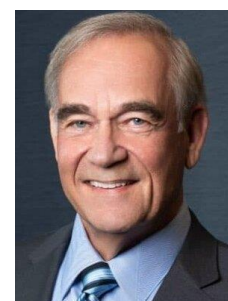


## Southwest Debacle May Spur Traveler Protection Legislation

By **Roger Clark** (February 13, 2023, 5:51 PM EST)

When countless Southwest Airlines Co. passengers were stranded during last December's frigid early winter storm meltdown, they had little legal recourse against the airline. Southwest and other airlines were forced to cancel or delay flights because of extremely harsh weather conditions — but Southwest's cancelations extended days beyond the weather stoppages.[1]

The front-page stories of missed vacations and canceled weddings may have done for airline regulation what years of customer complaints failed to do. Congress will now consider holding airlines accountable for preventable flight delays and other service lapses.



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On Jan. 23, Sens. Richard Blumenthal, D-Conn., and Ed Markey, D-Mass. introduced a new airline passenger bill of rights.[2] The proposal is expected to receive serious attention from legislators.

Ultimately, Southwest joined other affected carriers in providing stranded passengers with financial relief. But its assistance was primarily an effort to claw back some of the lost goodwill that had been squandered by the public relations disaster. There is no law that requires Southwest or any domestic carrier to do much of anything to aid stranded passengers.

Between Dec. 21 and Dec. 29, 2022, America's largest domestic carrier by passenger count canceled more than 16,700 flights.[3] Other large airlines grounded flights during the same time period, but Southwest's cancelations and delays were of a scale and magnitude beyond, accounting for roughly 77% of the affected flights nationally.

The reasons are straightforward. The airline's famously successful point-to-point routing is far more vulnerable to a major weather event than the hub-and-spoke routing of the legacy carriers. But the real culprit is the technological debt the C-suite executives at Southwest have allowed to accumulate for decades.

The company has significantly lagged its competitors in the implementation of updated digital operational technology — including ticketing, scheduling and internal communication systems. The investment in a modern technological highway system has not, apparently, been as important to C-suite executives as maximizing shareholder returns.

When skies are clear and sunny, Southwest experiences little downside as the nation's "analog" carrier.

Most metrics of on-time performance show that Southwest falls around the middle of the pack when compared to other domestic carriers.

But Southwest has seen tremendous growth in passenger count during the past 30 years — and ancient phone-based routing and scheduling systems, which may have worked just fine in the 1990s, have become the equivalent of a Timex watch in a digital age. They could not keep up with the unfolding crisis triggered by the severe winter storm.

Southwest's horse-and-buggy scheduling systems stand in odd contrast to the powerful industry and government push to digitize the national airspace system, the so-called Next Gen navigational and air traffic control communication deployment. The company acknowledged as much:

Our systems and processes became stressed while working to recover from multiple days of flight cancellations across 50 airports in the wake of an unprecedented storm. We're acutely focused on learning from this event, mitigating the risk of a repeat occurrence, and delivering the hospitality and outstanding service our customers expect from us.[4]

Southwest customers paid a heavy price. Ultimately, they will get refunds, credits and miles, but these are likely only because Southwest is in the crosshairs of the federal government. The U.S. Department of Transportation has told Southwest that it must provide timely refunds and reimbursements, and that it will hold the company accountable if it fails to do so.

Refunds, credits and compensation for delays and flight cancellations in the domestic airline industry are limited to those that airlines in their sole discretion grant to passengers under their contracts of carriage — adhesive agreements imposed on passengers unable to negotiate different terms, compelling them to accept the airline's terms if they want to fly on its planes.

Contracts of carriage are available online, but they are the proverbial fine print that few passengers read. And they vary from airline to airline. Of the major U.S. carriers, Southwest's terms are among the least generous.

For example, Delta provides complimentary hotel accommodations and ground transportation to and from the hotel, along with meal credits, if a delay or cancellation within Delta's control extends overnight.[5] Southwest, in contrast, agrees only to refund the unused portion of the customer's fare, "[f]ollowing a request by the Customer." [6] The DOT customer service dashboard is a good resource to review the contract of carriage of each airline.[7]

The airline industry is one of the nation's most heavily regulated industries. With safety the top priority of regulators, there are specs for almost every nut and bolt on an airplane, qualifications of air crews, and management of the national airspace system.

But compensation for cancellations and delays does not fall into the safety regulatory net. Consequently, the type, terms and amount of compensation an airline may offer for a flight disruption is left primarily to the market to decide.

In theory, if passengers do not like the terms of an airline's contract of carriage, they can fly on another airline. The reality, of course, is that there is no real choice. And, in any event, passengers choose their airline and flight based on a host of facts other than the fine print of a contract of carriage.

The individual states have no authority to regulate airlines. When Congress passed the Airline Deregulation Act in 1978,[8] it expressly barred states from regulating rates, routes and services of airlines.

Carriers set their own ticket prices, establish their own schedules subject to slot availability, and provide whatever level of customer service they choose. This includes investing — or not — in the technical infrastructure upon which consumers rely to book flights, check schedules and interface with the airline. The market decides whether the choices made by the airline are acceptable and satisfactory.

In stark contrast, airline passengers in Europe have clear legal rights in the event of flight disruptions. Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 requires that passengers receive compensation of:

(a) EUR 250 for all flights of 1500 kilometres or less; (b) EUR 400 for all intra-Community flights of more than 1500 kilometres, and for all other flights between 1500 and 3500 kilometres; (c) EUR 600 for all flights not falling under (a) or (b).[9]

Passengers must be offered a choice between reimbursement within seven days of the full cost of the ticket, at the price at which it was bought, for the part or parts of the journey not made, or for parts already made "if the flight is no longer serving any purpose in relation to the passenger's original travel plan," along with (1) a return flight to the first point of departure, at the earliest opportunity; (2) rerouting, under comparable transport conditions, to their final destination at the earliest opportunity; or (3) rerouting, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.

Of note, Article 9 of the EU regulations, which concerns payment for meals, hotels, phone calls and other expenses, is titled "Right to Care." By contrast, in the U.S., there is little that compares.

Yes, we have the Air Carrier Access Act[10] and regulations that describe a limited set of rights for airline passengers with disabilities. We also have a spotty patchwork of requirements that mandate that airlines return passengers to the terminal if there is a prolonged tarmac delay, feed and water them, and give them access to an operational restroom during the tarmac delay.

But there is no overarching thematic ideal in American statutory and regulatory law of an airline's obligation to care for its passengers when there is a flight cancellation or delay. However, all of this could soon change.

In 2021, Blumenthal introduced legislation in the Senate that would finally make airlines responsible for the care of passengers displaced by delay or cancellation. S.3222, the Airline Passengers Bill of Rights,[11] would require the DOT to establish passenger remedies for canceled and delayed flights, as well as other service mishaps.

When a cancellation or delay is within the carrier's control, such remedies would include automatic refunds of amounts paid for canceled or significantly delayed flights, as well as payment for meals, hotels and other related expenses. For flights delayed by four hours or more, an additional cash payment of \$1,350 would be required.

Not surprisingly, the bill faced stiff opposition from the airline industry when it was introduced. The

legislation was referred to the Committee on Commerce, Science, and Transportation on Nov. 17, 2021, where it languished.

But things have changed since 2021. The DOT has initiated a probe into whether Southwest engaged in unrealistic scheduling of flights, and has stated that it "will leverage the full extent of its investigative and enforcement power to ensure consumers are protected and this process will continue to evolve as the Department learns more."<sup>[12]</sup>

On Jan. 31, 2023, in the wake of December's unprecedented travel upheavals, Blumenthal and Markey, in a second go-around, introduced an updated airline passenger bill of rights.<sup>[13]</sup> The bill, known as the Airline Passenger's Bill of Rights and FAIR Fees Act, addresses many points in addition to flight delays and cancellations.

But at the heart of the bill, and the driving force behind the bill, is the continuing and persistent inconvenience to passengers from delays and cancellations. This time around, Congress may be more receptive to holding airlines financially accountable to their passengers who, because of flight delays and cancellations that are the fault of the airline, are forced to sleep on the hard floor of the airport terminal, miss a crucial business meeting or a once-in-a-lifetime family event, or are short-changed days from a long-anticipated and prepaid vacation.

In the meantime, before purchasing tickets, airline passengers can familiarize themselves with their rights and remedies under their contract of carriage. If they are not satisfied with those rights and remedies, they can vote by flying with another airline.

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[1] <https://www.nytimes.com/2022/12/28/us/southwest-airlines-canceled-flights.html>.

[2] <https://www.blumenthal.senate.gov/imo/media/doc/13123airlinepassengersbillofrightsbilltext.pdf>.

[3] <https://www.npr.org/2023/01/26/1151667801/southwest-airlines-investigation-losses-holiday-travel-cancellations>.

[4] [https://www.cnn.com/2023/01/25/business/dot-southwest-airlines/index.html?utm\\_term=16747342880233764888270bd&utm\\_source=cnn\\_Five+Things+for+Thursday%2C+January+26%2C+2023&utm\\_medium=email&bt\\_ee=DZU5%2FC%2FX6pRD2KG96mPIHTAB%2FBEMbgy4Go7grGVvqizLMxc3kaSXEhyOatLCXC2d&bt\\_ts=1674734288026](https://www.cnn.com/2023/01/25/business/dot-southwest-airlines/index.html?utm_term=16747342880233764888270bd&utm_source=cnn_Five+Things+for+Thursday%2C+January+26%2C+2023&utm_medium=email&bt_ee=DZU5%2FC%2FX6pRD2KG96mPIHTAB%2FBEMbgy4Go7grGVvqizLMxc3kaSXEhyOatLCXC2d&bt_ts=1674734288026).

[5] <https://www.delta.com/us/en/legal/customer-commitment>.

[6] <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard>.

[7] <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf>.

[8] <https://www.congress.gov/bill/95th-congress/senate-bill/2493>.

[9] <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1476179175834&uri=CELEX:32004R0261>.

[10] <https://www.transportation.gov/airconsumer/passengers-disabilities>.

[11] <https://www.congress.gov/bill/117th-congress/senate-bill/3222/text>.

[12] <https://fortune.com/2023/01/26/southwest-airlines-investigation-dept-transportation-pete-buttigieg-holiday-flights-cancelled-debacle-stranded/>.

[13] <https://www.cbsnews.com/newyork/news/airline-passenger-bill-of-rights/>.