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Recommended Citation
Calvin Davison et al., Air Carrier Liability under Deregulation, 49 J. Air L. & Com. 31 (1984)
https://scholar.smu.edu/jalc/vol49/iss1/3

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AIR CARRIER LIABILITY UNDER DEREGULATION

CALVIN DAVISON* AND DAVID H. SOLOMON**

I. INTRODUCTION

CLAIMS BY PASSENGERS against air carriers relating to baggage, overbooking (oversales), and delayed or cancelled flights, and the ability of carriers to limit their liability for these and similar harms, has been determined primarily in the context of a system of federal statutory and regulatory law.1 As of January 1, 1983, much of this statutory/regulatory system, including the domestic tariff system, ceased to exist.2

This article examines in detail the substantive liability rules that will govern in this deregulated environment and the manner in which carriers will be permitted to avoid or limit their liability for the sorts of harms listed above. Section II provides an overview of the tariff system and the changes that its elimination will engender. Section III examines the applicable substantive law, while Section IV discusses notice requirements. Section V provides some concluding remarks about what possibly lies ahead.

The impact of deregulation in the area of carrier terms and conditions of carriage is likely to be dramatic. While Civil Aeronautics Board (“Board” or “CAB”) and treaty regulation will continue in certain discrete areas, carriers will no

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longer be protected by the domestic tariff system. The relationship between carriers and their passengers will be governed to a much greater extent by the common law and state statutes. Carriers will have to adapt to a new era of contractual relations and increased disclosure. Carriers will almost certainly face more litigation and probably an increase in liability as well.

II. THE DOMESTIC TARIFF SYSTEM AND ITS ELIMINATION

A. The Domestic Tariff System

Section 403 of the Federal Aviation Act ("Act") required air carriers to file with the CAB detailed tariffs setting forth, *inter alia*, their "classifications, rules, regulations, practices, and services." The Act gave the CAB power to require certain information to be included in tariffs and to reject tariffs not in conformity with such requirements. The Board used this authority to promulgate detailed and extensive tariff regulations, including the prescription or proscription of liability limitation rules.

A valid domestic tariff, once on file with the CAB, governed the rights and liabilities of the air carrier and its passengers, either because it became part of the contract of carriage or as a matter of federal law. Provisions of the tariff,

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4 *Id.*
6 For example, the Board's tariff rules established certain notice requirements for carriers that limited their baggage liability, 14 C.F.R. § 221.176 (1982), and prohibited carriers from instituting time limitations on the bringing of suits for personal injury or death. 14 C.F.R. § 221.38(h) (1982).
including limitations of liability, governed even if not mentioned in the contract of carriage. The CAB generally had primary jurisdiction over cases relating to tariff rules.

B. Related Statutory Provisions

The Act also gave the CAB specific authority to regulate air carrier practices. Section 411, for example, permitted the Board to order carriers to cease and desist from "unfair or deceptive practices or unfair methods of competition." Section 1002 gave it authority to prescribe carrier rules, regulations or practices if those of particular carriers were "unjust or unreasonable, or unjustly discriminatory, or unduly preferential." Under its general authority to enforce the provisions of the Act, the Board also had authority to ensure that carriers (1) "provide safe and adequate service," (2) "establish, observe, and enforce . . . just and reasonable classifications, rules, regulations, and practices," and (3) do not provide any "undue or unreasonable preference or advantage" or subject anyone to "unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The Board used an amalgamation of these provisions as authority for imposing substantive requirements in such areas as oversales and smoking.

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9 See supra note 8; see also Shortley v. Northwestern Airlines, 104 F. Supp. 152, 155 (D.D.C. 1952) (the filing of a tariff constituted "constructive notice" of its provisions).
12 Id. § 1482(d)(1) (Supp. IV 1980).
13 Id. § 1324 (1976 & Supp. IV 1980).
15 Id.
16 Id. § 1374(b) (1976).
C. Deregulation and Remaining Board Authority

The Airline Deregulation Act of 1978 drastically changed this regulatory environment. It eliminated, as of January 1, 1983, the domestic tariff system. It also eliminated, as of the same date, the Board’s authority to prescribe carrier rules and practices in order to eliminate unjust, unreasonable, unjustly discriminatory, or unduly preferential practices. Similarly, as of January 1, 1983, the Board lost its authority to ensure just and reasonable rules and practices and to protect against preferential or discriminatory treatment. The only remaining authority that the Board has over carrier rules and practices is thus to ensure “safe and adequate” service and to protect against unfair or deceptive practices or unfair methods of competition.

The impact of the elimination of tariffs will be dramatic. Carriers will no longer be able to protect themselves or limit their liability merely by filing a valid tariff. Tariffs will no longer have “the force and effect of law,” and will not limit liability “in any way.”

While, as discussed below, some Board regulation continues to exist in the area of carrier terms and conditions, carriers now face the possibility of extensive regulation by the common law and by state statutes, with different rules governing in different states. The loss of tariff protection will almost certainly result in an increase of suits against carriers and probably in an increase in liability as well. The elimination of the related sources of CAB authority over carrier rules and practices will probably not have a substantial impact on liability issues. Authority to ensure safe and adequate service and to protect against unfair and deceptive practices is being broadly interpreted so as to sustain the Board’s exercise of

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21 Id. § 1551(a)(2)(D).
22 Id. § 1551(a)(2)(B).
23 Id. § 1551(a)(2)(D).
authority in such traditional regulatory areas as smoking, baggage and oversales.

The United States Courts of Appeals for the District of Columbia and Fifth Circuits, for example, recently held that the Board has authority to regulate smoking under the "adequate service" provision of the Act. More generally, both courts held that the "adequate service" provision should be read broadly to give the Board authority to regulate the "quality of service" provided by carriers, and that this authority was specifically retained by the Airline Deregulation Act. As the D.C. Circuit stated:

Legislative history indicates that the desired reform was not aimed at regulation of quality of service, but at the certification procedure that had retarded entry into the industry, expansion of service, and competition over fares. There is absolutely no indication of congressional intent to remove the Board's authority to regulate smoking. Thus, although the Deregulation Act reflected a congressional desire to rely more heavily on competition, it did not disturb Board authority to regulate quality of service.

While other courts may take a more restrictive view, especially if the Board enters new regulatory areas, the Board will likely be able to continue to regulate carrier rules and practices in discrete areas. Whether, where, and to what degree such regulation will survive ultimate CAB "sunset," presently scheduled for January 1, 1985, will depend on further legislative action by Congress.

III. SUBSTANTIVE LAW

A. CAB Regulation

1. Baggage

Through its tariff authority, which expired January 1,
1983, the CAB regulated the domestic and overseas (i.e., within United States territory) baggage policies of certificated air carriers. Carriers filing tariffs were required not to limit their baggage liability to an amount less than $750. In order to establish rules for the carriage of baggage in interstate and overseas air transportation after January 1, 1983, the CAB adopted a new part 254 of its regulations, which was to have been effective on February 22, 1983. On February 8, 1983, however, in response to a petition of the Air Transport Association to repeal the rules, the Board stayed the effective date of the new part 254, and ordered that the existing rules, without their tariff filing requirements, remain in effect until further notice. In April 1983, the Board issued a new notice of Proposed Rulemaking on part 254, requesting comments on whether (a) the minimum liability limit should be raised to $1,000 or $1,250, (b) any carrier, regardless of aircraft size, should be required to adhere to this limit for all flight segments included on the same ticket with a large-carrier segment, and (c) excess valuation coverage should be required.

2. Oversales/Overbooking

Under part 250 of its Regulations, the CAB regulates the

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31 Id. at 52,987-91. The new rules would have applied to chartered or scheduled passenger service involving aircraft with a maximum capacity of more than 60 seats. Carriers operating 60 seat or less aircraft, whether certificated or not, would have been exempted from the rules. Presently, only uncertificated carriers operating such aircraft are exempt from the rules. The new rules provided that a carrier could not limit to less than $1,000 per passenger its liability for the disappearance of, damage to, or delay in delivery of, a passenger's personal property, including baggage, which was in the carrier's custody. In addition, the rules set forth notice requirements for limitation of baggage liability, discussed in Section IV(A)(1), infra notes 155-164 and accompanying text.
33 48 Fed. Reg. 22,323 (1983). The Board also proposed new notice requirements, discussed in Section IV(A)(1), infra notes 155-164 and accompanying text. The Board offered its proposal to cover certain segments involving small aircraft as an alternative to the new notice requirement, which would state that small carriers may have lower liability limits. The two proposals are thus mutually exclusive.
overbooking policies of carrier operations with aircraft of more than 60 seats within the United States or its possessions or territories and those flights in foreign air transportation which originate at a point within the United States. Recent CAB modifications of these rules, effective January 23, 1983, indicate the CAB's intent to continue regulation in this area.

For those operations to which it applies, part 250, as modified, requires carriers to follow certain specified procedures if they have oversold a flight. In the event of an oversold flight, carriers are required first to request volunteers to accept willingly an offer of compensation, in any amount, in exchange for relinquishing their reserved space. If an insufficient number of volunteers come forward, the carrier may deny boarding to other passengers in accordance with its boarding priority rules, which it is required to have established.

Part 250 requires carriers to compensate passengers who are involuntarily denied boarding (i.e., who do not volunteer to relinquish their space) unless (a) the passenger has not presented himself for carriage at the appropriate time or place and has not complied fully with the carrier’s requirements as to ticketing, check-in, and reconfirmation procedures; (b) denied boarding is required for operational or safety reasons; (c) the passenger is offered accommodations or is seated in another section of the aircraft at no additional charge (or with a refund if a lower fare is charged for that section); or (d) the carrier arranges comparable transportation which is “planned to arrive” at the passenger’s next stop or final destination within one hour after the scheduled arrival time of the passenger’s original flight or flights.

Compensation to passengers involuntarily denied boarding is to be paid at the rate of 200 percent of the sum of the value of the passenger’s remaining flight coupons up to the passenger’s next stopover, or, if none, to the passenger’s final desti-

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37 Id. §§ 250.2b, 250.3.
38 Id. §§ 250.5, 250.6.
nation, with a $400 maximum. These amounts are halved if the carrier arranges comparable transportation that is "planned to arrive" at the passenger’s next stop, or, if none, at his or her final destination, within two hours of the planned arrival time in the case of interstate and overseas (i.e., within the United States and its territories) transportation or four hours in the case of foreign air transportation. The Board has recently codified an exemption which permits carriers to offer free or reduced rate air transportation in lieu of the required cash amount, provided the passenger agrees and the value of the transportation is equal to or greater than the cash payment otherwise required. A "bumped" passenger need not accept the compensation mandated under part 250. Rather, "the passenger may decline the payment and seek to recover damages in a court of law or in some other manner." Part 250 also requires that notice of overbooking policies be provided to passengers, as discussed below in Section IV(A)(2).

3. Smoking

Under part 252 of its Regulations, the Board regulates smoking aboard aircraft designed to have a capacity of more than 30 seats. Until recently, these rules required only that carriers designate no-smoking areas and provide no-smoking seats to passengers on request. In January 1983, the United States Court of Appeals for the District of Columbia Circuit vacated the Board’s recision of its prior, more stringent provisions requiring (a) special segregation of cigar and pipe smokers, (b) a ban on smoking when ventilation systems are not fully functioning, and (c) protections against non-smokers

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39 Id. § 250.6.
40 Id.
41 48 Fed. Reg. 29,678 (1983) (to be codified at 14 C.F.R. § 250). The Board has also eliminated the references to domestic tariffs in part 250, in accordance with the elimination of its domestic tariff authority.
45 Id § 252.2.
being "unreasonably burdened" by breathing smoke (e.g., by the "sandwiching" of non-smoking sections between, or across the aisles from, smoking sections).\footnote{1} In response to the court's order vacating its decision, the CAB reinstated the rules requiring segregation of cigar and pipe smokers and regarding ventilation systems.\footnote{2} Despite the court's order however, the Board reaffirmed its rejection of the "unreasonably burdened" provision.\footnote{3} The court then explicitly ordered the CAB to republish that provision,\footnote{4} which it has done.\footnote{5}

In addition, the court held that the Board had not justified its rejection of three proposed additional rules, and it remanded to the Board for further consideration several rules: (a) banning smoking on aircraft with 30 seats or less, (b) banning smoking on short flights, and (c) requiring carriers to provide special protections for persons unusually susceptible to the ill effects of breathing smoke.\footnote{6} In response to the remand portion of the court's order, the CAB first reaffirmed its decision not to ban smoking on short flights.\footnote{7} But later the CAB proposed to (a) ban smoking on small aircraft (defined alternatively as aircraft of 30 seats or less or 60 seats or less), (b) require special protections for passengers especially sensitive to smoke, (c) ban cigar and pipe smoking aboard aircraft, (d) revise the ventilation rule to ban smoking whenever the ventilation system on aircraft is not operating as designed to produce adequate ventilation (or, alternatively, ban all smoking when a ventilation system has been turned off for any reason).\footnote{8} As a further alternative in this rulemaking, the CAB is considering whether to exempt aircraft of 60 seats or

\footnote{1}{Action on Smoking and Health v. CAB, 699 F.2d 1209 (D.C. Cir. 1983). The court found the Board's justification in rescinding these rules to be "palpably inadequate." \textit{Id.} at 1217.}
\footnote{2}{48 Fed. Reg. 24,866 (1983).}
\footnote{3}{\textit{Id.}}
\footnote{4}{Action on Smoking and Health v. CAB, Nos. 79-1044, 79-1095, 79-1754 and 81-203 (D.C. Cir. June 30, 1983).}
\footnote{5}{CAB SUNSHINE MEETING, July 27, 1983.}
\footnote{6}{Action on Smoking and Health v. CAB, 699 F.2d 1209 (D.C. Cir. 1983).}
\footnote{8}{\textit{Id.} at 24,918.}
less from its smoking rules.\textsuperscript{54}

Currently, there are no Board requirements relating to notice of smoking rules. The Board has proposed, however, that those carriers covered by the smoking rules provide notice of their rules on or with their tickets.\textsuperscript{55} This proposed notice requirement is discussed below in Section IV(A)(3).

B. \textit{Warsaw Convention and Montreal Agreement}

1. \textit{Baggage}

The Warsaw Convention\textsuperscript{56} provides that carriers are liable for destruction or loss of or damage to any checked baggage or any goods of passengers in international travel, or on domestic segments of an international journey,\textsuperscript{57} where the baggage or goods were "in the charge of the carrier."\textsuperscript{58} A carrier will not be subject to baggage liability under the Convention if it proves that it took "all necessary measures" to avoid the damage or that it was "impossible for it to take such measures."\textsuperscript{59} This "necessary measures" requirement may not be as strict in practice as it appears on its face. One court, for

\textsuperscript{54} Id. at 24,919.
\textsuperscript{56} The Warsaw Convention, formally the Convention for Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, is a multilateral treaty, drafted and adhered to by most countries whose airlines have international routes. The Convention standardizes various liability and notice rules involving international travel and domestic segments of international journeys. \textit{See} 49 Stat. 3000, T. S. No. 876, 137 L.N.T.S. 11 (1934), reprinted at 49 U.S.C. § 1502 note (1976) [hereinafter cited as Convention]. For a general overview of the Convention, see \textit{In re Aircrash in Bali, Indonesia}, 684 F.2d 1301 (9th Cir. 1982).
\textsuperscript{57} As the CAB has recognized, the Convention "applies to wholly domestic segments of a "through" international journey, even where the carrier performing the domestic segment neither performs, nor is authorized to engage in, foreign air transportation." 48 Fed. Reg. 8,043 (1983) (to be codified at 14 C.F.R. § 203). Indeed, as the Board has recognized, the Convention may be applied to connecting successive carriage, even where double ticketing is involved, "if it has been regarded by the parties as a single operation." Convention, \textit{supra} note 56 art. 1(3). Thus, while the CAB thinks it "unlikely" that a court would find a domestic non-interlining carrier subject to the Convention, it recognizes that a court "might" so find. 48 Fed. Reg. 8,043 (1983).
\textsuperscript{58} Convention, \textit{supra} note 56, art. 18.
\textsuperscript{59} Convention, \textit{supra} note 56, art. 20. In addition, a carrier will not be subject to liability relating to baggage or goods if it proves that the damage was caused by an error in piloting, in the handling of the aircraft, or in navigation, and that, in all other respects, the carrier took "all necessary measures to avoid the damage." \textit{Id.}
example, held that, in the context of liability for damage to goods, the phrase cannot be read "with strict literality, but must, rather be construed to mean all reasonable measures."60

Under the Convention, carriers are permitted to limit their liability for checked baggage to a sum stated in French francs tied to a specified gold convertibility standard, unless the passenger declares a higher value and pays a supplementary sum, in which case the carrier will be liable to pay an amount not exceeding the declared value, assuming that it is not higher than the actual value at the time of delivery.61 While the CAB has stated that, in American dollars, the limits are "approximately" $9.07 per pound for checked baggage and $400 per passenger for unchecked baggage,62 the recent decision in *Franklin Mint Corp. v. Trans World Airlines*,63 suggests that these limits may be unenforceable in United States courts.

If a carrier can prove contributory negligence, it may be exonerated from liability for baggage or goods, in whole or in part, in accordance with the law of the jurisdiction where the case is tried.64 Carriers may not take advantage of any of these liability limitation provisions if the damage to the baggage was caused by their own "wilful misconduct."65 There is, according to one court, "no dispute as to what constitutes wilful misconduct," at least in the context of a suit for personal injury or death:

60 Manufacturers Hanover Trust Co. v. Alitalia Airlines, 429 F. Supp. 964, 967 (S.D.N.Y.), aff'd, 573 F.2d 1292 (2d Cir. 1977) (emphasis in original). The court noted that a carrier cannot be expected to "have taken every precaution literally necessary to the prevention of loss," but that taking merely "some" reasonable measures would be insufficient. *Id.* But see *Grey v. American Airlines*, 227 F.2d 282, 285 (2d Cir. 1955), cert. denied, 350 U.S. 989 (1956), discussed infra note 70 and accompanying text, in which the court adopts a more stringent interpretation of the same provision in the context of personal injury and death liability limitations.


62 Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982), appeal pending. The implications of this case are discussed in Section III B(4), infra notes 83-91 and accompanying text. See also *In re Aircrash at Kimpo International Airport, Korea*, 558 F. Supp. 72 (C.D. Cal. 1983).

63 Convention, *supra* note 56, art. 22.

64 Convention, *supra* note 56, art. 21.

65 Convention, *supra* note 56, art. 25.
Wilful misconduct is] proof of a conscious intent to do or omit doing an act from which harm results to another, or an intentional omission of a manifest duty. There must be a realization of the probability of injury from the conduct, and a disregard of the probable consequences of such conduct.\textsuperscript{66}

In order to take advantage of the Warsaw Convention's baggage liability limitation provisions, a carrier must provide notice in accordance with the Convention's notice provisions (as implemented by the CAB),\textsuperscript{67} discussed below in Section IV(B)(1).

2. Personal Injury and Death

The Warsaw Convention provides that carriers are liable for personal injury or death suffered by a passenger if caused by an accident in international travel or on a domestic segment of an international journey which "took place on board the aircraft or in the course of any of the operations of embarking or disembarking."\textsuperscript{68} The Convention permits a carrier to avoid its liability for personal injury or death where it took "all necessary measures" to avoid the damage or where it was "impossible" for it to take such measures.\textsuperscript{69} This phrase has been interpreted more narrowly in this context than with respect to baggage and goods; with respect to "most if not all serious accidents," it creates "presumptive liability" which "would seem to be almost if not quite insurmountable."\textsuperscript{70}

While the amount to which carriers could limit their liability under the Convention was originally set in terms of French francs tied to a specified gold convertibility standard,\textsuperscript{71} these limits have been superceded for carriers serving

\textsuperscript{68} Convention, supra note 56, art. 17.
\textsuperscript{69} Convention, supra note 56, art. 20(1).
\textsuperscript{71} Convention, supra note 56, art. 22. Problems with application of the gold franc convertibility standard have led some courts to hold its liability limitations unenforceable in United States courts. See supra note 65.
the United States by the so-called Montreal Agreement. Under that Agreement, carriers are permitted to limit their liability for personal injury or death to no less than $75,000 in U.S. dollars if legal fees are included, and $58,000 if legal fees are not included. The Montreal Agreement also eliminated the ability of carriers under the Warsaw Convention to avoid or limit liability for personal injury or death if they could prove contributory negligence.

Under the Warsaw Convention, a carrier may not take advantage of these provisions limiting liability if the personal injury or death was caused by its own "willful misconduct." The United States Senate recently defeated a proposal to eliminate this provision, in connection with a proposal to increase the liability floor to at least $320,000. Both the Warsaw Convention and the CAB mandate that specific notice requirements, discussed below in Section IV(B)(2), be met before a carrier may limit its liability for personal injury or death.

3. Delays

The Warsaw Convention also imposes liability on carriers "for damage occasioned by delay in the transportation by air of passengers, baggage, or goods." Such liability may be avoided or limited if "all necessary measures" were taken or it was impossible to take such measures or if there was contributory negligence. A carrier will not be able to avoid or

73 Id.
74 Id.
75 Convention, supra note 56, art. 21.
76 Convention, supra note 56, art. 25. See supra note 66 and accompanying text.
79 Convention, supra note 56, art. 19.
80 Convention, supra note 56, art. 20.
81 Convention, supra note 56, art. 21.
limit its liability for delays caused by its "wilful misconduct."\(^{82}\)

4. Franklin Mint and the Enforceability of the Warsaw Convention

In the *Franklin Mint* case, the U.S. Court of Appeals for the Second Circuit held the Warsaw Convention's limits on liability for the loss of cargo unenforceable in the United States courts.\(^{83}\) Because the price of gold is no longer the international monetary standard, the court held that there was no acceptable method of converting the Convention's French franc limitations into American dollars. To avoid substantial hardship to carriers, it applied its decision prospectively only. It also noted that its decision affected only the liability limitation provisions of the Convention, not its liability establishment provisions.\(^{84}\) The case is currently on appeal to the United States Supreme Court.

If upheld by the Supreme Court, *Franklin Mint* will have a dramatic impact on air carrier liability under the Warsaw Convention. Carriers will no longer be able to limit their liability with respect to goods and baggage\(^{85}\) under the Convention. Instead, their ability to limit such liability in international travel (including domestic segments of international journeys) will be determined by the common law,\(^{86}\) at least until an alternative international solution is achieved. *Franklin Mint* will almost certainly not affect limitation of liability for personal injury or death in international travel to or from the United States, however, as such liability limitations

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\(^{82}\) Convention, *supra* note 56, art. 25. See *supra* note 66 and accompanying text.

\(^{83}\) *Franklin Mint* Corp. v. Trans World Airlines, 690 F.2d 303 (2d Cir. 1982), appeal pending. See also *In re Aircrash at Kimpo International Airport, Korea*, 558 F. Supp. 72 (C.D. Cal. 1983) (applying *Franklin Mint* to limitations on liability for personal injury or death under *The Warsaw Convention*).

\(^{84}\) *Franklin Mint*, 690 F.2d at 311 n.27.

\(^{85}\) Under the Convention, limitation of liability for baggage is also based on French francs, so the holding of *Franklin Mint* would apply there as well. See *supra* note 61 and accompanying text.

\(^{86}\) See *Hill v. United Airlines*, 550 F. Supp. 1048 (D. Kan. 1982) (if the Warsaw Convention is inapplicable to a case arising out of international travel, liability will be determined by traditional common law rules).
are determined under the Montreal Agreement in terms of American dollars.\textsuperscript{87}

Another recent decision, \textit{In re Aircrash in Bali, Indonesia},\textsuperscript{88} may also have an important impact on the application in United States courts of the Warsaw Convention, as well as the Montreal Agreement. While not deciding the question of whether the Warsaw Convention was unconstitutional, as argued by the plaintiffs, the court did state that it “would be constitutional under the Commerce Clause \textit{unless arbitrary or unreasonable}.”\textsuperscript{89} Demonstrating considerable hostility to the Convention, the court, on its own motion, raised the question of whether the Warsaw Convention’s liability limits constitute an unconstitutional taking of property without due process of law, and held that “plaintiffs have a right to compensation if their claims have been unreasonably impaired by the treaty . . . .”\textsuperscript{90} Any such compensation would be provided by the United States Government through litigation in the Court of Claims.\textsuperscript{91}

Even if this decision does not lead to a finding that the Warsaw Convention and Montreal Agreement liability limitations are unconstitutionally arbitrary or unreasonable, the case could nevertheless seriously undermine the existing system of liability limitation in international travel. If plaintiffs were to begin routinely recovering money from the United States Government as a result of limitations on their recovery from carriers, the United States would be unlikely to stand by the Convention and Agreement for long. While such a series of events is highly speculative, \textit{Bali} nevertheless opens up the possibility.

\textsuperscript{87} See supra note 72 and accompanying text. But see \textit{In re Aircrash at Kimpo International Airport, Korea}, 558 F. Supp. 72 (C.D. Cal. 1983).

\textsuperscript{88} 684 F.2d 1301 (9th Cir. 1982).

\textsuperscript{89} \textit{Id.} at 1309 (emphasis added).

\textsuperscript{90} \textit{Id.} at 1313.

\textsuperscript{91} \textit{Id.}
C. The Common Law

1. Applicability in General

Even under the system of pervasive federal regulation, the common law played an important role in determining air carrier liability for harms such as denied boarding due to overbooking, loss of or damage to baggage, and delays or cancellation of flights. Section 1106 of the Federal Aviation Act specifically provides that the Act's provisions shall not "in any way abridge or alter the remedies now existing at common law or by statute, but . . . are in addition to such remedies." Federal statutory and regulatory law thus merely supplemented, rather than replaced, common law remedies.

Consistent with section 1106 of the Act, courts recognized, even during the regime of extensive CAB tariff regulation, the existence of common law actions against air carriers for fraudulent misrepresentation in failing to disclose overbooking practices, breach of contract for bumping due to overbooking, breach of contract for loss of or damage to baggage, breach of duty as a common carrier for cancelling a flight because an airplane was diverted to another route, and breach of contract in making an intermediate stop on a non-stop flight.

The common law will continue to play a role in these areas, especially in the case of smaller carriers, to whom many of the CAB's substantive rules do not apply. More fundamentally, the common law will replace domestic tariff regula-

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93 See Nader v. Allegheny Airlines, 426 U.S. 290 (1976). See also Gilbert v. Bagley, 492 F. Supp. 714 (M.D.N.C. 1980). In general, state and common law remedies survive enactment of a federal statute unless "they are specifically preempted or in conflict with the federal law." Id. at 742.
98 E.g., Vick v. National Airlines, 16 Av. Cas. (CCH) 18,405 (La. App. 1982).
99 See supra notes 30-33 and accompanying text, for a discussion of rules with regard to baggage. See supra notes 34-43 and accompanying text for a discussion of rules with regard to oversales.
tion by the CAB as the basic source for determination of carrier liability. The common law will also fill in the gaps created by deregulation. For example, while passengers had been able to seek relief for denied boarding under the anti-discrimination provisions of section 404 of the Act, with the repeal of that provision, they now will presumably have to resort to common law remedies.

The basis for common law liability of air carriers is not limited to cases involving air transportation. Prior to the regulation of railroads, buses, and other providers of transportation, courts developed a vast body of common law relating to common carriers. Because the federal government has regulated common carriers for so long, many of the relevant cases are old. Nevertheless, this common law of common carrier liability is still discussed and applied by modern courts. Given that commercial air carriers are common carriers, courts are likely to look for guidance to this general body of common law principles as a supplement to existing common law air carrier cases.

Once it is determined that the common law applies, a subsidiary question is whether state or federal common law will govern. Common law suits brought against air carriers in state court almost certainly will be governed by state com-

100 See Klicker v. Northwest Airlines, 563 F.2d 1310 (9th Cir. 1977); Fireman's Fund Ins. Cos. v. Barnes Elec., Inc., 540 F. Supp. 640 (N.D. Ind. 1982). The ability of carriers to set time limitations on the bringing of suits for personal injury or death, for example, will now be governed by the common law rather than the CAB. See supra note 6; see also Albert, supra note 10, at 134-137.


103 See, e.g., Hannibal R.R. v. Swift, 79 U.S. 262 (1870). (railroad held liable as a common carrier for damage to passenger's luggage).


105 Commercial air carriers are common carriers because they hold themselves out to the public as willing to carry all passengers for hire indiscriminately. Arrow Aviation, Inc. v. Moore, 266 F.2d 488 (8th Cir. 1959); Curtiss-Wright Flying Serv. v. Glose, 66 F.2d 710 (3d Cir.), cert. denied, 290 U.S. 696 (1933); Pacific Northern Airlines v. Alaska Airlines, 80 F. Supp. 592 (D. Alaska 1948); Irwin v. Pacific Southwest Airlines, 17 Av. Cas. (CCH) 17,546 (Cal. Ct. App. 1982).
mon law. Given deregulation, most federal court suits against air carriers for the types of harms discussed in this article will be based on diversity of citizenship, so state, rather than federal common law can be expected to govern. Indeed, most federal courts that have faced the issue have referred to state common law. Some federal courts, however, have suggested that federal common law applies. Application of federal law would ensure uniformity and avoid complicated conflict of laws questions. Another subsidiary question is whether states may enact statutes modifying substantive common law rules relating to air carrier liability. Generally, states may enact statutes modifying or abolishing common law rules, and there is no reason to believe they may not do so in this field.

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106 See, e.g., Vick v. National Airlines, 16 Av. Cas. (CCH) 18,405 (La. App. 1982) (air carrier breached contract when it made an unscheduled stop which caused passengers to miss their connecting flight; state common law used in awarding damages); Kalish v. Trans World Airlines, 50 Ohio St. 2d 73, 362 N.E.2d 994 (1977) (suit for bumping controlled by state common law).


111 See Klicker, 563 F.2d at 1316 n.10.

112 Gray v. Nelson, 533 F.2d 334 (6th Cir. 1976) (action against a county for negligence in violation of statutory duties barred by statute of limitations although common law would allow such recovery); Dague v. Piper Aircraft Corp., 513 F. Supp. 19 (N.D. Ind. 1980); (common law wrongful death action barred by statute); Agristor Credit Corp. v. Lewellen, 472 F. Supp. 46 (N.D. Miss. 1979).

113 Except for existing proprietary powers and rights, no state or political subdivision may, however, legislate or regulate with respect to the "rates, routes, or services" of interstate air carriers. 49 U.S.C. § 1305 (1976 & Supp. IV 1980). While the scope of this provision is uncertain, it is clear that Congress intended it to "prohibit states from exercising economic regulatory control over interstate airlines." S. REP. No. 95-631, 95th Cong., 2d Sess. 98 (1978). Thus states certainly may not enact and enforce systems of tariffs. See Hughes Air Corp. v. Public Util. Comm’n, 644 F.2d 1334 (9th Cir. 1981). Statutes affecting the substantive liability of air carriers and their ability to limit
2. Baggage

At common law, when a common carrier agrees to carry a passenger, it also impliedly contracts to carry a reasonable amount of that passenger's baggage. Such a common carrier is liable, as an insurer, for any loss of or damage to a passenger's baggage. Its liability as an insurer is not absolute, however. It is not responsible for loss of or damage to baggage caused by an act of God, public enemy, public authority, the passenger himself, or the nature of the baggage itself.

A common carrier may not, at common law, exculpate itself by contract from liability for harm caused by its negligent acts. While the cases do not discuss exculpation from liability for non-negligent acts, if a carrier cannot fit within one of the exclusions enumerated above, it would probably be considered negligent, given that it had exclusive control over the lost or damaged baggage. Also, as a matter of customer re-

...such liability are probably best viewed as permissible modifications of the common law rather than as economic regulation. It is conceivable, however, that such statutes could be viewed in certain circumstances as economic regulation involving rates, routes or services and therefore precluded by federal preemption.

...Railroad Co. v. Fraloff, 100 U.S. 24 (1879); Hannibal R.R. v. Swift, 79 U.S. 262 (1870); Saunders v. Southern Ry., 128 F. 15 (6th Cir. 1904).


See The Majestic, 166 U.S. 375 (1897); Cray v. Pennsylvania Greyhound Lines, 177 Pa. Super. 275, 110 A.2d 892 (1955); Missouri Pac. R.R. v. Elmore & Stahl, 377 U.S. 134 (1964); Ensco Inc. v. Weiker Transfer and Storage, 689 F.2d 921 (10th Cir. 1982); Marks Mfg. Co. v. New York Cent. R.R., 448 F.2d 68 (6th Cir. 1971) (cases involving damage to goods rather than baggage). These exclusions are comparable to those provided in the Warsaw Convention, i.e., that the carrier took "all necessary measures" to avoid the damage or that it was "impossible" for it to take such measures. See supra note 59 and accompanying text.


lations, a carrier would be unlikely to exculpate itself entirely from its liability for lost baggage, and would probably be willing to pay at least some minimal compensation.

A common carrier may, however, limit by contract its liability for damage to or loss of baggage.119 Such a limit of liability for a passenger's baggage must be "fair and reasonable," however.120 One specific application of this reasonableness requirement is the common law rule that a common carrier may not limit its liability without offering the passenger an opportunity to choose greater protection at a higher price.121 As the New York Court of Appeals has explained: "It is possible for parties to limit their liability provided that there is a voluntary choice of obtaining full or limited liability by paying under a graduated scale of rates proportioned to the responsibility in transportation or other services rendered."122

Similar to this reasonableness requirement is the requirement under a contract of adhesion analysis that, to withstand scrutiny, a challenged provision must not be "unconscionable."123 Given that air carrier contracts of carriage may be considered contracts of adhesion, in order to be considered valid, any limitations on baggage (or other) liability must be

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120 Saunders v. Southern Ry., 128 F. 15, 20 (6th Cir. 1904). See also Gas House, Inc. v. Southern Bell Tel. and Tel. Co., 289 N.C. 175, 221 S.E.2d 499, 505 (1976) (a common carrier may not limit its liability if to do so is "so unreasonable as to shock the conscience").


Air Carrier Liability

This may just be saying the same thing in a different way, as unconscionability has been defined as "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." A valid common law limitation of a common carrier's liability for loss of or damage to baggage must be accompanied by effective notice to the passenger of the limitation, as discussed below in Section IV(C).

3. Personal Injury and Death

While an air carrier is "not an insurer of the safety of its passengers," and its liability is based on negligence, it must "exercise the highest degree of care consistent with the practical operation of its plane for the safety of the passengers." This is a strict standard; an air carrier is "responsible for any, even the slightest, negligence and is required to do all that human care, vigilance and foresight reasonably can do under given circumstances." This strict standard is enforced by the willingness of courts to infer negligence to a carrier through res ipsa loquitur.

As discussed above, an air carrier, as a common carrier, may not exculpate itself from liability for its negligence. This rule applies "with special force" to the carriage of pas-

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124 See, e.g., In re Air Crash in Bali, Indonesia, 462 F. Supp. 1114 (C.D. Cal. 1978), rev'd on other grounds, 684 F.2d 1301 (9th Cir 1982). For a definition and further discussion of contracts of adhesion, see infra notes 212-219 and accompanying text.
126 Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 491 (8th Cir. 1959).
128 Id. See also Cox v. Northeast Airlines, 379 F.2d 893 (7th Cir. 1967), cert. denied, 389 U.S. 1044 (1968). Res ipsa loquitur literally means "the thing speaks for itself," and, at least as traditionally stated, has the following elements: (1) the event normally does not occur without someone being negligent, (2) the event is caused by an agency or instrumentality within the defendant's exclusive control, (3) the event must not have been due to any voluntary action or contribution by the plaintiff, and (sometimes) (4) the evidence as to what happened is more accessible to the defendant than the plaintiff. W. Prosser, Law of Torts 213-214 (4th ed. 1971).
129 See supra note 117 and accompanying text.
sengers. Unlike the case with baggage, an air carrier may not limit its liability for injuries caused by its negligence. Any such limitation "is invalid," even if the passenger is offered an opportunity to purchase greater protection. Given the applicability of *res ipsa loquitur*, it is difficult to imagine a personal injury or death claim against an air carrier not involving negligence, so, as a practical matter, air carriers are precluded at common law from limiting their liability for personal injury or death.

4. Oversales/Overbooking

(a) Fraudulent Misrepresentation

A confirmed airline passenger who is "bumped" from a flight because of overbooking may have a common law right of action against the carrier for fraudulent misrepresentation if the carrier fails to disclose its overbooking practice. The only apparent limitation on this right of action is that it is unavailable if the "bumped" passenger chooses to accept denied boarding compensation or alternative transportation offered by the carrier in accordance with CAB rules. In such a situation, the passenger is deemed to have elected to have foregone his common law remedies. Similarly, where the CAB oversales/overbooking rules do not apply, if a "bumped" passenger agrees to accept alternative transportation or compensation, that agreement may constitute a com-

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130 Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873).
133 See supra note 128 and accompanying text.
134 With the elimination of tariffs, carriers may, however, be able to limit the time in which a suit may be brought. See Albert, supra note 10, at 134-37.
mon law waiver of his or her right to sue for fraudulent misrepresentation.\textsuperscript{137}

Assuming that there has been no bar or waiver, a plaintiff in an overbooking/fraudulent misrepresentation case must show the following: (1) a false representation, (2) in reference to a material fact, (3) made with knowledge of its falsity, (4) made with intent to deceive, and (5) with action taken in reliance on it.\textsuperscript{138}

In the most prominent case in this area, \textit{Nader v. Allegheny Airlines},\textsuperscript{139} Allegheny bumped Ralph Nader from a confirmed flight and Nader sued Allegheny for failing to disclose its overbooking policies. The district court held that Nader had proven all five elements of fraudulent misrepresentation, and that Allegheny was therefore liable.\textsuperscript{140} Its basic theory was that Allegheny's nondisclosure of its overbooking practice was misleading and created a false understanding of Nader's chance, as a confirmed passenger, of being flown on the particular flight in question, and that this nondisclosure constituted a false representation.\textsuperscript{141}

The court of appeals did not dispute the district court's holding that Allegheny had made a false representation in reference to a material fact and with knowledge of its falsity. Indeed, the court referred specifically to the district court's opinion in noting as follows: "[C]onfirmation of a reservation connotes a guarantee of flight subject only to contingencies beyond the control of the airline. The possibility of being bumped because of overbooking is a factor within the airline's control."\textsuperscript{142} The court of appeals did, however, disa-

\begin{footnotes}
\footnote{\textsuperscript{137} See Bissett v. Ply-Germ Industries, 533 F.2d 142, 151 (5th Cir. 1967) (the right to an action for fraudulent misrepresentation arising out of a contractual setting is waived by a new agreement made with actual or imputed knowledge of the facts constituting the alleged fraud).}
\footnote{\textsuperscript{138} \textit{Nader v. Allegheny Airlines}, 626 F.2d 1031 (D.C. Cir. 1980).}
\footnote{\textsuperscript{139} \textit{Id.}}
\footnote{\textsuperscript{141} \textit{Id.} at 174. The court noted that "defendant at no time (not in his tariffs, advertising, or other communications to the public) communicated to the plaintiff the existence of its overbooking practice." \textit{Id.} at 168.}
\footnote{\textsuperscript{142} 626 F.2d at 1036.}
\end{footnotes}
gree with the district court as to intent to deceive and reliance, and reversed on these grounds. It held that Allegheny lacked intent to deceive because overbooking had been considered in CAB regulatory proceedings and was generally known to exist by the public. It also held that Nader, as an “extraordinarily knowledgable passenger,” knew that a confirmed reservation did not exclude the possibility of being bumped, and therefore had not relied on Allegheny’s lack of disclosure.

The easiest and most painless way to avoid common law liability for fraudulent misrepresentation would be if carriers could be assured that their present overbooking practices fall within the Nader holding of non-liability. There are three reasons, however, why carriers cannot be confident of fitting within the Nader holding. First, the average bumped passenger is not “extraordinarily knowledgeable” like Nader. Most bumped passengers probably will be able to prove reliance on a carrier’s statement of confirmation and nondisclosure of overbooking. Second, the court of appeals in Nader rested its conclusion that Allegheny had no intent to deceive in part on the fact that overbooking had been considered in CAB regulatory proceedings. Given deregulation, carriers may now be less able to point to similar regulatory proceedings as a bar to their deceptive intent. In the absence of such proceedings, lack of intent to deceive will be more difficult to show. Finally, it is far from clear that a carrier will be able to escape liability solely on the basis of lack of intent inferred from general public knowledge of overbooking, the final Nader reason for non-liability. In the absence of regulatory proceedings, this knowledge may be reduced. Furthermore, it is conceptually unclear why public knowledge vitiates intent. Public knowledge more properly goes to the question of reasonable reliance, and the court of appeals implied that reliance would be reasonable for passengers who were not extraordinarily well-informed.

This is not to say that carriers will be automatically liable

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143 Id. at 1037.
144 Id.
for fraudulent misrepresentation under Nader if they overbook and then bump passengers. Rather, it is to suggest that carriers are not securely protected from such liability unless they take preventive steps. The element of fraudulent misrepresentation over which carriers have the most control is whether they make a false representation. If carriers engage in overbooking, there are two basic approaches for carriers to prevent charges of false representation; they may refuse to make confirmed reservations, or they may disclose overbooking practices. The basic theory of a fraudulent misrepresentation/overbooking suit is that a confirmed reservation, in the absence of any additional information, suggests a guaranteed seat. Thus, if there is no confirmed reservation, there is no guaranteed seat and, hence, no misrepresentation if a seat is not provided.

Because many carriers may want to continue overbooking and oversales practices, the preferable method of avoiding fraudulent misrepresentation liability for most carriers is disclosure of overbooking practices. There can be no fraudulent misrepresentation if there is adequate disclosure, for there is no false representation. What constitutes adequate disclosure at common law is discussed below in Section IV(C).

(b) Breach of Contract

A passenger bumped from a flight because of overbooking may also sue the carrier for breach of the contract of carriage, again assuming he does not accept denied boarding compensation. The theory of such a breach of contract suit, while not explicitly developed by the courts, is simple. By confirming a passenger’s reservation, a carrier contracts to carry that passenger; by not honoring the confirmed reservation because of overbooking, the carrier breaches the contract of carriage and is therefore liable.


If a carrier makes the requisite disclosure of its overbooking practices so as to avoid liability for fraudulent misrepresentation, it should also be able to avoid liability for breach of contract. Once adequate disclosure of overbooking practices is made, the contract of carriage is subject to those disclosed practices (i.e., the contract is to carry the passenger only if he is not bumped in accordance with overbooking practices), and there should be no danger of a successful breach of contract suit.

5. Flight Delays and Cancellations

There have been a limited number of cases dealing, at least in part, with an air carrier’s liability at common law for flight delays or cancellation.147

In one recent case, the court held a carrier liable for breach of its contract to fly the plaintiffs non-stop to their destination when it made an unscheduled stop to pick up passengers that the carrier had not been able to pick up on an earlier leg of the flight due to bad weather.148 Another recent case, in which an air carrier had cancelled a flight because the plane was diverted (to fly another route for which the scheduled plane had broken down), suggested, while denying recovery, that in the absence of a tariff provision limiting liability, a passenger on the cancelled flight may have had a common law right of action against the air carrier for breach of its duty as a common carrier.149 Other cases have suggested, while also denying recovery, that in the absence of exculpatory provisions a carrier may be liable for breach of contract for omitting a scheduled stop,150 adding an unscheduled stop,151 or cancelling a flight altogether.152

These cases suggest that a carrier may avoid or limit its liability for these sorts of harms through proper notice. Effective common law notice, discussed below in Section IV(C), would not only make the liability limitation part of the contract and preclude breach of contract suits, but should also preclude tort suits based on any misrepresentation theory.

IV. NOTICE REQUIREMENTS

A. CAB Regulation

1. Baggage

The CAB's new part 254, if it takes effect as originally promulgated, will require each carrier using aircraft of more than 60 seats to provide notice to passengers, "by written material included on or with its tickets," of any limitations on its baggage liability, including rules for fragile and perishable goods, and of the availability of excess valuation insurance coverage, if provided by the carrier. It is not clear whether this notice requirement will mean that those carriers to which it applies must actually describe the substance of their limitations or merely state that they exist. The CAB has proposed amending part 254's baggage notice requirement to require specific notice on or with each ticket of a carrier's baggage liability limitations. The ticket would be required to state either the carrier's actual monetary baggage liability limitation or include the following statement: "Federal rules require any limit on an airline's baggage liability to be at least $1000 per passenger, except for

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153 See, e.g., Brunwasser, 541 F. Supp. at 1341 ("the terms of this contract of carriage are set forth in writing on the ticket. . . . The terms of the agreement are clear and unambiguous."); Vick, 16 Av. Cas. at 18,406 ("[d]efendant's failure was [in part] in not adequately informing plaintiffs of the changed flight schedule. . . .").

154 See supra notes 135-145 and accompanying text for a discussion of misrepresentation suits in the context of oversales/overbooking.


156 As discussed supra note 32 and accompanying text, the CAB has stayed implementation of the new baggage rules. See 48 Fed. Reg. 6,696 (1983).


158 CAB staff informally advises that the rule does not require that substantive terms be stated but notes that, under state law, such a course may be preferable or required.

flights on small aircraft where lower limits may apply. Airlines may have higher limits." The CAB has also proposed amending part 253 to require that if carriers incorporate terms of carriage by reference, they must give passengers notice that such incorporated terms may include limits on baggage liability, including those for fragile or perishable items, and of the availability of excess valuation insurance. Because, in reliance on the new part 254, the CAB amended its tariff rules to eliminate requirements that carriers provide notice of domestic baggage liability limitations, technically there are currently no CAB domestic baggage notice requirements applicable to certificated carriers. Section 298.30 of the CAB Regulations requires, however, that non-certificated carriers operating aircraft of 60 seats or less "cause to be displayed continuously in a conspicuous public place" wherever its employees sell its tickets a "clearly visible and readable" sign setting forth its baggage liability policy. Thus, ironically, non-certificated smaller carriers are subject to CAB regulation in an area in which, at least in the short run, larger certificated carriers are not.

2. Oversales/Overbooking

Part 250 of the CAB Regulations requires carriers using aircraft of more than 60 seats to provide two types of notice of their overbooking/oversales policies. First, they must cause to be displayed continuously wherever their tickets are sold a sign for passengers, as set forth below, in bold-face type at least one-fourth of an inch high. The sign must be in a "con-

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160 Id. at 22,324. Presumably the $1000 figure would be changed to $1250 if that is the minimum liability limit adopted by the CAB. See supra note 33 and accompanying text.
164 14 C.F.R. § 298.30 (1982). Certificated carriers operating aircraft of 60 seats or less are exempted from this requirement by 14 C.F.R. § 298.95(b)(1982). Those carriers are also not covered by the new part 254.
spicuous public place,” and must be located so as to be “clearly visible and clearly readable to the traveling public.” The sign must read as follows:

Notice—Overbooking of Flights

Airline 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 reservation. If the flight is overbooked, no one will be denied a seat until airline personnel first ask for volunteers willing to give up their reservation in exchange for a payment of the airline’s choosing. If there are not enough volunteers the airline will deny boarding to other persons in accordance with its particular boarding priority. With few exceptions persons denied boarding involuntarily are entitled to compensation. The complete rules for payment of compensation and each airline’s boarding priorities are available at all airport ticket counters and boarding locations. Second, carriers covered by part 250 must include this same notice “with each ticket sold in the United States.” The notice must be printed in at least 12-point type, and its last two sentences must be printed in a typeface contrasting with that used on the rest of the notice.

Section 298.30 of the CAB Regulations require that non-certified carriers operating aircraft of 60 seats or less “cause to be displayed continuously in a conspicuous public place” wherever its employees sell its tickets a “clearly visible and readable” sign setting forth its denied boarding compensation policy.

3. Smoking

The CAB’s current smoking rules do not require that any notice be provided. The Board recently proposed, how-

\[\text{id. at 52,987.}\]
\[\text{id.}\]
\[\text{id.}\]
\[\text{id.}\]
\[\text{id.}\]
\[\text{14 C.F.R. § 298.30 (1982). By virtue of 14 C.F.R. § 298.95(b)(1982), this requirement does not apply to certificated operators of aircraft of 60 seats or less. These carriers are also not subject to part 250, so they are not subject to any notice requirements with respect to their denied boarding policies.}\]
\[\text{14 C.F.R. § 252 (1982).}\]
ever, that carriers using aircraft of more than 30 seats be required to provide the following notice “on or with” their tickets: “Every passenger who meets the airline’s check-in requirements has a right to a seat in a non-smoking section.” Alternatively, the Board proposed that smoking rules be added to the terms and conditions covered by the new part 253 on Notice of Terms of Contract of Carriage, discussed below.

4. General Notice of Terms of Contract of Carriage

Until January 1, 1983, carriers using aircraft of more than sixty seats were able to incorporate terms and conditions of carriage through tariffs. Without CAB action, on January 1, 1983, all carriers would have been subject to the laws of the various states regarding (a) whether they can incorporate terms and conditions by reference to documents other than a passenger’s ticket (i.e., to a separate set of terms and conditions) and (b) the notice that must accompany any such incorporated terms and conditions.

To deal with this situation and prevent the applicability of disparate state laws, the Board adopted rules permitting incorporation by reference provided that uniform federal notice and other newly-established requirements are followed. The Board’s new incorporation by reference and notice rules originally applied only to scheduled direct air carrier operations in interstate or overseas (i.e., within United States territory) air transportation involving aircraft designed to have a

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173 Id.
175 As stated by the Board:
   [I]n the absence of general [CAB] rules on the subject, it is likely that courts acting on passenger claims would either deny altogether the validity of any contract terms of which the passenger did not have direct notice, or lay down differing rules for their incorporation by reference. Such rules would probably require a higher degree of notice than had been provided by the tariff system. The question of notice might also be subject to State legislative attention.
maximum passenger capacity of more than 60 seats, as well as to passengers on flight segments that are included on the same ticket with segments involving such large aircraft, regardless of aircraft size or the identity of the carrier.\textsuperscript{177} The Board subsequently extended the rules to cover all scheduled direct air carrier operations in interstate or overseas air transportation.\textsuperscript{178}

Under part 253, if a carrier chooses to incorporate contract terms by reference to other documents, it is required to do the following: (a) make the full text of each incorporated term available at each of its airport and city ticket offices (but not at travel agencies); (b) provide, upon the request of passengers, a free copy of the text of its incorporated terms, either by mail or "other delivery service"; (c) ensure that all locations within the United States where its tickets are sold, including travel agencies, have available free information sufficient to enable passengers to order the full text of incorporated terms; (d) ensure that any passenger can obtain from any location where a carrier's tickets are sold within the United States, including travel agencies, a "concise and immediate" explanation of the specified terms described below which the carrier has incorporated by reference,\textsuperscript{179} and (e) provide notice on or with the ticket as described below.\textsuperscript{180}

Carriers incorporating contract terms by reference must include on or with the ticket (or other written instrument given to a passenger which embodies the contract of carriage and incorporates terms by reference) "conspicuous written notice" of the following: (a) that any terms incorporated by reference are part of the contract; (b) that passengers may inspect the full text of each incorporated term at the carrier's airport or city ticket office; (c) that passengers have the right, upon re-

\textsuperscript{177} Id.
\textsuperscript{179} 47 Fed. Reg. 52,128 (1982). To meet this requirement, the Air Traffic Conference of America has begun publishing a periodic summary of carriers' incorporated terms and conditions. See, e.g., AIR TRAFFIC CONFERENCE OF AMERICA, UNITED STATES AIR CARRIERS CONDITION OF CONTRACT SUMMARY OF INCORPORATED TERMS (DOMESTIC AIR TRANSPORTATION) (February, 1983).
\textsuperscript{180} 47 Fed. Reg. 52,128 (1982).
quest at any location within the United States where the carrier's tickets are sold, to receive by mail or other delivery service the full text of each incorporated term; (d) that incorporated terms may include certain specified subjects, described below; and (e) that passengers may obtain from any location where the carrier's tickets are sold within the United States further information about those specified subjects.\(^{181}\)

The specified subjects about which passengers have to be notified that incorporated terms may exist\(^{182}\) are the following: (a) limits of liability for personal injury or death; (b) claim restrictions, including time periods within which passengers must file a claim or bring an action against the carrier for its acts or omissions or those of its agents; (c) rights of the carrier to change non-price terms of the contract; (d) rules about reconfirmation of reservations, check-in times, and refusal to carry; and (e) rights of the carrier and limitations concerning delay or failure to perform service, including schedule changes, substitution of alternate air carrier or aircraft and rerouting.\(^{183}\)

The new rules also require actual notice of certain fare-related terms. A passenger will not be bound by any terms restricting refunds of the ticket price, imposing monetary penalties on passengers, or permitting the carrier to raise the price, unless the passenger "receives conspicuous written notice" of the "salient" features of those terms on or with the ticket.\(^{184}\) Except for these limited actual notice areas, the new rules do not require carriers to provide substantive information on or with the ticket of any of their incorporated terms or conditions.

The CAB has not elaborated on what constitutes "conspicuous" notice. Instead, in adopting the new part 253, it stated

\(^{181}\) Id. at 52,135.

\(^{182}\) The CAB assumes that this notice "can and presumably will" be standardized. Id. at 52,132. The Air Traffic Conference of America has developed such a standard "Notice of Incorporated Terms" for use on ticket stock.

\(^{183}\) Id. at 52,135. The CAB has proposed that limits on baggage liability, including those for fragile or perishable items, and the availability of excess valuation insurance be added to this list. 48 Fed. Reg. 22,323 (1983).

\(^{184}\) Id.
that courts will "have an important role to play in determining whether the notice given was 'conspicuous.'" In determining what constitutes conspicuous notice for purposes of the CAB rules, courts are likely to follow the common law requirement that in order for notice of common carriers' terms and conditions to be deemed sufficient to make those terms and conditions binding, the terms and conditions in question must be "distinctly declared," "distinctly brought to the knowledge of the passenger," or "plainly declared."

Two caveats to these rules should be stressed. First, the rules are not mandatory. They apply only to carriers that choose to incorporate by reference terms that are not a part of the documents given to passengers. As the CAB has emphasized (in the context of small carriers, but applicable to large carriers as well): "[T]he upshot . . . is that there is no necessity for them to comply with the notice requirements of part 253 . . . . If they do not, the terms of their contracts with passengers will be simply those stated on the ticket."

Second, the new part 253 does not preempt or otherwise affect the role of state common or statutory law in governing the substantive terms of carriers' contracts of carriage. As the CAB explained in adopting the new rules, the courts will have an "important role" in determining whether any "term itself is proper." Thus, even if a court concludes that CAB notice requirements were met, it could still find the carrier fully liable on the basis that the limitation involved was substantively unreasonable or unconscionable or otherwise contrary to law.

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185 Id. at 52,132.
186 The Majestic, 166 U.S. 375, 386 (1897); Railroad Co. v. Fraloff, 100 U.S. 24, 29-30 (1879); Saunders v. Southern Ry. 128 F. 15, 20 (6th Cir. 1904). See infra notes 205-220 and accompanying text for a discussion of common law notice requirements.
187 48 Fed Reg. 6,317 (1983). See also id. at 6318 ("[t]he rule is only permissive, offering carriers a method of incorporating terms by reference if they choose to do so"). The Board has proposed amending part 253 to make its permissive nature, at least with respect to small carriers, even more explicit. 48 Fed. Reg. 29,707 (1983).
B. Warsaw Convention and Montreal Agreement

1. Baggage

In order to take advantage of the baggage liability limitation provisions of the Warsaw Convention, carriers operating in international travel or on domestic segments of an international journey must provide the passenger with a baggage check that, inter alia, states the number of the passenger ticket, the number and weight of the packages (i.e., items of baggage) being transported, and a statement that the transportation of the baggage is subject to the liability rules of the Convention.

The CAB has adopted notice requirements giving these baggage liability provisions "substantive effect." Section 221.176 of the Board's Regulations prescribes specified ticket and sign notices. The ticket notice must be printed in at least 10-point type. If the notice is printed in smaller type (e.g., 8.5-point), the carrier may not avail itself of the applicable liability limits. The sign notice must be placed in a "conspicuous public place" wherever in the United States the carrier's tickets are sold or it accepts baggage for checking.

2. Injury or Death

In order to take advantage of the personal injury and death liability limitations of the Warsaw Convention and the Montreal Agreement, carriers must provide the passenger with a ticket that includes, inter alia, a statement that the transportation is subject to the liability rules of the Convention. The ticket must be "delivered to the passenger in

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190 Convention, supra note 56, art. 4.
193 Id.
195 14 C.F.R. § 221.176.
196 Convention, supra note 56, art. 3.
such a manner as to afford him reasonable opportunity to take protective measures"; otherwise the liability limitations will not apply. Under the Montreal Agreement carriers must also provide notice in 10-point type of liability limitations at the time tickets are delivered. Notice printed in smaller type (e.g., 8.5-point) will not do. CAB tariff rules require that carriers covered by the Montreal Agreement provide a specified notice in writing to each passenger whose transportation is governed by the Agreement and whose place of departure or destination is the United States. The notice must be in at least 10-point modern type and in ink contrasting with the stock. It must also be printed either on each ticket or on a piece of paper placed in the ticket envelope, or must be attached to the ticket or the ticket envelope. Additionally, it must be "displayed continuously in a conspicuous public place" wherever tickets are sold in the United States involving transportation governed by the Warsaw Convention and at the place of departure or destination in the United States. These signs must be printed in bold-faced type at least one-fourth of an inch high. In addition, the CAB requires that carriers include the Montreal Agreement in their contracts of carriage. These CAB notice requirements give "substantive effect" to the notice provisions of the Warsaw Convention and Montreal Agreement.

C. Common Law

Under the common law, for a clause limiting an air car-

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198 CIVIL AERONAUTICS BD., supra note 72.
199 In re Aircrash Disaster at Warsaw, Poland, 535 F. Supp. 833 (E.D.N.Y 1982).
201 Id.
202 Id. An alternative sign providing notice of liability limitations with respect to both baggage and personal injury and death is provided in section 221.176 of the Board's Regulations. See supra note 192.
204 See Deutsche Lufthansa Aktiengesellschaft v. CAB, 479 F.2d 912, 918 (D.C. Cir. 1973).
rier's liability to be valid, passengers must be notified in such a fashion that they can be deemed to have knowingly agreed to the limitation. In an early steamship case, for example, the Supreme Court held that a passenger was not bound by a limitation of liability for baggage printed on the back of his ticket, even though "SEE BACK" was printed in bold face type on the front of the ticket, because the limitation had not been "distinctly declared and deliberately accepted".

More recent ship cases have also stressed the importance of adequate notice of liability limitations. A recent review of such cases by the United States District Court for the Southern District of New York suggests that it is not enough that the contract of carriage (i.e., ticket) include a statement of the liability limitation imposed by the carrier. The court reasoned that "[E]ven if the condition appears in the body of the contract, a court should nevertheless inquire whether the reader's attention was called to the fine print." The court stated that notice would be sufficient where there is a warning to read the ticket's conditions that is in a "conspicuous location on the ticket cover" and printed in white lettering set off against a blue background.

Apart from location of the notice, a carrier must be careful that the substance of the liability limitation is itself expressed in clear and understandable terms: "[A] passenger would not be bound by a provision written so lututently [obscurely] and printed in such small type as to be virtually incomprehensible."

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205 The Majestic, 166 U.S. 375, 386 (1897) (emphasis added). Early common law railroad cases took a similar approach. One court stated, "When a carrier desires to limit its common law responsibility, there is nothing unreasonable in requiring that the extent of the exoneration shall be plainly declared and brought to the attention of its customer in such way as to afford opportunity for acceptance or rejection." Saunders v. Southern Ry., 128 F. 15, 20 (6th Cir. 1904) (emphasis added). See also Railroad Co. v. Fraloff, 100 U.S. 24, 29-30 (1879) (a limitation of baggage liability must be "distinctly brought to the knowledge of the passenger").


207 Raskin, 521 F. Supp. at 340 (emphasis added).

208 Id. at 341 (citing McQuillan v. Italia Societa Per Azione Di Navigazione, 386 F. Supp. 462 (S.D.N.Y. 1974), aff'd, 516 F.2d 896 (2d Cir. 1975)).

209 Id. at 340-41 (interior quotation marks omitted).
Courts applying the notice requirements of the Warsaw Convention have also stressed the importance of the passenger being able to understand the notice, in addition to the notice itself being conspicuous. The United States Court of Appeals for the Second Circuit has provided, in that context, a good description of how a carrier should not attempt to fulfill its common law notice obligations:

[T]he exculpatory statements on which defendant relies are virtually invisible. They are ineffectively positioned, diminutively sized, and unemphasized by bold face type, contrasting color, or anything else. The simple truth is that they are so artfully camouflaged that their presence is concealed. Moreover, even if a passenger were able to read the printing on the ticket and baggage check, it is highly questionable whether he would be able to understand the meaning of the language contained thereon.

In addition to this general body of case law, notice requirements may be imposed under a contract of adhesion analysis. A contract of adhesion is a standardized contract, drafted and imposed by a party of superior bargaining power, which relegates to the subscribing party the opportunity to adhere to the contract or reject it. In addition, an adhesion contract generally involves services that cannot readily be obtained elsewhere.

Over a century ago, the Supreme Court approached rail carrier contracts in a fashion that today would be considered contract of adhesion analysis, and modern courts could easily categorize limitation of liability provisions in air carrier contracts with passengers as similarly adhesive. Air carriers

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211 Id. at 514. Compare Brunwasser v. Trans World Airlines, Inc., 541 F. Supp. 1338, 1341 (W.D. Pa. 1982) (contractual terms as set forth in the ticket were "clear and unambiguous").
214 In striking down exculpatory contract provisions, the Supreme Court referred, inter alia, to "the inequality of the parties, [and] the compulsion under which the customer is placed . . . ." Railroad Co. v. Lockwood, 84 U.S. 357, 381 (1873).
essentially impose standardized clauses on passengers who have no effective choice or bargaining opportunity, in a context involving a service that cannot readily be obtained elsewhere (assuming all or most carriers follow the same or similar limitation of liability policies or that their schedules differ substantially). Indeed, at least in the context of the Warsaw Convention, courts have "treat[ed] the airline passenger ticket, absent effective notice of liability limitations, as a contract of adhesion." With air carrier contracts made in a deregulated common law environment, there is no barrier to courts applying the adhesion contract doctrine more generally.

The fact that air carrier limitation of liability clauses might constitute contracts of adhesion does not necessarily make them invalid. Rather, the contract (or provision) will not be enforced if, as discussed above in Section III(c)(2), it is "unconscionable," or, more relevant to the discussion here, is "not within the reasonable expectations of the weaker or 'adhering' party." While this latter requirement involves more than notice, notice is a key factor in deciding whether an adhesive provision should be enforced. One court stated that "provisions contrary to the reasonable expectations of the adhering party will be denied enforcement in the absence of plain and clear notification and an understanding consent." A passenger thus cannot reasonably be deemed to have given his or her "understanding consent" to a limitation of liability or other contract term if the contract itself (i.e., the ticket and accompanying documents) merely refers to the existence of such a limitation or term rather than providing some "plain and clear notification" of the substance of the limitation or term at issue.

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215 In re Air Crash in Bali, Indonesia, 462 F. Supp. 1114, 1120 (D.C. Cal. 1978), rev'd on other grounds, 684 F.2d 1301 (9th Cir. 1982).
217 For a definition of unconscionable, see supra note 125 and accompanying text.
218 Graham, 28 Cal 3d at 820, 633 P.2d at 172, 171 Cal. Rptr. at 612.
219 Id. at 821 n.18, 623 P.2d at 173, n.18, 171 Cal. Rptr. at 614 n.18. (emphasis added; interior quotation marks omitted).
Under this vast body of law, one cannot state precisely what will constitute adequate or inadequate disclosure of air carrier liability limitations at common law. The general principle is clear, however. The passenger should be given on or with his ticket or baggage claim check a conspicuous and clear explanation of the carrier's liability limitation policies. In order to enforce baggage liability limitations, a carrier must also provide passengers with "a fair opportunity to choose between a higher or lower liability by declaring a correspondingly greater or lesser value."220

V. CONCLUSION

As of January 1, 1983, the world of commercial air carriers changed dramatically. Air carriers are now no longer able to protect themselves from liability to their domestic passengers by filing tariffs with the Civil Aeronautics Board.221 The elimination of domestic tariffs is likely to encourage an increase in court claims by passengers against carriers and probably an increase in carrier liability as well, at least in the short run or until carriers adapt to the new environment.

While, in a variety of areas, carriers' substantive liability and notice responsibilities continue to be governed by federal regulation and treaties, carriers are now more exposed to the generally greater liability and stricter notice requirements of the common law. The common law will also play an important role as courts interpret and enforce regulatory and treaty law, especially given some of the uncertainties discussed in this article.222

Despite the variety of sources of law to which carriers now have to be responsive, there is one unifying theme — notice. If carriers properly notify passengers of their terms and conditions of carriage, the carriers should be able reasonably to limit their liability. Whether carriers will conscientiously pro-

222 See, e.g., supra notes 83-91 and accompanying text for discussion of enforceability of Warsaw Convention.
vide such notice is far from clear at this time.223

223 See, e.g., Aviation Consumer Action Project v. American Airlines, CAB Docket No. 41399 (filed March 30, 1983). The CAB alleged that twelve major carriers were not complying with the Board's new general contract of carriage notice requirements. The carriers involved were American Airlines, Delta Airlines, Eastern Airlines, New York Air, Northwest Orient Airlines, US Air, Western Airlines, and World Airways. Id. After considering the complaint, the carriers' responses, and conducting a survey of its own, the Board dismissed the complaint with respect to seven of the carriers and agreed to accept a compromise civil penalty for apparent violations by five of the carriers. CAB Order 83-7-31 (Enf. Div. July 11, 1983). In addition, the Board conducted an investigation of its own and found that two other carriers were not in compliance and agreed to accept a compromise civil penalty from these carriers as well. Id. The Board also stressed that carriers would be held to a "high standard of compliance" with part 253 if they incorporate by reference because, if "loosely enforced," part 253 "would create the very result it was designed to prevent: unconscionable contracts of adhesion." Id.