declined to evaluate whether continued overbooking of confirmed reservations constituted fraudulent misrepresentation. In 1983, however, a New York state court did consider the issue of fraudulent misrepresentation with respect to overbooking practices. In *Mendelson v. Trans World Airlines*, the court noted that following *Nader*, the CAB promulgated a new regulation requiring airlines to post a public notice of the practice of overbooking as well as to include such notice with each ticket sold. Mendelson asserted that failure to disclose overbooking in other forms of publication, such as advertisements, even when the airline was in compliance with the new regulation, constituted misrepresentation. The trial court held that the airline had no duty of disclosure beyond that stated in the regulation. Any extension of the duty was for the CAB or the legislature to make, not the judiciary.

Thus, fraudulent misrepresentation claims seem very difficult to sustain since the high-water mark of *Nader*. The discussion of the problem increased public awareness and spurred the CAB to require public disclosure of overbooking practices. However, so long as the airline complies with the regulation, it protects itself from a successful allegation of nondisclosure, the basis of the claim in *Nader*. In addition, it is clear that the passenger forecloses all common law claims if he accepts any form of

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149 Wasserman II, 632 F.2d at 71.
150 120 Misc. 2d 423, 466 N.Y.S.2d 168 (Sup. Ct. 1983).
151 *Id.* at 425, 466 N.Y.S.2d at 170. This notice is codified at 14 C.F.R. § 250.11 (1988).
152 Mendelson, 120 Misc. 2d at 425, 466 N.Y.S.2d at 170.
153 *Id.* at 425, 466 N.Y.S.2d at 170.
154 *Id.* at 425, 466 N.Y.S.2d at 170. The court stated that "any argument that CAB regulations governing disclosure should be amended must be made to either the CAB or the legislature." *Id.* (citation omitted).
155 14 C.F.R. § 250.11(a) (1988); see supra note 134 for a partial text of this regulation.
denied boarding compensation, either payment for tickets or other travel arrangements.156 Thus, a successful mis-
representation claim today would require an exacting set of circumstances. First, the airline must fail to comply with regulations on notices about overbooking. Second, the airline would probably have to affirmatively represent that a confirmed reservation guaranteed a seat on a given flight in advertising or other promotional literature, thus meeting the elements of misrepresentation.157 Finally, the passenger must decline all compensation offered at the time he is bumped, and must make his own alternate travel arrangements at his own expense. Even if the passenger meets these requirements, he awaits uncertain results in the court system. Thus the airlines are probably in a stronger position currently than pre-Nader due to increased protection afforded by compliance with the regulation. The rash of punitive awards for misrepresentation feared by the airlines in bumping cases has not materialized.

2. Discrimination

After litigation based on discrimination claims under section 404(b) of the Federal Aviation Act of 1958158 proved successful, many of the subsequent cases included allegations of discrimination. Since Congress repealed the section underlying these claims159 pursuant to the Airline Deregulation Act of 1978,160 the practitioner must keep in mind the chronology of the statute when examining cases with discrimination claims. Discrimination cases filed before 1958 fell under section 404(b) of the Civil

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156 See supra notes 137-148 and accompanying text.
157 See supra note 99 for elements of a misrepresentation claim.
159 49 U.S.C. app. § 1551(a)(2)(B) (1982) (repealing earlier section “except insofar as such section requires air carriers to provide safe and effective service”).
160 See supra note 116 for citation to the Airline Deregulation Act.
Aeronautics Act of 1938.\textsuperscript{161} Claims brought after 1958 fell under section 404(b) the Federal Aviation Act of 1958.\textsuperscript{162} Most of the recent case law refers to this 1958 provision.\textsuperscript{163} As previously noted, Congress specifically repealed section 404(b),\textsuperscript{164} effective January 1, 1983. Thus, causes of action which arose prior to January 1, 1983 were viable under the Federal Aviation Act of 1958. Current claims may not have the same statutory basis available. Nevertheless, understanding the discrimination cases is important for two reasons. First, discrimination issues frequently arise in courts' written decisions on bumping, so that research on bumping requires familiarity with the discrimination claim. Second, the discrimination claim may still be available under the regulations passed in June 1983.\textsuperscript{165} These regulations specify the boarding priority rules "shall not make, give, or cause any undue or unreasonable preference or advantage to any particular person or subject any particular person to any unjust or unreasonable prejudice or disadvantage in any respect whatsoever."\textsuperscript{166} Discrimination under the regulation is as yet untested, however.

Most of the litigation for bumping based on discrimination after the early Fitzgerald case\textsuperscript{167} was not racially motivated. Two court of appeals cases in 1978 reiterated that discrimination need not be racial to be unjust. However, sizable awards for nonracial discrimination are rare. In

\textsuperscript{161} See supra note 26 for text.
\textsuperscript{162} See supra note 26 for text.
\textsuperscript{163} See Heister, supra note 11, for an article reviewing the majority of case law through 1974 under the Federal Aviation Act of 1958 section 404(b).
\textsuperscript{165} 14 C.F.R. § 250.3(a) (1988) (includes an antidiscrimination clause).
\textsuperscript{166} Id. The intent to preserve a rule against discriminatory practices is apparent in the written commentary to the regulation changes. "The current rule allocates the risk of being denied boarding among travellers by requiring airlines to solicit volunteers and use a non-discriminatory boarding procedure." Economic Regulations Amendment 19 to Section 250, 47 Fed. Reg. 52,980 (1982) (to be codified at 14 C.F.R. § 250).
\textsuperscript{167} See supra notes 25-32 and accompanying text for discussion of the Fitzgerald decision.
Smith v. Piedmont Aviation, Inc.,\textsuperscript{168} Smith had a confirmed reservation through Delta for a Piedmont Aviation flight from Atlanta, Georgia to Bluefield, West Virginia in 1974 to participate in a friend's wedding.\textsuperscript{169} He complied with all airline preflight procedures\textsuperscript{170} but was bumped by the airline agent, along with seven others, in violation of the airline's own boarding priority rules.\textsuperscript{171} Piedmont refused to remove Smith's luggage from the plane, tendered denied boarding compensation which Smith refused to cash, and offered standby status on a subsequent flight which was also full.\textsuperscript{172} Smith finally booked a flight to Roanoak, Virginia, and drove into Bluefield several hours late for the wedding rehearsal and dinner.\textsuperscript{173} The trial court found that the airline unjustly discriminated against Smith by its failure to follow its own boarding priority rules.\textsuperscript{174} The trial court awarded both compensatory damages for actual expenses, emotional distress and humiliation, and punitive damages for the airline's knowing violation of its own boarding priority rules.\textsuperscript{175} On appeal, the Fifth Circuit affirmed the compensatory damages, indicating that the award was generous, but did not "shock the judicial


\textsuperscript{169} Smith v. Piedmont Aviation, Inc., 567 F.2d 290, 291 (5th Cir. 1978) [hereinafter Smith II].

\textsuperscript{170} Id. at 291. Smith reconfirmed his reservation twice before departure and checked into the boarding gate two hours prior to departure time. Not wanting to stand in a long line, however, he did not line up at the first boarding call, thinking his confirmed reservation assured him a seat. \textit{Id.}

\textsuperscript{171} Id. Piedmont's boarding priority rules provided for seating passengers in the order of time and date of booking reservations. By seating passengers in order of the first to line up, the agent used a first-come, first-served rule. However, the agent contended he was under verbal instructions to "get the flight out on time" and that checking booking times and dates would have delayed the flight several hours. \textit{Id.} at 292.

\textsuperscript{172} Id. at 291.

\textsuperscript{173} Id.

\textsuperscript{174} Smith I, 412 F. Supp. at 643.

\textsuperscript{175} Id. The trial court awarded $51.80 for actual damages in the amount paid for a rental car, $1000 for emotional distress and humiliation, and $1,500 for punitive damages for Piedmont's "knowing and continuing violation of its boarding priority rules." \textit{Id.}
conscience." However, it reversed the punitive damage award, because the airline did not exhibit "evil motive, actual malice, deliberate violence, or oppression." The Seventh Circuit rendered a similar decision in the same year in *Karp v. North Central Airlines.* North Central Airlines bumped Ms. Karp and her children from a flight on which she had confirmed reservations. The airline boarded passengers on a first-come, first-served basis, contrary to its boarding policy on file with the CAB. The trial court found that the airline violated the antidiscrimination provision of section 404(b) of the Federal Aviation Act of 1958. Karp received actual damages of three dollars and punitive damages of $2,000 from the trial court. The Seventh Circuit reversed the award of punitive damages, citing both *Nader* and *Smith* for the requirements of wanton, malicious, and oppressive behavior necessary to sustain punitive damages. The court applied the requirements to the airline's failure to file a boarding priority rule that corresponded with its actual practice rather than to the airline agent's behavior toward Karp. The behavior which the court evaluated was that

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176 *Smith II*, 567 F.2d at 292.
177 Id. The Fifth Circuit cited the *Nader II* court of appeals decision for the elements required to award punitive damages. *Id.; see supra notes 67-111 and accompanying text for a discussion of all the *Nader* decisions.
179 *Karp v. North Cent. Airlines*, 583 F.2d 364, 365 (7th Cir. 1978) [hereinafter *Karp II*]. Karp was travelling home with her twenty-one month old child and her ten-month old child who was recovering from surgery. *Id.* at 365.
180 *Id.* at 366. The plaintiff also advanced an argument that a first-come, first-served boarding priority rule constituted invidious discrimination against the infant which the court of appeals rejected as unsupported. *Id.* at 366 n.6.
181 *Karp I*, 437 F. Supp. at 90. The airline filed a third-party complaint against the travel agent who booked Ms. Karp on the flight, alleging that the error of that agent caused the overbooking. *Id.* at 91. The trial court dismissed this claim on the ground that only the airline had violated the boarding priority rules and discriminated against the passenger. *Id.* The airline did not appeal the dismissal. *Karp II*, 583 F.2d at 365 n.2.
182 *Karp II*, 583 F.2d at 365.
183 *Id.* at 365-66.
184 *Id.* at 366.
of the airline as a whole and not that of its agent toward individual passengers.

The Ninth Circuit found the claim of unjust discrimination actionable by a handicapped individual in *Hingson v. Pacific Southwest Airlines.* The airline agent denied boarding to Hingson, a blind passenger with a confirmed reservation, because the front row seats were full. The agent claimed that airline policy required handicapped passengers to sit in the front row. Hingson boarded the next flight but refused to take a front row seat, and was escorted from the plane by the Los Angeles police. The trial court directed a verdict for the airline on all issues except a section 404(b) discrimination claim. The jury verdict on that claim favored the airline. Hingson’s appeal of the jury verdict contested certain evidentiary rulings by the trial court excluding expert testimony for Hingson by an airline employee. The court of appeals approved Hingson’s claim under section 404(b) because Hingson could show, through the excluded testimony, that the airline’s policy, stated in manuals and filed tariffs, did not restrict blind passengers to front row seats. The court remanded the discrimination claim for a new trial, though it upheld the directed verdict for the airline on the other issues. The appellate court also

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185 743 F.2d 1408 (9th Cir. 1984).
186 Id. at 1411.
187 Id.
188 Id.
189 Id. Hingson’s complaint had listed fourteen causes of action under state and federal law, including infliction of emotional distress, assault, and false imprisonment. Id. at 1411, 1416.
190 Id. at 1411.
191 Id. at 1412.
192 Id. The airline’s policy manuals stated that blind passengers could be allowed to sit anywhere except by emergency exits. Id.
193 Id. at 1417. Discrimination under the Federal Aviation Act of 1958 section 404(b) was the only claim which went forward. Hingson had alleged discrimination under two other statutes, the Federal Aviation Act of 1958 section 404(a) and the Federal Rehabilitation Act. Id. at 1413-14. Section 404(a) of the Federal Aviation Act required carriers to provide “safe and adequate service, equipment, and facilities in connection with such transportation,” but it did not create a private right of action. 49 U.S.C. app. § 1374(a) (1982); *Hingson,* 743 F.2d at 1408, 1414.
noted that 404(b) had been repealed by the Airline Deregulation Act of 1978, effective January 1, 1983, but Hingson’s claim arose prior to the repeal.

The Seventh Circuit heard a case based on section 404(b) as recently as 1987-88. In Wolgel v. Mexicana Airlines, the cause of action arose in 1981 when Mexicana Airlines bumped the Wolgels at O'Hare Airport from a flight to Acapulco. Five years later, the passengers filed suit for breach of contract and discriminatory bumping. Since Mexicana was an international carrier and subject to the provisions of the Warsaw Convention, the trial court held the Wolgels' claim was barred by the two-year statute of limitations in the Convention. The Seventh Circuit disagreed on appeal, however, finding that the Wolgels' claim fell outside the Warsaw Convention which allowed action only for personal injury, loss of damage to baggage, or delay of travel. The Wolgels sought damages for bumping itself, which the court of appeals interpreted as total nonperformance of the contract as opposed to delay of travel. Therefore, the Illinois five-
year statute of limitations "for all actions not otherwise provided for" applied.\textsuperscript{202} The court remanded the case for trial on the section 404(b) claim of unjust discrimination, holding that the remedy for bumping was limited to the remedy provided by the home country.\textsuperscript{203} The court noted that although section 404(b) was repealed during deregulation,\textsuperscript{204} a combination of the Illinois statute of limitations and the federal savings clause preserved the Wolgels' claim.\textsuperscript{205} Upon remand, however, the trial court held that the Wolgels failed to establish a prima facie case under 404(b) because they had not complied with the airline's preboarding conditions.\textsuperscript{206} Therefore, Mexicana had no duty to provide seats, to ask for volunteers to deplane, or to pay the Wolgels any oversale compensation.\textsuperscript{207}

In all cases of discrimination, courts look closely at the facts and circumstances to determine whether passengers and airlines have complied literally with their respective obligations before finding the airline responsible for even relatively low amounts. Punitive damages are particularly hard to sustain because the courts evaluate the overall

\textsuperscript{202} Id. at 444-46. The court summarized the applicable state provisions for statutes of limitations:

Illinois provides a two-year statute of limitation for personal injury claims, see Ill. Ann. Stat. ch. 110, para. 13-202 (Smith-Hurd 1984), a ten-year statute of limitation for contract claims, see id. at para. 13-206, and a five year statute of limitations for, among other things, "all civil actions not otherwise provided for," see id. at para. 13-205.

\textsuperscript{203} Id. at 444-45. A cause of action for bumping under the Warsaw Convention is outside the scope of this paper. However, there appears to be a difference of opinion on the legitimacy of such a claim. See infra notes 284-289 for other cases on this issue.

\textsuperscript{204} Wolgel I, 821 F.2d at 443 n.1.

\textsuperscript{205} Id. The federal saving statute cited is 1 U.S.C. § 109 (1982). Id.

\textsuperscript{206} Wolgel v. Mexicana Airlines, 3 Av. L. Rep. (CCH) (21 Av. Cas.) ¶ 17,317, 17,319 (Feb. 19, 1988) [hereinafter Wolgel II]. Mexicana's tariff on file with the CAB required check-in at the ticket counter sixty minutes before flight time; the Wolgels did not reach the counter until fifty-five minutes before flight time, missing the required time by five minutes. Id. at 17,318-19.

\textsuperscript{207} Id. at 17,319.
conduct of the airline instead of considering solely the behavior of the individual airline agent involved in a particular bumping incident. Additionally, a private right of action under the statute is no longer available if the incident occurred after January 1, 1983, when the statute was repealed.  

There is at least a possibility, however, that discrimination is still actionable under the current regulations which specify that boarding rules shall not subject any person to any unreasonable prejudice or disadvantage in any respect. The purpose of the regulation is to allocate the risk of being bumped among passengers by requiring airlines to solicit volunteers for later travel and by requiring airlines to use nondiscriminatory boarding procedures. Thus presumably an airline who discriminates in its boarding procedures is still liable under the current regulations. To bring a successful claim for bumping, however, the passenger will likely have to comply with specific conditions in other regulations by meeting the preboarding requirements of the airline and rejecting any proffered compensation. As yet, however, there is no indication whether discrimination, the most common claim by bumped passengers, will wither or revive after deregulation.

3. Breach of Contract

In addition to misrepresentation and discrimination claims, plaintiffs look to state common law for other useful theories of liability, such as breach of contract and tortious infliction of emotional distress. As mentioned earlier, the Wills court specifically affirmed that a state common-law cause of action for breach of contract existed in addition to the discrimination claim when a passenger is bumped from a flight. Although not used extensively

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208 Wolgel I, 821 F.2d at 443 n.1.

209 14 C.F.R. § 250.3 (1988); see supra note 123 for text of the antidiscrimination provision in the regulations.

210 See supra note 166 for citation regarding purpose from the Federal Register.

prior to deregulation, several decisions at the trial court level have affirmed the usefulness of such claims since deregulation. Though not expressed in contract terms, a New York City court in 1982 allowed a plaintiff to recover from an airline apparently on a breach of contract theory.212 Plaintiff Levy had reservations on an Eastern Airlines flight which was delayed due to bad weather.213 The Eastern agent made alternate reservations for Levy on a Pan American flight which he confirmed three times.214 Just prior to departure, Pan American bumped Levy and four family members.215 Levy sued both airlines for denial of transportation and for insult and inconvenience.216 The trial court found that Eastern had behaved in a reasonable manner, but that Pan American breached its duty to the passenger.217 The court evaluated both the passenger’s rights and the airline’s obligations under the applicable CAB regulations218 and applied to Pan American a new and superseding independent obligation to transport the passengers.219 These obligations were imposed in addition to the CAB regulations. The passengers had complied with all their requirements for ticketing, check in, and confirmation, but the airline failed to meet its obligation to transport the passengers. The court awarded the plaintiff damages in accordance with the regulations.220

213 Id. at 847, 449 N.Y.S.2d at 907.
214 Id. at 847, 449 N.Y.S.2d at 909.
215 Id. at 847, 449 N.Y.S.2d at 907-08.
216 Id. at 847, 449 N.Y.S.2d at 909.
217 Id. at 847, 449 N.Y.S.2d at 908.
218 Id. The court quoted from a tariff rule on file with the CAB:

Tariff Rule 240(C)(1)(b) provides: “If the carrier causing such delay (Eastern) . . . is unable to provide onward transportation acceptable to the passenger, any other carrier, or combination of carriers, at the request of the passenger, will transport the passenger without stop-over on its next flight . . . if it will provide an earlier arrival at the passenger’s destination.”

219 Id. at 847, 449 N.Y.S.2d at 908-09.
220 Id. at 847, 449 N.Y.S.2d at 909. Section 250.4 stated at that time that denied boarding compensation was equal to the ticket price. However, if the airline could not arrange another flight to the passenger’s destination within two hours
In Goranson v. Trans World Airlines, another New York court examined both the discrimination cause of action and the Nader decision to establish a common-law contract cause of action. TWA bumped Goranson from a flight booked as part of a tour package to England because the flight was overbooked. The tour included items of special interest to Goranson, an avid horticulturist, who had saved and waited many years for the trip. She stated that she selected Trans World Airlines (TWA) because of its “representations as to reliability and responsibility” particularly in the TWA brochure promoting the tour. After bumping her, the airline finally arranged a flight for her two days after her scheduled departure, causing her to miss the most important features of her trip. TWA then refused to allow her to revisit the sights she had missed. TWA tendered denied boarding compensation of $400, the maximum amount required by the regulations, which Goranson refused. The court of the scheduled arrival time, the compensation was doubled. The court award was equal to twice the price of five one-way fares. The court thus looked to the regulations to provide a measure of damages, and the plaintiffs received the same amount they would have received if they had accepted denied boarding compensation initially.

221 121 Misc. 2d 68, 467 N.Y.S.2d 774 (Civ. Ct. 1983).
222 Goranson, 121 Misc. 2d at 68, 467 N.Y.S.2d at 778-79. The court concluded that “a careful reading of the case law establishes that the airlines have not been immunized from a State common law contract cause of action as a result of the Federal Aviation Act.” Id. at 68, 467 N.Y.S.2d at 778.
223 Id. at 68, 467 N.Y.S.2d at 779-80. The court reasoned, “The Nader III case unmistakably affirms the existence of common law tort liability and it is only a mere corollary to hold that common law contract liability is viable.” Id. at 68, 467 N.Y.S.2d at 780.
224 Id. at 68, 467 N.Y.S.2d at 775.
225 Id. at 68, 467 N.Y.S.2d at 775. The credibility of this plaintiff is obvious from the court’s description of her as an “intelligent woman having a genuine interest in gardening . . . a member of various horticultural associations” with a “special personal interest in visiting the Savill Gardens.” Id. at 68, 467 N.Y.S.2d at 775.
226 Id. at 68, 467 N.Y.S.2d at 775. TWA’s brochure promoting the tour read in part, “Consider: with TWA there are no charter risks, no standby blues or airport gambles. Every flight is scheduled, carrying with it the TWA reputation of reliability. You know in advance exactly where you’ll fly from and when.” Id. at 68, 467 N.W.2d at 775.
227 Id. at 68, 467 N.Y.S.2d at 776.
considered two issues: whether the carrier was liable under simple common-law breach of contract, and whether the amount of damages was limited exclusively by the regulations on oversales. The court reported no other cases which awarded compensatory damages for breach of contract by bumping. The court examined earlier decisions involving unjust discrimination and concluded that breach of contract still provided a viable remedy, a conclusion supported by the analogous tort liability under common law found by the Supreme Court in Nader.

Having thus grounded the action in contract, and having a plaintiff who had refused to accept the denied boarding compensation as liquidated damages, the judge went beyond the contract-based liquidated damages specified in the regulations, and awarded actual compensatory damages, disregarding TWA's tariffs and the maximum amounts specified in the CAB regulation. Those damages for Goranson included round trip airfare, ground transportation, hotel, meal and tour expenses to recreate the two days which TWA denied her by the bumping incident. The court also awarded her a small amount for her extreme inconvenience, which presumably represented an "actual" damage item. Goranson established a logical legal response to the bumping problem based on

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228 Id. at 68, 467 N.Y.S.2d at 776.
229 Id. at 68, 467 N.Y.S.2d at 775.
230 Id. at 68, 467 N.Y.S.2d at 779.
231 Id. at 68, 467 N.Y.S.2d at 780. The court noted the inconsistency between the CAB's tacit approval of overbooking and the implied recognition that resultant bumping is a breach of contract as embodied by the regulations. Id. at 68, 467 N.Y.S.2d at 777. The court also noted the predominance of discrimination and misrepresentation theories, presumably because plaintiffs had achieved little success with breach of contract actions. Id. at 68, 467 N.Y.S.2d at 778.
232 Id. at 68, 467 N.Y.S.2d at 780.
233 Id. at 68, 467 N.Y.S.2d at 781.
234 Id. at 68, 467 N.Y.S.2d at 781. These expenses came to $1,400. The maximum allowed by the regulation was $400.
235 Id. at 68, 467 N.Y.S.2d at 781 (citing Wills, 200 F. Supp. at 366-67 (damages available for humiliation and outrage) and Smith II, 567 F.2d at 292 (damages for extreme inconvenience)). The Goranson court gave no rationale for an "inconvenience" element in contract damages.
breach of contract. The court stated its decision was a substantial remedy, particularly useful for persons whose tour plans are disturbed, because special damages are provable in a greater amount than provided by the regulations.236

A federal district court recently found the breach of contract claim viable in a non-tour-package situation in Lopez v. Eastern Airlines.237 Eastern bumped Lopez from a flight from Newark to Miami en route to a wedding. Lopez declined to accept denied boarding compensation, ultimately using his ticket on a late flight which arrived between 3:00 and 4:00 in the morning instead of the originally scheduled time of midnight.238 The court recognized that the widespread disclosure of overbooking practices foreclosed the common-law fraudulent misrepresentation claim set forth in Nader. However, the court reasoned that simply because one common-law claim was not available, "it does not follow that [bumped] passengers should not be able to seek relief from such a vexing practice under a breach of contract theory."239 Specifically following Goranson, the court found Eastern Airlines liable for common-law breach of contract and awarded Lopez actual compensatory damages.240 These damages included out-of-pocket costs and amounts for inconvenience, loss of time, anxiety, and frustration.241

Although reported cases allowing recovery for bumping on a breach of contract are few, one may expect that the theory will be used more with corresponding decline in

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236 Id. at 68, 467 N.Y.S.2d at 775.
238 Id. at 182. Lopez was an attorney who apparently understood the significance of accepting the compensation, because he was aware that Eastern overbooked and was aware that his ticket contained provisions relating to overbooking and available damages. Id.
239 Id. at 183.
240 Id.
241 Id. (citing Goranson, 121 Misc. 2d at 68, 467 N.Y.S.2d at 781 (damages for extreme inconvenience) and Smith II, 567 F.2d at 292 (affirming damages for inconvenience)). The court awarded only $450, "not much, unless as one suspects, Lopez has brought this action for the principle of it all." Id.
misrepresentation and discrimination as causes of action.\textsuperscript{242} The regulations of 14 C.F.R. section 250 will govern the contractual relationship. The passenger will probably be held to standards established by the regulations for compliance with airline rules for ticketing, check-in, and reconfirmation. According to the regulations, the passenger must decline the denied boarding compensation and probably also decline any alternate travel arrangement which would reach his destination within one hour of the original arrival time. If the passenger proves compliance with the regulations, however, a court may require the airline to compensate the passenger for his actual damages, which may be more than the ticket price and more than the amount specified in the regulations. However, because damages under breach of contract theory are only compensatory in nature, plaintiffs will probably not recover the large punitive damage awards feared by the airlines after Nader.

4. Emotional Distress — Mental Anguish

Intentional infliction of emotional distress as a common-law claim has greater potential for sizeable awards than a contract claim. In Nader, the Supreme Court clearly affirmed the passenger's right to pursue common-law claims under the regulations,\textsuperscript{243} with no limitations on any particular cause of action. In addition to common-law misrepresentation and contract claims, then, the passenger has the right to pursue any common-law claim provable under the facts and circumstances, including intentional infliction of emotional distress. Courts have awarded small amounts for anxiety and inconvenience re-

\textsuperscript{242} Another recent decision has used breach of contract theory against an airline, but not in the bumping context. See Mathews v. Northwest Airlines, 3 Av. L. Rep. (CCH) (21 Av. Cas.) ¶ 17,300 (Feb. 8, 1988) (holding that passenger could collect refund on tickets purchased at a reduced rate with nonrefundable cancellation clause, because there was no mutuality of obligation as the airline could cancel her reservation at any time and bump her due to overbooking).

\textsuperscript{243} Nader III, 426 U.S. at 300; see supra notes 85-91 and accompanying text for preservation of common law claims.
sulting from bumping.\textsuperscript{244} In practice, however, emotional distress as a separate tort has not met with success.

In \textit{Reyes v. Eastern Airlines},\textsuperscript{245} Mrs. Reyes and her two daughters were bumped from an Eastern flight from New York City to San Juan, Puerto Rico at 10:30 p.m. They finally boarded a flight at 8:00 a.m. the following morning, having spent the entire night in the airport with no money, no accommodations, and little assistance from the airline in dealing with the situation.\textsuperscript{246} Mrs. Reyes alleged damages of $70,000 for mental anguish and pain from being left alone in the airport.\textsuperscript{247} The court examined the facts carefully to determine whether there was any basis for so great a recovery or whether the amount was alleged as a means of meeting the requisite amount in controversy for federal jurisdiction in a diversity case.\textsuperscript{248} The court acknowledged that there might be a valid tort claim under Puerto Rican law, but held that the plaintiff would not be able to recover the amount claimed under Puerto Rican requirements.\textsuperscript{249} The court stated that the plaintiff could recover damages if her emotional condition had been af-


\textsuperscript{245} 528 F. Supp. 765 (D.P.R. 1981).

\textsuperscript{246} Id. To compound the situation, the Reyes' spoke very little English. \textit{Id.}

\textsuperscript{247} Id. Reyes requested another $5,000 in damages for hardship, and mental anguish and pain as a result of loss of her baggage and later receipt of a letter from Eastern Airlines' claims department refusing liability. \textit{Id.} Reyes' husband, as co-plaintiff, alleged another $40,000 in damages for mental anguish and pain because he could not find his wife and daughters at the airport when he went to meet the flight. \textit{Id.} at 767.

\textsuperscript{248} Id.

\textsuperscript{249} Id. The court acknowledged that judgment for pain and suffering was "necessarily subjective and must rest upon an evaluation of the severity of pain suffered, its duration and its mental consequences." \textit{Id.} The court also noted the Supreme Court of Puerto Rico required that moral damages be compensated only if "it is shown how those damages affected the health, welfare, and happiness of the injured." \textit{Id.} at 767-68 (citing Ramos Rivera v. E.L.A., 90 P.R.R. 806 (1964)).
fected substantially, but the court failed to find physical injury, medical treatment, hospitalization, expenses, disbursement, loss of incomes, or other special damages to support a claim of emotional distress. Based on the paucity of proof, the court rejected the plaintiff's claim as made in bad faith for the purpose of obtaining federal jurisdiction. Thus the court approved the availability of the emotional distress claim under state law, but not its manipulation for federal jurisdictional purposes.

Even where a plaintiff can prove medical expenses, general tort law may disallow such expenses where there is a superseding or intervening cause. In *Farmilant v. Singapore Airlines*, a plaintiff with an “open” ticket in the Orient was bumped from a flight to Madras, but no alternative flight seats were available for the next three weeks. His alternate travel arrangements included a train trip during which he apparently suffered food poisoning. Once back in the United States, he spent twelve days in the hospital recovering from his illness. The court held that the train meal was a superseding cause of his illness that was not attributable to the airline, and reduced the possible award to compensatory damages only. In addition, the court disallowed punitive damages because Farmilant failed to show willfulness, malice, or fraud on the part of

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250 Id. at 767.
251 Id. (citing Gill v. Allstate Ins. Co., 458 F.2d 577 (6th Cir. 1972)).
252 Id. at 768. The court noted the Christensen II decision in which the court found that the plaintiff prayed for a large amount of damages in bad faith for jurisdictional purposes. Id.; see supra notes 137-143 and accompanying text for further discussion of Christensen II.
254 Id. at 1149. The “open” arrangement included a round trip ticket between Los Angeles and Singapore, with short regional flights left open for his own travel flexibility. The travel agent assured him there was “no problem” with booking passage whenever he wanted, but the lack of a confirmed reservation obviously created problems in pursuing a bumping claim. Id. at 1149-50.
255 Id. at 1150.
256 Id. at 1151. Farmilant alleged misrepresentation, breach of contract, negligence, and wilful and wanton conduct by the airline. After excluding the medical expenses, the court concluded that compensatory damages could include extra living costs, extra costs for travel by rail, and extra costs for the use of another carrier for the flight home. Id.
the airline agent who told him there would be "no problem" travelling around the Orient without confirmed reservations once he arrived in the region.\textsuperscript{257} Because of the court's holdings, damages fell short of the jurisdictional amount, allowing the court to dismiss for lack of subject matter jurisdiction.\textsuperscript{258} The court indicated in dicta that the airline might have been negligent in its treatment of Farmilant, but not intentionally evil or malicious.\textsuperscript{259} Thus one could infer that Farmilant might have been more successful in state court with a state law claim of negligence by the airline or intentional infliction of emotional distress by the agent.\textsuperscript{260}

Courts disposed of two very recent cases in which plaintiffs alleged infliction of emotional distress on the grounds that the plaintiff had failed to raise a triable issue of fact. In \textit{Marshall v. Pan American World Airways},\textsuperscript{261} the airline bumped Marshall and her three children from a flight to St. Croix. She accepted alternate travel arrangements but the airline bumped her a second time the next day.\textsuperscript{262} Following an altercation with Pan Am's ticket agent, Marshall sued for assault, false imprisonment, negligent hiring and employment of the ticket agent, and negligent infliction of emotional distress.\textsuperscript{263} The emotional distress claim included both an intentional infliction element based on the agent's behavior toward the plaintiff and a negligent infliction element based on airline supervision of employees and regulation of its business.\textsuperscript{264} The court found that Marshall failed to submit

\begin{footnotes}
\textsuperscript{257} \textit{Id.} The court stated that "mere negligence is not enough" to sustain punitive damages. \textit{Id.}
\textsuperscript{258} \textit{Id.} at 1152.
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} \textit{Id.} The judge pointedly told Farmilant, "Don't try to make a federal case out of it." \textit{Id.}
\textsuperscript{262} \textit{Id.} at 17,408.
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} \textit{Id.} The plaintiff alleged that the airline negligently inflicted emotional distress "by failing to enact rules and regulations in respect to the operation of the . . . passenger terminal; in failing to supervise the employees at the . . . terminal; in
enough evidence on the negligent hiring and negligent infliction of emotional distress to raise a factual question, and granted summary judgment for the airline. The court denied summary judgment on the false imprisonment and assault claims, however, impliedly preserving the intentional infliction of emotional distress claim associated with them. Although the final disposition of the case is not available, it seems clear that the claim can be valid under state law if properly grounded in the facts and circumstances.

In *Braunstein v. United Airlines*, a passenger alleged emotional distress as a result of being bumped. Braunstein claimed that the airline bumped her involuntarily after a pushing and shoving incident among passengers waiting in line for boarding passes. She accepted alternate travel arrangements, but arrived at her destination at 3:00 a.m., at an airport different from the airport scheduled by her original ticket. She claimed damages for meals, numerous telephone calls, and “extreme anxiety and emotional upset” in the amount of $25,000. The airline proved, however, that the flight was not overbooked though neither side fully explained why

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failing to enact rules and regulations to permit passengers to board airplanes, and in otherwise acting in a reckless, careless, and negligent manner.” *Id.*

265 *Id.* at 17,408-09.

266 *Id.* at 17,408. The court allowed the assault and false imprisonment claims to go forward against the airline since the court found the question of whether the agent’s activities were within the scope of his employment to be one of fact for the jury. The airline maintained that the plaintiff was screaming and interfering with the boarding of the flight, so the court could not say as a matter of law that the alleged tortious acts of the agent in resistance were not within the scope of his employment. *Id.*


268 *Id.* at 388. The facts in the reported decision are sparse about the events leading to the bumping accident. Braunstein alleged that a “screaming commotion” took place and that she was bumped in the ensuing confusion. *Id.*

269 *Id.* Braunstein was scheduled to arrive at LaGuardia Airport originally, but arrived on the alternate flight at Newark Airport much later than her originally scheduled arrival time. The airline countered that she had failed to change planes in Denver, thus arriving at the wrong airport. *Id.* at 389.

270 *Id.* at 388.

271 *Id.* The plane left with 189 empty seats after a one hour delay due to operational difficulties. *Id.*
Braunstein failed to board the flight. The court found no facts to support Braunstein's claim that the airline denied her boarding by its acts or omissions, and granted summary judgment for the airline.\textsuperscript{272} The court largely ignored the emotional distress claim, concentrating instead on the contract aspects of the case.\textsuperscript{273} This state court found no merit in an emotional distress claim standing alone without a corresponding contract claim, even though Braunstein had not alleged breach of contract against the airline.\textsuperscript{274}

Thus, a claim of intentional infliction of emotional distress may be a valid common-law cause of action in the bumping situation, but as a practical matter, recovery is very difficult to achieve. Courts apply established tort principles of state law to the facts in an exacting manner. The emotional injury must be substantial, and there should be provable expenses from that injury, such as medical expenses, loss of earnings, or other special damages. An intervening or superseding cause destroys the claim, as in any tort. One possible advantage of an emotional distress claim is that it might apply to the behavior of the individual agent during the bumping incident instead of overall airline policies on overbooking. It is clear, however, that courts will not entertain frivolous claims for emotional distress, nor will they allow large unsubstantiated claims of damages to go forward just to satisfy the amount in controversy for federal jurisdiction.

5. Other Issues Related to Bumping

There are other claims related to bumping which warrant only brief mention here, primarily because plaintiffs have not sustained recoveries by using them. For instance, a third party cause of action for bumping is sel-

\textsuperscript{272} Id. at 389.
\textsuperscript{274} Braunstein, 684 F. Supp. at 389.
dom successful although various parties have sued on behalf of or as co-plaintiffs with a bumped passenger. The Nader court of appeals denied a third party cause of action to the group whose rally Nader missed, even though it lost money when Nader failed to appear. Thus, courts can be expected to limit consequential damages for missed engagements, meetings, and other appointments to damages suffered by the passenger himself with no recourse for the affected third party.

In one instance, a court denied a travel agency standing to sue on behalf of its customers who had been bumped. The passengers assigned their claims to the agency, but the court ruled that the assignment of a tortious cause of action was invalid under state law and rejected the third party claim. In other cases, courts found that tour operators lacked standing to bring a discrimination claim under section 404(b) of the Federal Aviation Act of 1958 on behalf of their bumped clients. The tour operators fell outside the class of persons the statute was designed to protect, thus limiting the claim to the individual actually bumped. Although it might seem more efficient and more effective for a travel agent to sue on behalf of his clients if a number of them are bumped from a certain flight, the courts deny standing on both common-law and statutory claims.

Even close relatives of bumped passengers lack third party standing to recover damages. Parents who purchased a ticket for a minor daughter could not sue on

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275 Nader II, 512 F.2d at 549; see supra notes 77-84 and accompanying text for discussion of the Nader II court of appeals decision.


a contract claim, because the daughter accepted the denied boarding compensation and signed a release of liability for the airline.\(^{278}\) The parents also lacked standing to sue for fraudulent misrepresentation because they were too remote from the transaction for the airline to owe them a duty of disclosure.\(^{279}\)

A wife could not recover on a discrimination claim based on section 404(b) of the Federal Aviation Act of 1958 when her husband was denied transportation,\(^{280}\) because derivative claims for emotional distress were not actionable under the statute.\(^{281}\) This court did remand the wife's claim of emotional distress for evaluation under common-law tort principles, leaving open the possibility that a wife might recover damages for emotional distress when the husband was denied boarding.\(^{282}\)

In addition, there is probably not a cause of action for bumping under the Warsaw Convention,\(^{283}\) although courts differ in their opinions as to its availability. One federal district court allowed a claim for bumping on an international flight under the Convention,\(^{284}\) but recently a court of appeals criticized the opinion and held that the Warsaw Convention did not create a cause of action for bumping.\(^{285}\) According to its view, the remedy for bumping comes from the law of the injured party's home coun-

\(^{278}\) Roman v. Delta Airlines, Inc., 441 F. Supp. 1160 (N.D. Ill. 1977) (parents were in a position too remote to be able to recover from airline for misrepresentations made in connection with daughter's flight).

\(^{279}\) Id. at 1168. The daughter also signed a release which "as a matter of law bar[red] any claim her parents [might] have . . . ."  Id. at 1166.


\(^{281}\) Id. at 220.

\(^{282}\) Id. at 222. The court of appeals noted that the trial court appeared to assess damages "both for Pan American's refusal to let Mr. Mason board and for its failure to explain his absence to Mrs. Mason when she inquired at the Pan Am desk."  Id. at 220.

\(^{283}\) See supra note 198.

\(^{284}\) Harpalani v. Air India, 622 F. Supp. 69 (N.D. Ill. 1985) (holding that Article 19 of the Warsaw Convention established a cause of action for bumping on an international flight, and that other state and federal claims were preempted by the Convention).

\(^{285}\) Wolgel v. Mexicana Airlines, 821 F.2d 442, 445 (7th Cir. 1987) (criticizing the Harpalani holding, and finding that the Warsaw Convention did not apply to
try. The Convention applies only to delay and not to total nonperformance of the carriage contract. Other district court decisions have denied recovery under the Convention for bumping, leaving little positive authority for any bumping claim under the international treaty.

Finally, there are instances of denied boarding due to reasons other than overbooking of the flight. The airlines have great discretion when the denial of boarding is for safety or health reasons as opposed to the usual oversales situation. A court upheld an airline’s right to deny boarding to a passenger who, in its judgment, is too ill or infirm to travel unaccompanied. The court emphasized, however, that such judgment does not allow airlines to unjustly discriminate against sick, elderly, or handicapped persons. Also, an airline may for safety reasons deny boarding to an individual whom they believe to be armed or dangerous. An airline which acted properly and reasonably in refusing to board a passenger who was the subject of a FBI report was not liable for discrimination, breach of contract, or false imprisonment. However, carriers may not deny boarding unreasonably without some investigation of a complaint against a passenger.

bumping); see supra notes 196-208 and accompanying text for discussion of the Wolgel case under section 404(b) of the Federal Aviation Act of 1958.

Wolgel, 821 F.2d at 444.
Id. The court looked to the history of the Warsaw Convention to determine that the drafters did not intend the word “delay” to extend to claims arising from total non-performance. Id.
See also Hill v. United Airlines, 550 F. Supp. 1048 (D. Kan. 1982) (holding that a cause of action for delay of flight due to misrepresentation was outside the Warsaw Convention); Mahany v. Air France, 474 F. Supp. 532 (S.D.N.Y. 1979) (holding damages occasioned by delay only to be actionable under Warsaw Convention, and two-year statute of limitations of Warsaw Convention does not apply to claim under section 404(b) of the Federal Aviation Act of 1958).
Adamsons v. American Airlines, 58 N.Y.2d 42, 444 N.E.2d 21, 22, 457 N.Y.S.2d 771 (1982) (holding airline may refuse passage to individual where in its judgment a sick or invalid person will require extraordinary individual care so as to interfere with the airline’s duty to other passengers).
Id. at 50, 444 N.E.2d at 26, 457 N.Y.S.2d at 776.
Williams v. Trans World Airlines, 509 F.2d 942, 943 (2d Cir. 1975) (holding that airline receiving information that passenger was dangerous could refuse carriage to the passenger).
Cordero v. Cia Mexicana de Aviacion, 681 F.2d 669 (9th Cir. 1982) (airline
Nor can an airline use the safety issue as a sham to insulate itself from liability.\textsuperscript{293}

Thus, before bringing a claim for bumping, a practitioner should evaluate the facts and circumstances to determine the reason for denied boarding. If the airline's overbooking of the flight led to the need to bump some passengers, then the causes of action outlined by this paper could apply. If the airline denied carriage for health or safety reasons, the claims related to overbooking may not apply. However, the passenger can question the airline's justification and procedure in denying boarding.

**CONCLUSION**

Deregulation has not significantly changed overbooking practices. The legislature maintained the oversales regulation in 14 C.F.R. section 250 by transferring its administration to the Department of Transportation, impliedly accepting the practice of overbooking itself.\textsuperscript{294} The only major change relating to bumping has been the repeal of the antidiscrimination provision of the Federal Aviation Act of 1958,\textsuperscript{295} depriving plaintiffs of a major statutory cause of action. Airlines continue to overbook for financial reasons, and bumping may occur more frequently now than in the past.\textsuperscript{296}

Indeed, overbooking is arguably one rational method of protecting the airlines against "no-shows" and last minute cancellations. An alternative method would be to enforce contract provisions on both sides of the carrier-passenger relationship: carriers could not bump, and passengers could not unreasonably deny passage to individual involved in altercation in airplane without some inquiry into complaints against him).

\textsuperscript{298} Sherrod v. Piedmont Aviation, Inc., 516 F. Supp. 46 (E.D. Tenn. 1980) (passenger wrongfully ejected from airplane for having open can of beer suffered unjust discrimination, humiliation, and indignity for which the airline was liable in compensatory damages).

\textsuperscript{294} See supra note 120 and accompanying text.

\textsuperscript{295} See supra note 117 and accompanying text.

\textsuperscript{296} See supra notes 22-24 and accompanying text for statistical summary indicating recent increases in bumping incidents.
could not cancel. Airlines would have seats paid for whether passengers flew or not. However, this solution is not desirable from either the passenger's or the airline's position. Such a solution would deprive passengers of their freedom to change plans without financial loss, and airlines would have wasted space that another passenger could use. Thus strict enforcement of the contractual relationship might have undesirable economic results. Still another solution might be to allow passengers who do not want the airline to deny their boarding to pay a premium to guarantee their reservation. Regular or lower priced tickets would be subject to the usual risk of bumping. Last, changing the booking system in response to consumer demand might alleviate the problem in part.

If regulatory agencies or consumer demands do not curtail overbooking, however, the system of grievance and redress is likely to operate in the future much like it has in the past. Since deregulation maintained the regulations in 14 C.F.R. section 250, passengers still have the choice of accepting compensation as specified in the regulations or seeking redress in court. Because the regulations have responded to a certain extent to the plight of consumers and to certain court decisions, particularly Nader, they now define more precisely the passenger's rights and the airline's obligations. Under current regulations airlines protect themselves from misrepresentation claims by giving public notice of overbooking and from discrimination claims by formulating and adhering to nondiscriminatory boarding priority rules. By asking for volunteers to give up seats, airlines allow willing passengers to delay flight, and thus accommodate passengers who might suffer extreme inconvenience from bumping.

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297 See 14 C.F.R. § 250.8(b) (1988).
298 See supra notes 67-112 and accompanying text for discussion of the Nader case.
299 14 C.F.R. §§ 250.11(a), (b) (1988).
Passengers, on the other hand, receive the equivalent of contract damages through denied boarding compensation. The bumped passenger quickly receives alternate travel arrangements and the cost of his ticket.\textsuperscript{301}

If the passenger declines compensation under the regulation, he may turn to the legal system for a remedy. However, the legal system declines to regulate the airlines, in deference to the legislature and administrative agencies.\textsuperscript{302} Courts will probably continue to apply common-law principles to redress individual grievances over a particular bumping incident. In the future, plaintiffs can probably use the state law claims reviewed by this paper with some success. In addition, courts may extend the repealed statutory cause of action for discrimination to one arising under the regulatory language. Plaintiffs can use still another claim which does not appear in the reported cases. The Restatement (Second) of Torts section 48 acknowledges a common carrier's special liability for insults by the carrier's servants while acting in the scope of their employment.\textsuperscript{303} If the airline agent's conduct in bumping the passenger is offensive, a plaintiff might use this section in addition to a claim for the infliction of emotional distress.

As a review of the cases shows, however, bumped plaintiffs typically do not receive large damage awards, if they receive awards at all. Many potential plaintiffs may decide damages do not offset costs of litigation, particularly attorney's fees. Delay in the litigation process and uncertainty of outcome may further discourage bumped passengers from seeking redress in court. Many bumped passengers, however disgruntled, may take denied boarding compensation rather than court action as the most ex-

\footnotesize{\textsuperscript{301} 14 C.F.R. §§ 250.4, 250.5 (1988).}

\footnotesize{\textsuperscript{302} See supra notes 153-154 and accompanying text for one court's explicit refusal to regulate disclosure, deferring to CAB or the legislature.}

\footnotesize{\textsuperscript{303} Restatement (Second) of Torts § 48 (1965). This section states: "A common carrier or other public utility is subject to liability to patrons utilizing its facilities for gross insults which reasonably offend them, inflicted by the utility's servants while otherwise acting within the scope of their employment." Id.}
pedient remedy. In the future, courts could tip the scales toward the bumped consumer by sustaining larger awards, either for tort claims or by finding a malicious element in the practice of overbooking sufficient to sustain a punitive award.

Consumers can hope to change overbooking practices and bumping only through market demand for guaranteed seats or through changes in public perceptions of the problem. Changing public perceptions could lead to legislative or administrative curtailment of overbooking itself or to justification of larger awards by courts. Without some significant fundamental change in those perceptions, however, airlines may be expected to continue overbooking and the legal system will provide remedies on a case-by-case basis. Ultimately, deregulation may have little practical impact on the problems of overbooking and bumping in general.
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