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Martin E. Rose
Beth E. McAllister

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THE EFFECT OF POST-DEREGULATION COURT DECISIONS ON AIR CARRIERS LIABILITY FOR LOST, DELAYED OR DAMAGED BAGGAGE

MARTIN E. ROSE*
BETH E. McALLISTER**

I. INTRODUCTION

THE FRAGILE BOND between an airline and its passenger is easily strained by the frustrating task of separating the traveler and his luggage at the start of the journey and subsequently reuniting the two — at the same time, at the right place — at the end of the journey. Passengers love to complain about the airline industry's imperfect record in baggage-handling. Often, the frustration felt by the traveler who started his vacation without his golf clubs or reported for a key meeting without his briefcase, turned to anger when it was discovered that the carrier's liability exposure for the lost articles was severely limited.

* Martin E. Rose is a partner at the law firm of Gardere & Wynne. Mr. Rose is head of the firm's aviation practice group. His professional career has been devoted to aviation litigation, including air carrier and products liability litigation, insurance and reinsurance litigation, aircraft sales, acquisition, and leases, as well as regulatory work with regard to airport development, airport noise, and FAA enforcement proceedings.

Mr. Rose received his undergraduate degree in 1971 from the University of California at Los Angeles and his law degree in 1974 from Southwestern University.

** Beth E. McAllister is an associate at the law firm of Gardere & Wynne. Ms. McAllister has worked with the firm for three years and in the aviation section with Mr. Rose for the past one and one-half years.

Ms. McAllister received her undergraduate degree in 1976 from North Texas State University and her master's degree from Texas Christian University in 1981. She received her law degree in 1987 from St. Mary's University School of Law.
Historically, the regulatory scheme which developed around commercial aviation worked decidedly in favor of air carriers, permitting them to cap the dollar value of their maximum exposure for lost baggage. Lawsuits by irate travelers, seeking to set aside these severe restrictions, were uniformly unsuccessful. The deregulation of the airline industry, however, greatly altered the rules by which the baggage liability game will now be played. At the same time, the risks for air carriers have increased for two reasons: (1) the development of the hub and spoke system, which replaced point to point travel with connecting flights, requires air carriers to transfer passenger and luggage from plane to plane, greatly increasing the odds of misplaced luggage; and (2) the abolition of the Civil Aeronautics Board (CAB) weakened the regulatory protection from baggage claims enjoyed by air carriers in the past. What remains to be seen is whether air carriers will adopt new strategies to cope with these changes before the traveling public appreciate the import of deregulation on baggage claim liability and tries to even the score.

This Article will explore the law under which a claim for lost or damaged baggage must now be litigated and explore methods air carriers might employ to lessen their increased exposure to liability. This focus will entail a review of the current regulatory law and the few court decisions regarding lost or damaged baggage that have been rendered since regulation of the industry ceased. A close
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look at these decisions will provide guidance to practitioners handling baggage claims in the future. Further, the tenor of these court decisions make it clear that air carriers must depart from their traditional methods of handling baggage claim actions or confront increased and unlimited liability.

II. AIR CARRIER LIABILITY FOR BAGGAGE CLAIMS PRIOR TO DEREGULATION

Until the early 1980s, the rights and liabilities of passengers and carriers were strictly delineated under the federal regulatory umbrella.\(^5\) This Article will not detail the domestic tariff system under regulation or the deregulation of the airline industry that followed.\(^6\) An analysis of the law governing baggage liability, however, requires a brief review of the development of the federal common law and later treatment under the federal regulatory system. This background is helpful in understanding recent court decisions and to predict the direction of future liability decisions.

A. Federal Common Law

Early common-law principles governing the rights and liabilities of carriers and shippers were developed in reference to the transportation of property by ship and rail.\(^7\)


\(^{7}\) See, e.g., Liverpool & Great W. Steam Co. v. Phenix Ins. Co., 129 U.S. 397
The carrier was viewed as an insurer of the goods, liable unless the damage was caused by: (a) an act of God, (b) a public enemy, (c) an act of the shipper himself, (d) public authority, or (e) the inherent vice or nature of the goods.\(^8\)

As case law developed, carriers were permitted to limit their liability, provided that the shipper was given adequate notice of the carrier's limited liability and an opportunity to purchase increased valuation.\(^9\)

This concept, known as the "released valuation doctrine," was validated by the United States Supreme Court as a method of calculating the carrier's liability based upon an agreed value rather than exculpating the carrier from its liability.\(^10\)

Hence, while the carrier could not escape liability completely, it was permitted to limit its exposure to a predetermined amount.\(^11\)

In the event transported property


\(^{9}\) See, e.g., Union Pac. R.R. v. Burke, 255 U.S. 317, 321-22 (1921) (court explained the valuation rule as an exception to the common-law rule of no exculpation from liability); Boston & Me. R.R. v. Piper, 246 U.S. 439, 443-44 (1918) (shipper's acceptance of a certain valuation limits him to that value based on principles of estoppel); Railroad Co. v. Fraloff, 100 U.S. 24, 27-28 (1879) ("It is undoubtedly competent for carriers of passengers, by specific regulations, distinctly brought to the knowledge of the passenger . . . to protect themselves against liability, as insurers, for baggage exceeding a fixed amount in value . . . ."); Zeidenberg v. Greyhound Lines, 3 Conn. Cir. Ct. 176, 209 A.2d 697, 699 (1965) (even though bus passengers did not read the printed matter on the face of their tickets, they were presumed to know the provisions of the tariffs filed and published with the I.C.C.).

\(^{10}\) See Hart v. Pennsylvania R.R., 112 U.S. 331 (1884). The Court explained: The distinct ground of our decision . . . is, that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. Id. at 343.

\(^{11}\) See First Pennsylvania Bank v. Eastern Airlines, 731 F.2d 1113, 1116-19 (3d Cir. 1984); infra notes 64-67 and accompanying text for a discussion of this case's modern application of the released value doctrine.
was lost or destroyed, the carrier reaped the benefits of this doctrine because the passenger was prevented from asserting a greater amount as the true value of the transported property when a lesser value had been utilized to calculate the transportation rate. The key factor validating the imposition of this doctrine was the opportunity given to the customer, before shipment, to declare a higher valuation on the property for an increased transportation charge.

B. Federal Regulatory System

Congress enacted the Civil Aeronautics Act of 1938 (Act), and subsequently reenacted it in 1958, with the objective of promoting public interest in air travel by prompting air carriers to expand their services and to provide for the highest degree of safety at reasonable rates and with fair competitive practices. For the first fifty years the Act was in effect, the regulation of an air carrier’s classifications, rules, regulations, practices, and services was overseen by the CAB. Congress retained the released valuation doctrine under the Act, allowing

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12 See First Pennsylvania Bank, 731 F.2d at 1118.
17 49 U.S.C. § 1373(a) (1982), amended by 49 U.S.C. § 1551(a) 4(B) (Supp. V 1987). This section provided:
   Every air carrier and every foreign air carrier shall file with the Board, and print, and keep open to public inspection, tariffs showing all rates, fares, and charges for air transportation between points served by it... and showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation.
Id.
18 49 U.S.C. § 1506 (1982). This section provides: “Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law
carriers to achieve the benefits of limited liability by filing tariffs with the CAB. These tariffs declared the limit of a carrier’s liability for losses to various types of baggage and were deemed to be part of the contract of carriage when the passenger purchased a ticket. In reviewing these tariffs, courts held that passengers had constructive knowledge of the tariff provisions, regardless of actual knowledge.

Courts did not question the reasonableness of a carrier’s filed rates and limitations because the CAB had “primary jurisdiction” over the determination of the validity of the tariff. Under the primary jurisdiction doctrine, a court may not examine the findings of a regulatory agency unless that agency has acted arbitrarily. Therefore, courts deemed tariff provisions properly filed with the CAB to be valid and thus enforced them. As a con-

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or by statute, but the provisions of this chapter are in addition to such remedies.”

Id.; see also Klicker, 563 F.2d at 1314 (the court found that Congress, in enacting § 1506, “expressly incorporated the entire federal common law applicable to carriers . . .”).


21 See Tishman & Lipp, 413 F.2d at 1403-04 (“Limitations of liability in tariffs . . . are binding on passengers and shippers whether or not the limitations are embodied in the transportation documents.”); Vogelsang, 302 F.2d at 712 (analogizing to railroad carriers before the ICC); Lichten, 189 F.2d at 940-41; Hycel, 328 F. Supp. at 192-93 (the carrier’s filed tariff is an integral part of the contract “even though the passenger or shipper may be unaware of the provisions of the tariff.”).


23 See, e.g., Lichten, 189 F.2d at 939. In Lichten, the court upheld a tariff which exculpated a carrier from any liability. The court determined the Civil Aeronautics Act required it to uphold any tariffs because it was without jurisdiction to grant relief to the plaintiff until the CAB found the rules unlawful or until the plaintiff
sequence, when confronted with a baggage claim action, counsel for the air carriers automatically moved for summary judgment, seeking to invoke the carrier's baggage tariffs. These motions were uniformly successful, despite the passenger's lack of knowledge of the tariff and regardless of his opportunity to declare excess value.24

III. Deregulation and Residual Federal Regulations

A. Deregulation

In 1978, Congress enacted legislation which gradually eliminated the CAB's regulation of domestic and foreign aviation.25 These "sunset provisions"26 of the ADA provided for the elimination of the CAB's legislative authority by 1985.27 In 1983, pursuant to the ADA, air carriers were no longer required to file tariffs with the CAB.28 No indication exists in the Congressional Record that Congress specifically considered the effect of deregulation on air carriers' capacity to limit their liability. During these "sunset years" before deregulation, however, the CAB was concerned about this issue. This concern is reflected in the CAB's enactment of federal regulations, designed to control carriers' rights to limit their liability after deregulation.29

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24 See infra notes 108-119 and accompanying text for a discussion and criticism of the Lichten case.
25 See infra notes 108-127 and accompanying text for a discussion of tariffs which abridge passenger's common-law rights.
30 14 C.F.R. §§ 253, 254 (1989); see infra notes 30-39 and accompanying text.
B. Current Federal Regulations

1. Baggage Limitation of Liability Regulations

(a) Excess Valuation

With the abolition of tariff filing requirements imminent, the CAB enacted baggage liability regulations to ensure the continued viability of the released valuation doctrine after deregulation.\(^5\) Curiously, while these regulations codified the typical tariff limitation of liability for lost or damaged baggage at $1,250,\(^1\) the CAB specifically rejected a regulation which would have required air carriers to offer excess valuation coverage to passengers.\(^2\) The CAB turned a deaf ear to arguments for requiring carriers to offer excess coverage. The foremost of these arguments was that the enforceability of limitations under the now controlling common law, depends upon the availability of excess insurance coverage.\(^3\) The CAB reasoned that regulatory intervention was not needed in this area because air carriers typically offered excess insurance without a Board requirement.\(^4\) This assumption, however, was at least partially false.

Air carriers traditionally advised the public that they would not be responsible for damages resulting from the transportation of certain items. For example, air carriers typically exclude all liability for lost money, jewelry, cameras, and electronic equipment. By refusing to accept any

\(^5\) Domestic Baggage Liability, 49 Fed. Reg. 5065 (1984). The regulation initially applied only to flights with 60 or more passenger seats or any flight on the same ticket with a flight having 60 or more seats. \(\text{id.}\)

\(^1\) 14 C.F.R. § 254.4 (1989); Domestic Baggage Liability, 49 Fed. Reg. at 5068-70 (1984). The CAB arrived at this figure after considering the Consumer Price Index for All Urban Consumers and the Apparel Commodities Index. Domestic Baggage Liability, 49 Fed. Reg. at 5069. Additionally, the CAB was of the opinion that a $1,250 baggage liability limitation was reasonable in light of the possibility of future price movements. \(\text{id.}\)


\(^3\) \(\text{id.}\).

\(^4\) \(\text{id.}\). ("The Board has decided not to impose such a requirement without a more persuasive showing that regulatory intervention is needed.")
responsibility for such items, air carriers contend that the released valuation doctrine is inapplicable and that excess valuation coverage is not available. The CAB’s position can most likely be attributed to the historical observation that passengers rarely purchased excess coverage. Nonetheless, given the air carrier’s stance, the CAB’s refusal to require excess valuation coverage for all items calls into question the effectiveness of its sunset regulatory efforts. If, by its efforts, the CAB was attempting to maintain the status quo for air carriers after deregulation, it has failed to achieve this goal.

(b) Notice Requirements

The CAB adopted notice requirements that must be given by the air carrier to the passenger regarding the carrier’s limitation of liability for baggage. Following deregulation, air carriers were to provide conspicuous written notice to passengers of any limit on liability on or with the passenger ticket. This regulation permitted the air carrier to continue with the equivalent of a tariff filing system while arguably providing passengers with actual notice that limitations existed, and would be binding on the passenger, even though not printed on the contract ticket itself.

The CAB’s expressed intent in mandating this notice was to alert the passenger to the limitation. The CAB regulation attempts to balance the need to notify passengers through simple terms in a cost effective manner, with the need to make all pertinent details available to passengers. In promulgating these notice provisions, the CAB

35 Id. at 5065-66. The Board rejected the analogy that liability for other bailments cannot be limited by notice. Id.

36 14 C.F.R. § 254.5(a)-(b) (1989). Pursuant to the enacted regulation, the air carrier shall provide conspicuous written notice on or with the passenger ticket of either (1) the Board mandated notice or (2) a specific statement of the air carrier’s liability to passengers. Id.

37 Domestic Baggage Liability, 49 Fed. Reg. 5065-66 (1984). The Board previously concluded that short form ticketing was critical to the efficiency of the air transportation system and that no cost justification existed for replacing the tariff system with bulky individual contracts given out to each passenger. Id. The
expressly rejected several alternative notice suggestions; such as providing the passenger with oral notice, providing a written document that set forth the precise limitation of liability, or providing ticket counter signs containing notice of the limitation. Instead, the CAB's minimum mandated notice is most often utilized by carriers as a component part of the ticket coupon and provides: "Federal rules require any limit on an airline's baggage liability to be at least $1,250 per passenger."  

2. Incorporation by References
(a) Purpose of Regulation

Under the tariff filing system of the CAB's era, air carriers were afforded an opportunity to incorporate contractual terms by reference. By filing its tariff with the CAB, the carrier bound its customers to provisions in the tariff regardless of whether the provisions were embodied in the transportation documents. Under this system, the carrier could bind a passenger to its baggage tariffs without providing the passenger with a copy of the tariff. With the onset of deregulation, where tariff filings were no longer required, consumer groups prophesied that carriers would no longer be permitted to "incorporate by reference" certain terms and would, thus, be exposed to conflicting requirements of the law of the individual states.

In anticipation of this potential conflict, the CAB enacted federal regulations which permitted incorporation
by reference of certain contract terms, including baggage limitation provisions. The CAB took this action despite the fact that it had no clearly defined statutory authority to enact these regulations. In an apparent effort to legitimize the CAB’s action in this regard, Congress later amended the ADA to provide that the CAB could properly issue regulations regarding incorporation by reference.

The overriding concern of the CAB in deciding whether to permit incorporated terms, was how to best preserve the air carrier’s short-form airline ticket while including the necessary contract provisions. In the CAB’s view, detailed terms were not essential to the formation of the contract and could, therefore, be incorporated by reference. This viewpoint is disputed by consumer groups because of the carriers’ tradition of incorporating in the tariffs detailed lists of items they would not be responsible for in transport. From the face of the ticket, the passenger does not know that certain items he is transporting will not be covered if damaged or lost.

The CAB feared that in the absence of regulations on the subject, courts were likely to either deny the validity of any contract terms that the passenger did not receive actual notice of, or impose differing rules for incorporating the terms by reference. Therefore, to prevent courts from requiring a greater degree of notice than was re-

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43 See H.R. REP. No. 793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2857, 2870 (noting the CAB had purported to issue such regulations under authority of the Federal Aviation Act).
44 49 U.S.C. § 1381(b) (Supp. V 1987) ("any air carrier may incorporate by reference in any ticket or other written instrument any of the terms of the contract of carriage and interstate and overseas transportation, to the extent such incorporation by reference is in accordance with regulations issued by the board.").
46 Id. The CAB reasoned that because the names of the parties, the service to be rendered, and the price paid for such service were on the passenger ticket, these items were sufficient to form a contract. Id.
47 Id.
quired by the tariff system and to foreclose state legislation on the subject, the CAB enacted 14 C.F.R. § 253. The CAB’s actions were designed to provide the public with proper notice while satisfying the legal system’s requirement of “reasonableness.”

(b) Substance of Regulation

14 C.F.R. § 253 provides that the passenger ticket, or any other written instrument which embodies the contract of carriage, may incorporate contract terms by reference. If the air carrier chooses to incorporate contract terms by reference, it must provide notice to the passenger of the incorporated terms. If the air carrier fails to give the required notice, the carrier loses the benefit of the incorporated terms and the passenger cannot be bound by any such term. It is the carrier’s duty to make available, at each of its airports and ticket offices, the text of each incorporated term, and to provide, upon request of the passenger, the full text of the terms incorporated.

The CAB also delineated the nature of the notice required concerning incorporated terms. The air carrier is required to provide “conspicuous” notice to the passen-

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48 Id.
49 Id. The CAB further explained: “[The rules] provide a flexible method whereby airlines can continue to incorporate complex terms while still using short form ticket stock, and without levying a great cost burden.” Id.
52 Id. (“[T]he passenger shall not be bound by, any contract term incorporated by reference if notice of the term has not been provided . . .”).
53 Id. § 253.4(b) (“Each air carrier shall make the full text of each term that it incorporates by reference in a contract of carriage available for public inspection at each of its airport and city ticket offices.”).
54 Id. § 253.4(c) (“Each air carrier shall provide free of charge .. . to passengers, upon their request, a copy of the full text of its terms incorporated by reference in the contract.”).
ger of any terms which have been incorporated by reference via the passenger ticket or any other written instrument given to the passenger that embodies the contract of carriage and incorporates terms by references. The CAB did not define the term "conspicuous." Instead, it acknowledged that courts would play an important role in determining the "conspicuousness" of the notice. The passenger is to receive notice that any terms which are incorporated by reference are a part of the contract and that the passenger has the right to inspect the full text of each of the incorporated terms. Finally, to accompany the final domestic baggage rule discussed in subsection 1 above, the CAB amended the regulations to permit air carriers to incorporate terms concerning the air carriers' limitation of liability for lost, damaged or delayed baggage.

Air carriers have uniformly attempted to comply with the requirements of 14 C.F.R. § 253 by publishing a booklet entitled "Conditions of Carriage" that contains the incorporated terms. This booklet sets forth important information the passenger should be aware of in reference to the carrier's position on fare changes, oversells, baggage, check-in requirements, acceptance of passengers, refunds, ticket validity and claims. The carrier considers these conditions to be a binding part of the passenger's contract of carriage that cannot be altered by an employee of the carrier. Finally, carriers often attempt to fulfill the notice requirement of 14 C.F.R. § 253 by stating, on a component part of the passenger ticket, that the conditions of carriage are available on application from the carrier. While these efforts by carriers to comply with

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55 Id. § 253.5.
57 Id. at 52,133. The Board required "that concise and immediate information about the terms listed in the required notice be readily available to passengers upon request at the locations where the carrier's tickets are sold." Id.
58 14 C.F.R. § 253.5(b)(1) (1989); see supra notes 35-39 and accompanying text for a discussion of the general notice requirements regarding limitation of liability for carriage of baggage.
the CAB enacted regulations may have been sufficient prior to deregulation, they appear to be deficient under the evolving deregulation case law.

IV. Baggage Claim Actions After Deregulation

A. Federal Common-Law Principles Govern Baggage Claim Actions

The deregulation of the airline industry caused commentators to forecast that the common law of the state in which an action was brought would govern future litigation regarding baggage claims. Although most litigants initiate their actions in federal court, diversity is the basis for federal jurisdiction and state law would govern in the absence of federal preemption. Application of state law, however, would place an obvious burden upon the carrier. In order to adequately protect itself, the carrier would have to constantly monitor the law in the various jurisdictions and modify the component parts of the contract of carriage as required by each state. One commentator even suggested that the only safe course for the carrier would be to draft its passenger tickets so as to provide protection for the carrier in the jurisdiction which most severely limited the carrier's rights. The specter of

59 See, e.g., Davison & Solomon, supra note 6, at 48 ("given deregulation, most federal court suits against air carriers . . . [for loss of or damage to baggage] will be based on diversity of citizenship, so state, rather than federal common law can be expected to govern."); Dickerson, Travel Law: Baggage Claims, 5 Air L. 130, 130-33 (1980) (the author identifies three causes of action, breach of contract, negligence and conversion, which passengers will likely use against air carriers for lost, damaged or delayed baggage after deregulation); Wilson, Air Carrier Baggage Loss Cases in a Regulated and Unregulated Environment, 1984 Trial LAW. Guide 440, 452 ("Carriers and passengers will look to state law, including state choice of law rules, in determining their rights and remedies in baggage loss cases.").

60 See Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (In an action in which the jurisdiction of a federal court is based on diversity, the federal court is required to apply the substantive law of the state in which it sits.).

61 Wilson, supra note 59, at 452; see also Notice of Terms of Contract of Carriage, 47 Fed. Reg. 52,129-30 (1982) ("[A]irlines would have to constantly monitor and compare the rules of each State and make adjustments for local State law.").

62 Wilson, supra note 59, at 452.
state judicial domain was a further concern to carriers because some states do not recognize the released valuation doctrine at all. 63

The first case decided after deregulation proved the pundits wrong, applying the federal common-law principle of released valuation to baggage claim actions rather than the conflicting state law. In First Pennsylvania Bank v. Eastern Airlines, 64 the passenger appealed the district court’s award of $500.00, the released value, for checks lost during shipment that had a total value of $364,313.45. The passenger contended that deregulation eliminated the doctrine of released valuation and, therefore, that Pennsylvania state law was applicable. 65 After analyzing the federal common-law principles governing common carriers’ liability limitations and the subsequent effect of deregulation, the Third Circuit concluded that federal law, rather than state law, governed the enforceability of the released valuation tariff provision. 66

In essence, the First Pennsylvania Bank court found that deregulation had no impact upon the applicability of the federal common-law doctrine of released valuation. The court viewed deregulation as merely dispensing with the doctrine of “primary jurisdiction” and thus held that the validity of the agreed value tariff provision was a purely judicial question for determination by application of the federal common law. 67 Before deregulation a tariff prop-

63 See, e.g., Las Vegas-Tonopah-Reno Stage Line v. Burleson, 320 P.2d 1104, 1105 (Nev. 1958) (Nevada does not allow a negligent carrier to impose its released value limits); Wells v. Great N. Ry., 59 Or. 165, 114 P.2d 1070 (1911) (Oregon does not permit imposition of released value when damages result from a carrier’s negligence); Rogers v. Crespi & Co., 259 S.W.2d 928, 930 (Tex. Civ. App. — Waco 1953) (under Texas common law, a common carrier is strictly accountable for damages to transported goods except from acts of God or “the public enemy”).

64 731 F.2d 1113 (3d Cir. 1984).

65 Id. at 1114.

66 Id. at 1119. The court chronicled the development of the released valuation doctrine and its persistence throughout regulatory legislation. Id: at 1116-19. In particular, the court noted that the savings clause in 49 U.S.C. § 1506 carried the doctrine over into the regulatory period of the industry. Id. at 1117.

67 Id. at 1119-22. The court found that releasing carriers of the obligation to
erly filed was immune from judicial scrutiny because of the presumption that the regulatory body, the CAB, acted properly in approving the tariff. Now, with the presumption removed, the courts are free to scrutinize each carrier’s rules, effectively supplanting the CAB function.

The holding in First Pennsylvania Bank is in keeping with the Congressional intent that federal, not state law, govern the practice of the airline industry. This intent was clearly manifested when the CAB enacted and amended 14 C.F.R. §§ 253 and 254. While the extensive analysis set forth by the court in First Pennsylvania Bank has been accepted in subsequent court decisions, other post deregulation decisions have either failed to address the issue, or failed to recognize that the industry has been deregulated.

B. Actions Must Be Based on Breach of Contract Claim

Assuming that the federal common-law doctrine of re-file tariffs was essentially a change that eliminated the requirement of exhausting administrative remedies. *Id.* at 1121.

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68 See H.R. REP. No. 793, 98th Cong., 2d Sess. 4, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS 2857, 2860. In discussing consumer protection and unfair competitive practices, Congress stated:

In addition to protecting consumers, federal regulation insures a uniform system of regulation and preempts regulation by the states. If there was no Federal regulation, the states might begin to regulate these areas, and the regulations could vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

*Id.* at 2860.

69 See 14 C.F.R. § 253.1 (1989) (the purpose of rule “is to set uniform disclosure requirements, which preempt any State requirements on the same subject”).

70 See, e.g., Deiro v. American Airlines, 816 F.2d 1360 (9th Cir. 1987); Neal v. Republic Airlines, 605 F. Supp. 1145 (N.D. Ill. 1985); see infra notes 83-105 and accompanying text for a discussion of Deiro; notes 73-76 and accompanying text for a discussion of Neal.

71 See, e.g., Coughlin v. Trans World Airlines, 847 F.2d 1432 (9th Cir. 1988). Since the Ninth Circuit, in Deiro, accepted the First Pennsylvania Bank analysis that federal law governed, it is assumed that the court did not question the issue in Coughlin.

leased valuation will continue to apply to baggage claim actions, plaintiffs will be relegated to litigating baggage claim actions only on a breach of contract theory. This view is supported by the decision in Neal v. Republic Airlines.\textsuperscript{73} The passenger in Neal purported to assert causes of action against the carrier based on allegations of breach of contract, negligence, bailment, \textit{res ipsa loquitur}, negligent infliction of emotional distress and gross negligence.\textsuperscript{74} Relying upon the opinion in First Pennsylvania Bank, the court concluded that a shipper seeking damages is "bound by the terms of the carriage contract."\textsuperscript{75} The court ruled that the passenger could not circumvent the contract's limitation of liability by framing his action in terms of bailment and tort.\textsuperscript{76}

The Neal case, however, raises the lingering question as to what effect the carrier's breach of the contract terms will have on that carrier's ability to enforce a limitation of liability. For example, in Coughlin v. Trans World Airlines,\textsuperscript{77} the court ruled that rescission of the contract was warranted for a material breach of the contract.\textsuperscript{78} In other words, the carrier could not enforce the limitation of liability provision contained in the same contract it violated.\textsuperscript{79} Instead, the carrier, by violating the contract, exposed itself to liability beyond the agreed value.

The holdings in First Pennsylvania Bank, Neal and Cough-

\textsuperscript{73} 605 F. Supp. 1145 (N.D. Ill. 1985).
\textsuperscript{74} Id. at 1147.
\textsuperscript{75} Id. at 1148.
\textsuperscript{76} Id.
\textsuperscript{77} 847 F.2d 1432 (9th Cir. 1988).
\textsuperscript{78} Id. at 1434. The court determined that by refusing to allow the passenger to carry the cremated remains of her husband on board "TWA breached Tariff Rule 230(B)(3) which states that valuables 'should be carried personally by the passenger.'" Id.
\textsuperscript{79} Id. The court explained:

TWA's refusal to allow Mrs. Coughlin to protect her valuables by carrying them personally effectively denied her the benefit of her bargain with respect to the tariff agreement ... Moreover, TWA's breach caused the very damages at issue. We conclude that TWA's breach of the tariff agreement rendered the tariff liability limitation unenforceable.

\textit{Id.}
make it clear that air carriers must strictly adhere to the common-law principles surrounding the released valuation doctrine if they are to continue to enjoy the opportunity to limit their liability. At the same time, these decisions instruct the practitioner representing a passenger that the only manner in which the carrier's limitation of liability can be circumvented is by demonstrating that the carrier has failed to comply with the necessary prerequisites for application of the doctrine: notice of the limitation and the opportunity to purchase excess valuation. This straightforward analysis, however, belies the difficulties that carriers experience in complying with these prerequisites.

C. Sufficiency of Air Carrier's Notice of Limitation of Liability

Prior to regulation, carriers were required to provide the shipper/passenger with notice of the limitation provisions before they were entitled to invoke the limitation.\(^8^0\) During the fifty years of regulation, federal regulators created standard ticket notices and posting requirements, whereby the sufficiency of the notice was based solely upon the carrier's compliance with the federal regulations. The notice provisions themselves were not scrutinized to determine if they were adequate.\(^8^1\) We have already seen that the CAB, as part of its sunset activities, sought to return carriers to the preregulation status quo by developing a simple notice and incorporation scheme.\(^8^2\) Air carriers, with an apparent confidence that they could comply with the new federal regulations by maintaining the status quo, did not substantially alter their ticket forms. As previously noted, however, whether the carrier's notice provisions would pass the test of "conspicuousness" was left to the courts to determine. Now, as

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\(^8^0\) See, e.g., The Majestic, 166 U.S. 374 (1897); La Bourgogne, 144 F. 781 (2d Cir. 1906), aff'd, 210 U.S. 95 (1908).

\(^8^1\) See supra notes 14-24 and accompanying text for a discussion of the tariff filing system.

\(^8^2\) See supra notes 35-39 and accompanying text for a discussion of the CAB mandated notice requirements.
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evidenced by post-deregulation case law, compliance with the federal regulations described in section III., above, may no longer be sufficient to provide the passenger with adequate notice under federal common law.

The most significant post-deregulation decision rendered on this subject was by the Ninth Circuit in *Deiro v. American Airlines.* In this action, the passenger filed suit against American for breach of contract, negligence, and willful and wanton misconduct in the death and injury of several valuable greyhound racing dogs. The dogs died or were injured while being transported by American. The trial court limited the passenger's damages to American's $750 limitation of liability amount printed on the passenger ticket.

The Ninth Circuit chose to approach its decision by determining whether the carrier's traditional method of providing notice of its baggage liability limitation was reasonable under common-law principles. In analyzing this issue, the court scrutinized the physical characteristics of the passenger ticket. The ticket coupon issued to the passenger included “Conditions of Contract,” “Advice to International Passengers and Limitations of Liability,” and “Notice of Baggage Liability.”

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83 816 F.2d 1360 (9th Cir. 1987).
84 Id. at 1361-62 (Plaintiff alleged damages of approximately $900,000 for the loss of the dogs).
85 Id. at 1362.
86 Id. As noted previously, the current limitation of liability may be no less than $1,250. See *supra* note 31 and accompanying text for a discussion of how the CAB chose the $1,250 amount.
87 Deiro, 816 F.2d at 1362-65.
88 Id. at 1362-63. The court listed the many provisions included in the several page ticket coupon:

1) printed on the face of the ticket, along with a list of Deiro's flights, was the following line in the upper left-hand corner printed in very small type: "PASSENGER TICKET AND BAGGAGE CHECK [—] SUBJECT TO CONDITIONS CONTAINED IN THIS TICKET"; 2) attached to the ticket was a page with the heading "CONDITIONS OF CONTRACT," under which paragraph three stated that the "services performed by each carrier are subject to: (i) provisions contained in this ticket, (ii) applicable tariffs, (iii) carrier's condition of carriage and related regulations which are made part
booklets containing "Conditions of Carriage," referred to in the ticket coupon, were available at American ticket counters and that a "NOTICE OF BAGGAGE LIABILITY" sign was posted at American's ticket counter at the time relevant to the dispute. The testimony regarding whether the passenger read the above-described notices was in dispute. At a minimum, however, the passenger admitted that he knew there was information printed on the back of the ticket.

The court in Deiro relied upon decisions from the First, Second, Fifth and Sixth Circuits in adopting the "reasonable communicativeness" test to determine when a passenger is contractually bound by the fine print contained in a carrier's passenger ticket. The "reasonable communicativeness" test, as adopted by the Ninth Circuit, re-

hereof (and are available on application at the offices of carrier) ...); and 3) printed on another page in significantly larger type were two notices; the first with a heading "ADVICE TO INTERNATIONAL PASSENGERS ON LIMITATION OF LIABILITY," and the second with the heading "NOTICE OF BAGGAGE LIABILITY LIMITATIONS." The second heading was for a paragraph that stated: Liability for loss, delay, or damage to baggage is limited as follows unless a higher value is declared in advance and additional charges are paid: ... (2) For travel wholly between U.S. points, to $750 per passenger on most carriers (a few have lower limits). Excess valuation may not be declared on certain types of valuable articles. Carriers assume no liability for fragile or perishable articles. Further information may be obtained from the carrier.

Id. at 1363. The court noted "[t]he wording of this sign is nearly identical to that in the paragraph in the ticket coupon under the same heading ..." Id.

Id. "At his deposition ... Deiro stated: 'You know, there's a whole bunch of stuff printed on the back of the ticket and I didn't read all of that.'" Id.

Id. at 1364-65. For the decisions used by the Ninth Circuit in support of its adoption of the reasonable communicativeness test, see Barbachym v. Costa Line, Inc., 713 F.2d 216 (6th Cir. 1983) (applying "reasonable notice" standard to contractual limitation in steamship ticket and finding notice "not only insufficient, but virtually nonexistent"); Shankles v. Costa Armatori, S.P.A., 722 F.2d 861 (1st Cir. 1983) (raising question whether entire ticket reasonably communicated "important terms and conditions" and holding that disputed ticket, under the circumstances, did so); Carpenter v. Klosters Rederi A/S, 604 F.2d 11 (5th Cir. 1979) ("controlling principle is . . . adequate notice" of limitation; held, conspicuous boldface type was adequate); Silvestri v. Italia Societa per Azioni di Navigazione, 388 F.2d 11 (2d Cir. 1968) (analyzing line of cases concerning notices in steamship tickets).
requires a two-pronged analysis. First, the court must examine the ticket itself for such physical characteristics as the conspicuousness and readability of the notice and the contractual terms and limitations in question. Second, the court is to review the "circumstances surrounding the passenger's purchase and subsequent retention of the ticket." Significantly, the second prong of the analysis is weighed equally with the first in determining whether proper notice has been given. Because carriers typically use standard airline ticket stock, the physical characteristics and notice provisions contained in the ticket at issue in Deiro would be similar if not identical to tickets utilized by other carriers. Accordingly, the court's finding in this action may have broad application in other cases.

A critical shortcoming in the Deiro opinion is the Ninth Circuit's indecisiveness on the issue of whether the notice provisions contained within the ticket coupon sufficiently met the "reasonable communicativeness" test. The court noted that it was doubtful that the small size print on the face of the ticket stating "SUBJECT TO CONDITIONS CONTAINED IN THIS TICKET" provided "clear and conspicuous" notice to the passenger of the conditions of carriage. Further, while the court found the other notice provisions contained within the ticket coupon were more clearly and conspicuously stated, the court never expressly stated that they were sufficient. Nonetheless, in the absence of the extrinsic factors present in Deiro, the notice provisions would probably not have been found adequate by the court in communicating the carrier's limitation of liability.

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52 Deiro, 816 F.2d at 1364.
53 Id. "The surrounding circumstances to be considered include the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket." Id.
54 Id.
55 Id. at 1364-65.
56 Id. at 1364.
57 Id. at 1365.
The determinative extrinsic factors on which the Deiro court relied were (1) that the passenger was an "experienced commercial air traveler" and (2) that the passenger was aware there was printed material on the back of the ticket. Additionally, the fact that the passenger had possession of the ticket nine days prior to his departure led the court to surmise that "he had ample opportunity to become familiar with the baggage liability limitations," especially since he knew that he would be shipping valuable property. This ruling begs the question of whether reasonable notice, via the printed notice provisions now utilized by carriers, can ever be given to an "unseasoned traveler" or a traveler who purchases a ticket only minutes before departure. Even though the carrier in Deiro complied with the notice provisions required in 14 C.F.R. § 254, it is significant that the court failed to cite this section in reference to the adequacy of the notice provisions. This omission implies that compliance with the notice provision in 14 C.F.R. § 254 is insufficient to meet the carrier's burden to provide notice to its passengers of contract terms.

The Deiro decision provides for further confusion rather than clarity because it presents a different version of the "reasonable communicativeness" test than other circuits employ. Several of the circuit courts, for example, focus only on the first prong of the test enunciated by Deiro—namely, the physical characteristics of the passenger's ticket. These courts emphasize the location of the no-

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98 Id. The court found that Deiro's acknowledgment of not reading the back of the ticket "only points to his knowledge of the existence of some kind of written provisions or notices in the ticket." *Id.*

99 *Id.*

100 See supra notes 35-39 and accompanying text for a discussion of the adoption of the notice provision of 14 C.F.R. § 254.

101 See, e.g., Barbachym v. Costa Line, Inc., 713 F.2d 216, 219 (6th Cir. 1983) (finding no conspicuous language on the face of the ticket); DeNicola v. Cunard Line Ltd., 642 F.2d 5, 10-11 (1st Cir. 1981) (upholding the lower court's use of the physical characteristics prong); Silvestri v. Italia Societa per Azione di Navigazione, 388 F.2d 11, 17 (2nd Cir. 1968) (reversing a grant of summary judgment and applying the first prong).
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tice provisions and the sufficiency of the statement. Before the limitation provision can be held to have reasonably communicated to the passenger, "the face of the ticket must contain conspicuous language directing the passenger's attention to the contractual terms contained in other parts of the ticket." Second, the substance of the notice must be of such caliber that it warns the passenger that the incorporated terms located elsewhere within the ticket coupon are important matters. Under this interpretation of the "reasonable communicativeness" test, the notice American Airlines printed on the face of the passenger's ticket in Deiro could not pass the muster of conspicuous notice. Specifically, the notice provision printed on the face of the ticket is the smallest print-type size used for any notice provision. Moreover, the ticket does not caution the passenger that he should inquire about incorporated terms. Finally, these court decisions did not examine the extrinsic factors considered by the Deiro court.

The question of whether the carrier provides the passenger with reasonable notice of its limitation of liability will likely be decided on a case-by-case determination. This reality is a complete departure from the law prior to deregulation where carriers were accustomed to having their notice provisions enforced without any scrutiny by the courts. Deiro and the cases upon which it affirmatively relies, signal air carriers that they cannot expect courts to bind passengers to limitation of liability provisions without a clear indication that the passenger had notice and an opportunity to review the notice provisions. The burden of proof is on the carrier to demonstrate that it acted reasonably in all respects to bring the limitation to the passenger's attention.

102 See Carpenter v. Klosters Rederi A/S, 604 F.2d 11, 13 (5th Cir. 1979); Silvestri, 388 F.2d at 17.
104 Silvestri, 388 F.2d at 17.
D. Validity of Exculpatory Clauses

Historically, the United States Supreme Court held that an air carrier may lawfully limit exposure to an amount less than the actual loss sustained only where the passenger was granted a fair opportunity to choose between higher or lower liability limits.\(^\text{106}\) When carriers attempted to totally exculpate their liability, the Supreme Court has demurred, finding:

The great object of the law governing common carriers was to secure the utmost care in the rendering of a service of the highest importance to the community. A carrier who stipulates not to be bound to the exercise of care and diligence “seeks to put off the essential duties of his employment.” It is recognized that the carrier and the individual customer are not on equal footing. “The latter cannot afford to higgle [sic] or stand out and seek redress in the courts.”\(^\text{107}\)

Despite the highest court’s ruling on this issue, some courts prior to deregulation upheld exculpatory clauses. The leading case which permits an air carrier to exculpate itself from all liability is *Lichten v. Eastern Airlines*.\(^\text{108}\) In *Lichten*, the passenger sought to recover damages in excess of $3,000 for jewelry stolen from her baggage while in the possession of the carrier.\(^\text{109}\) The applicable tariff specifically provided that the carrier would not be liable

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\(^\text{108}\) 189 F.2d 939 (2d Cir. 1951).

\(^\text{109}\) Id. at 940.
for any jewelry lost from a passenger's baggage.\textsuperscript{110} The passenger argued that the Act should not be interpreted to permit the CAB to modify the common-law rule that a carrier may not contractually relieve itself from liability for the consequences of its own negligence.\textsuperscript{111} The Second Circuit ruled, however, that since the Act did not include an express provision prohibiting a carrier from exempting itself from liability for lost or damaged baggage, this exclusion indicated that such an exemption was not forbidden by the CAB.\textsuperscript{112}

Courts have rarely followed\textsuperscript{113} and have more often criticized the decision reached in \textit{Lichten}.\textsuperscript{114} Nonetheless, air carriers continued to invoke exculpatory clauses as a defense to liability even where the CAB ruled that a particular exculpatory provision was unlawful. In \textit{Klicker v.}}

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\textsuperscript{110} Id. "Money, jewelry \ldots and similar valuables \ldots will be carried only at the risk of the passenger." \textit{Id.}

\textsuperscript{111} \textit{Id.} at 941.

\textsuperscript{112} \textit{Id.} The court found that the Civil Aeronautics Act was similar to the Interstate Commerce Act. Since the Interstate Commerce Act contained an express provision prohibiting exemption from liability for any lost or damaged baggage which was caused by the carrier, the absence of such a provision in the Civil Aeronautics Act compelled the conclusion that the exemption was not forbidden to air carriers. \textit{Id.}

\textsuperscript{113} See Tishman & Lipp, Inc. v. Delta Air Lines, 413 F.2d 1401 (2nd Cir. 1969) (adopting the \textit{Lichten} court's rejection of a claim that misdelivery deprives a carrier of a tariff limiting liability).

\textsuperscript{114} See, e.g., Klicker v. Northwest Airlines, 563 F.2d 1310, 1313-14 (9th Cir. 1977) ("\textit{Lichten} makes little sense from the standpoint of ordinary rules of statutory construction and none when the legislative history of the Interstate Commerce Act and Civil Aeronautics Act is read."); Odom v. Pacific N. Airlines, 393 P.2d 112, 116 (Alaska 1964) (refusing to adopt the \textit{Lichten} rationale); Davis v. Northeast Airlines, 362 A.2d 208, 209-10 (N.H. 1976); Note, \textit{Air-Carrier Tariff Provisions Limiting Liability for Negligence}, 70 HARV. L. REV. 1282, 1287-88 (1957) ("[T]he doubtful whether a carrier should be permitted to exempt itself from all liability for negligence, since the elimination of liability might reduce the deterrents to negligent conduct."); \textit{Recent Cases, Air Law-Tariff Provision Filed with CAB Frees Carrier from Liability for Negligent Loss of Jewelry in Passenger's Baggage}, 65 HARV. L. REV. 341, 342-43 (1951) (analyzing the \textit{Lichten} reasoning and posing several potential errors in the court's reasoning); \textit{Recent Developments}, 21 FORDHAM L. REV. 64 (1952) (noting that Congress never allowed non air carriers to exempt themselves completely from liability, the article explains: "Congress may not be deemed to have intended, by remaining silent, to permit air carriers to enforce a contract provision for exemption of liability uniformly forbidden to all other types of carriers in the interstate scheme.").
Northwest Airlines, a couple sued Northwest Airlines for the wrongful death of their valuable golden retriever carried as baggage in the cargo compartment. Northwest defended this action by relying on three tariffs which fully exculpated it from any liability for injury to animals in transport, or alternatively limited its liability to a stated sum. The CAB had previously ruled that the exculpatory tariffs in question were unlawful. The Ninth Circuit, therefore, refused to follow the rationale in Lichten, finding that "it [was] flatly wrong."

At the core of the court's rationale in Klicker was the understanding that the Act did not abrogate preexisting federal common law. Before Congress drafted the Act, federal common law prevented a common carrier from completely exculpating itself from its own negligent acts. Today, with a return to federal common-law principles, exculpatory provisions are, once again, unenforceable. One postderegulation decision, however, held that carriers may exculpate themselves from liability for certain articles. In Dopf v. United Airlines, the court's ruling was based upon the erroneous belief that the industry was still regulated and that the CAB, pursuant to its primary jurisdiction, had approved exculpatory provisions.

Although it appears clear that exculpatory clauses are unlawful and will not be enforced in the postderegulation era, air carriers' baggage tariffs and conditions of carriage typically contain exculpatory provisions. In a recent magazine publication by a major carrier, for example, one page was devoted to the carrier's "flight plan" and contained the following notice to its readers: "[The carrier]
will not be responsible for money, jewelry, cameras, video and electronic equipment, silverware, negotiable papers, securities, business documents, samples, paintings, antiques, artifacts, manuscripts, furs, irreplaceable books or publications and similar valuables contained in checked or unchecked baggage."  This provision would prohibit the passenger from purchasing excess valuation on these items, or collecting the minimum baggage valuation or limitation from the carrier for any of these items if they were lost or damaged. Air carriers would be wise to drop the disfavored exculpatory clauses entirely in favor of a rigid dollar limit. For example, a carrier who excluded all liability to its passenger for a bag containing $100,000 in jewelry may run afoul of public policy and subject itself to liability for the passenger's entire $100,000 loss. On the other hand, by clearly limiting liability to a fixed amount ($1,250) and offering excess valuation insurance for an additional charge, the carrier fully protects itself against this exposure.

Air carriers' reluctance to abandon exculpatory clauses may stem from the belief that they represent a deterrent to outrageous or fraudulent claims. Compelling arguments exist for allowing a carrier to place all risk of transporting valuable or fragile items upon the passenger. One such argument is that articles of exceptional value should be handled by alternative means; the most practical alternative being for the passenger to carry the articles on her person.

At least one postderegulation decision has ruled that an air carrier may limit its liability for lost or destroyed baggage, so long as the carrier permits the passenger to protect the baggage by either carrying it on board the aircraft or purchasing excess valuation insurance. In *Coughlin*, the tariff in question provided that "valuables should be

123 SPIRIT, Oct. 1989, at 12. This publication is the magazine of Southwest Airlines.
124 *Coughlin v. Trans World Airlines*, 847 F.2d 1432 (9th Cir. 1988).
carried personally by the passenger."125 The court’s holding permitting the carrier to limit its liability, and allowing the passenger alternative means of protecting its transported baggage, was an application of the carrier’s tariff in keeping with federal common-law principles.126 Even though this court acknowledged that carrying a valuable article on the person of the passenger is an alternative to excess valuation, the court still held that the carrier was subject to the released value.127 Accordingly, the air carrier was still obligated to pay the passenger the released value. This holding is contrary to the position traditionally adhered to by air carriers, that they are not bound to pay the released value on certain transported items.

V. DISCUSSION OF AIR CARRIERS’ OPTIONS TO ENSURE LIMITED LIABILITY

The CAB’s enactment of the sunset provisions found in 14 C.F.R. §§ 253 and 254 may have lulled air carriers into believing the status quo would be maintained in reference to baggage claim actions. As the postderegulation case law develops, it can readily be determined that neither the CAB nor air carriers considered the sufficiency of the sunset provisions in conjunction with the controlling federal common law. If air carriers incorporate new procedures in their contracts to meet these changes, however, they should be able to enjoy continued protection from unlimited liability in baggage claim actions.

A. Accept Responsibility for All Property Transported

The released valuation doctrine was never intended as an avenue for carriers to exculpate themselves from liability. Even though a few preregulation decisions permitted

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125 Id. at 1433.
126 Id.
127 Id. at 1433-34. The ticket agent’s error in refusing to allow the passenger the right to carry her valuables on her person rendered the liability limitation unenforceable. Id.
carriers to avoid all liability for lost or damaged baggage, these decisions were in clear derogation of the federal common law. The unanswered question is why the CAB approved air carriers’ tariffs which contained exculpatory language, then later struck down such provisions when they were brought to the CAB’s attention. It is likely that many carriers successfully exculpated themselves at the trial court level because the courts misunderstood how the CAB’s primary jurisdiction interfaced with the federal common law. At this time, however, there should be no misunderstanding that exculpatory provisions are invalid. Accordingly, carriers should subject all transported property to the released value, or risk being fully liable for the property.

B. Provide Legally Sufficient Notice to Passengers

Consumer groups would perhaps argue that actual notice, presented to the passenger in express written form, would provide better protection to the public. If written notice were given separate from the ticket coupon, however, the only foolproof manner to ensure that the passenger received the notice would be to require the passenger’s signature on the written notice. This method is clearly impractical. Providing actual notice to the passenger presents endless difficulties. For example, many passengers purchase their ticket from a travel agent and consequently never approach the airline’s ticket counter. Curbside check-in would no longer be a quick service alternative for passenger check-in. Finally, long ticket counter lines would become even longer as each passenger would be required to read the baggage provisions and sign the notice.

A clearly acceptable method of ensuring that the passenger receives proper notice of the limitation of liability and incorporated terms, is to provide this notice on the face of the passenger’s ticket. Traditionally, carriers have provided notice on a separate page of the passenger’s ticket coupon. Courts have not been opposed to the re-
quired written notice provisions being placed on the pas-

senger ticket, but rather, have opposed the manner in

which this notice was provided. Therefore, if carriers

conformed the written notice contained on the passenger

ticket to meet federal standards, actual notice should not

be required.

To invoke its limitation of liability, federal common law

requires the carrier to provide clear and conspicuous no-
tice of the limitation of liability, incorporated within the
ticket coupon and the other documents which the passen-
ger does not have in his possession but of which he is
deemed to have notice. From the decision in Deiro, it is
clear that the written notice provisions currently utilized
by carriers on the ticket coupon are probably insuffi-
cient. Deiro and related decisions lead to the conclusion

that a carrier must give foremost consideration to the no-
tice provision which is printed on the face of the ticket. At
the present time, the notice provision printed on the face
of the ticket is inconspicuous. To comply with federal
standards, this notice must be of such size, type, print and
color as to bring itself to the passenger’s attention. It
should substantively warn the passenger that there are
other provisions contained within the ticket coupon which
the passenger will be bound to and therefore should
read. In the past, air carriers have typically given the
passenger notice that certain items should be carried on
their person in the published tariff and the conditions of
carriage booklet. In view of the fact that carriers may not
exculpate themselves for valuable and fragile items, air
 carriers should now consider providing this notice within
the ticket coupon itself.

See supra notes 80-105 and accompanying text for a discussion of cases focusing
on the manner of notice provided by the carrier.

See supra notes 83-105 and accompanying text for a discussion of the notice
implications of the Deiro decision.

See supra notes 35-39 and accompanying text for a discussion of the federal
regulatory notice requirements.
C. *Practical Considerations*

There are several practical details that air carriers can monitor to enhance the viability of their limitation of liability. Air carriers uniformly provide a sign at the ticket counter notifying the passenger of the carrier's limitation of liability and incorporated terms. This sign, however, is often not visible to the passenger because of its usual location on the front of the ticket counter. The passenger's view of this sign is blocked by other passengers waiting in the ticket line.

Air carrier's employees need to be fully aware of the conditions of carriage pertaining to baggage and should attempt to abide by these conditions to prevent the invalidation of the contract. The TWA ticket agent's refusal to permit a passenger to carry her husband's cremated remains on board the aircraft in *Coughlin* is an example of this potential harm.131 Because the carrier's tariff specifically stated that valuables "should be carried personally by the passenger," and the carrier's ticket agent prevented the passenger from doing so, the court held that the ticket agent's actions voided the contract of carriage and subjected the carrier to liability beyond the released value.132

Another consideration for the carrier concerns the pre-flight transfer of baggage. When a carrier's personnel remove baggage from a passenger who has already boarded a plane, the passenger loses the opportunity to purchase excess coverage and can no longer secure protection for the property by carrying it on their person. If the property is damaged, this action by the attendant would likely void the contract and subject the carrier to unlimited liability.

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131 *Coughlin*, 847 F.2d at 1433-34; see *supra* notes 77-79 and accompanying text for a discussion of the *Coughlin* case.
132 See *supra* notes 77-79 and accompanying text.
VI. Conclusion

It is clear that the CAB desired to maintain the status quo for air carriers with respect to their liability for lost, delayed or damaged baggage. In some respects, this desire was accomplished by federal regulations allowing air carriers to utilize the released valuation doctrine and incorporate certain terms by reference into the contract of carriage. The CAB, however, did not foresee that federal common-law principles, which would govern baggage actions after deregulation, would place additional requirements on air carriers that they were not prepared to address.

The reversion to federal common-law principles in the area of baggage actions necessitates a change in current practice by the air carriers. Although only a few baggage claim actions have been decided since the industry was deregulated, these decisions highlight areas on which air carriers must concentrate in order to preserve any right to limit their liability. Foremost consideration must be given by air carriers to bringing the limitation of liability to the passenger’s attention. To satisfy this requirement air carriers must alter their traditional methods of providing notice of the baggage limitation to the passenger. The courts will no longer presume that the passenger has knowledge of the limitation. The carrier must utilize more advanced methods to demonstrate that reasonable efforts were made to bring the limitation to the attention of the passenger. Additionally, air carriers must stop using exculpatory clauses and provide excess coverage for all items transported. Air carriers failing to modify their past policies run the risk of reimbursing the passenger for the actual value of the entire contents of the lost or destroyed baggage. Any court that properly applies the federal common law will not uphold an exculpatory clause.