

# Commentary

## Should Airlines Be Legally Required to “Care” for Stranded Passengers?

Roger W. Clark\* with Dr. Dana Blair\*\*

When millions of airline passengers were stranded in airport terminals across the nation during December’s frigid early winter storm, missing family holiday gatherings and vacations and last-minute business appointments, they had little recourse to refunds, compensation, and expense reimbursements for their nightmarish inconvenience. The passengers had paid for a seat upon a commercial aircraft that was to depart at an agreed-upon time and was to arrive at an agreed-upon destination at an agreed-upon time. Yet, the “value” that was inherent to the passengers with an on-time and on-destination delivery was significantly reduced, if not completely lost.

A ticket is a euphemism for the contract of carriage between the airline and the passenger. We do not think of a ticket as a

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contract, we think of it as a simple “Ticket-To-Ride,” but contract it is, and the fine-print terms and conditions are buried in the “contract of carriage” that is available on-line, an agreement nobody reads. Unlike so many other contractual relationships where terms are regulated, implied, and controlled – think of insurance agreements and employment contracts and automobile purchases, for example – contracts between airlines and their passengers reflect governmental policy that the terms of service offered by an airline in its contract of carriage should reflect “maximum reliance on competitive market forces and on actual and potential competition.”<sup>1</sup>

Joseph Lochner must be somewhere applauding. That is a name that few airline passengers would recognize today. But airline passengers have more in common with the “Lochner Era” than we realize. Who was Joseph Lochner and what was the Era that bears his name?

In 1905, the United States Supreme Court ushered in the Lochner Era with its controversial 5-4 decision in *Lochner v. New York*.<sup>2</sup> The Supreme Court struck down a New York statute known as the “Bakeshop Act,” a law intended to promote the safety of bakery employees by limiting the hours an employee could be compelled to work. Joseph Lochner, a bakeshop owner, violated the act and was criminally prosecuted, when he required as a condition of employment that his employees work longer than the 10 hours per day or 60 hours per week allowed by the Bakeshop Act.

The Supreme Court, over the dissents of John Marshall Harlan and Oliver Wendell Holmes, Jr., ruled the Bakeshop Act violated Joseph Lochner’s right to freedom of contract under the Fourteenth Amendment. The Lochner Era lasted until 1937 when “the switch in time that saved nine” of *West Coast Hotel Co. v. Parrish*,<sup>3</sup> upholding the constitutionality of state minimum-wage legislation, effectively ended the court-packing plan of Franklin Roosevelt, and gave a judicial green light to further New Deal legislation.

So, what do today’s airline passengers have in common with employees from the Lochner Era? Airlines and passengers, like

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<sup>1</sup> Defining Unfair or Deceptive Practices, 85 Fed. Reg. 78,707, 78,709 (Dec. 7, 2020).

<sup>2</sup> 198 U.S. 45 (1905).

<sup>3</sup> 300 U.S. 379 (1937).

Joseph Lochner and his employees of that bygone time, are in theory free to negotiate and conclude contracts with terms they have mutually agreed upon. This assumes, of course, there is equal bargaining power between the negotiating parties. That is a fiction now with airlines and passengers, as it was with Lochner and his employees.

So, the spirit of *Lochner’s* unregulated freedom of contract lives on with the “contract of carriage” – a contract of adhesion – that every airline imposes upon its passengers.<sup>4</sup> When you purchase a ticket you “agree” to the terms of the contract of carriage, although you have never read those terms, you probably did not know there was such a thing as a contract of carriage, and you had no power to negotiate a contract with different terms.

Could “The Times They Are A-Changin’” be upon us? Possibly, but do not ask Bob Dylan; look instead to United States Senators Richard Blumenthal and Ed Markey. On January 23, 2023 they introduced a new “Airline Passengers’ Bill of Rights.”<sup>5</sup> The bill, if passed, would fundamentally alter the relationships between airlines and their passengers by ending the Lochner Era of unregulated freedom of contract in the commercial airline industry. The bill would address a host of service issues and would regulate compensation and reimbursement for flight delays and cancellations.

Is the proposed bill sound public policy? Or is it an overreaction to the December meltdown?

Airline passengers are uniquely vulnerable when there are flight delays and cancellations. You have surrendered your baggage when you check in at the airport, and except in unusual circumstances, you cannot recover your belongings until you arrive at your ticketed destination, assuming your checked baggage arrives with you. You must clear TSA security, be subject to an intrusive body search to enter the “sterile area” of the airport terminal where you must wait patiently for your airplane to board, a process that could be delayed for hours. Your luggage might be opened and gone through in the cause of collective safety and security. When you finally board the aircraft, you might have to sit for hours on the tarmac before the airplane takes off. Your flight might be diverted to a location you never intended to visit.

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<sup>4</sup> *Shipwash v. United Airlines, Inc.*, 28 F. Supp. 3d 740 (E.D. Tenn. 2014). The Court agreed that a Contract of Carriage is an adhesion contract.

<sup>5</sup> S. 178, 118th Cong. (2023).

You are under the control of the aircraft captain, and through him or her, the instructions of the flight attendants. And if you disobey their instructions, or if you say something that could be interpreted as a threat, even if the statement was inadvertent or intended as a joke (“It’s not like I have a bomb in my suitcase”), you can be prosecuted for a crime. And then we sit crammed shoulder to shoulder with strangers. You have utterly surrendered your control and your privacy.

So, why do we put up with such treatment? Because airlines provide swift transportation to distant and often exotic locales at a cost that we could not come close to duplicating through other means, even if we could drive ourselves. And it is an extraordinarily safe way to travel, the most secure and safe way to travel ever invented. You are at a higher risk of injury in your restroom at home than you are in a commercial aircraft. The commercial airline industry has, since World War II, made the world accessible to millions who otherwise would be left behind. There would be no “Destination Wedding” business without commercial aviation.

But flight delays and cancellations make us moan and scream. Any of us might sit in hard airport terminal seats, hour after hour, wondering if we should have gone to the dentist for that root canal instead of scheduling that last-minute trip.

The Airline Passengers’ Bill of Rights was introduced in the heated aftermath of the December “meltdown,” when outrage was high and the opportunity for a political right-cross was great. Southwest Airlines became the media “whipping boy” even though the airline has consistently been rated as one of the most admired companies in the United States. And, in a strange twist of irony, Southwest has consistently been rated either in the middle or near the top of the pack, at least in the United States, for customer satisfaction for on-time arrival.

Between December 21 and 29, 2022, America’s largest domestic carrier by passenger count canceled more than 16,700 flights.<sup>6</sup> Other large airlines grounded flights during the same period, but Southwest’s cancellations and delays were of a scale and magnitude beyond, accounting for roughly 77 percent of the affected flights nationally. The reasons are straightforward. The airline’s

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<sup>6</sup> Kaitlyn Radde, *Southwest Faces Investigation over Holiday Travel Disaster as It Posts a \$220M Loss*, NPR.ORG (Jan. 26, 2023, 11:32 AM), <https://www.npr.org/2023/01/26/1151667801/southwest-airlines-investigation-losses-holiday-travel-cancellations>.

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.

The delays and cancellations at Southwest were compounded by the “technological debt” accumulated by the airline for decades. The company has lagged its competitors in the implementation of updated digital operational technology, including ticketing, scheduling, and internal communication systems. This was a policy decision of the C-suite executives. Southwest has been a highly profitable company since the beginning of operations in the early 1970s. The profits were not plowed back into company technology infrastructure upgrades and were instead used to maximize shareholder returns and executive bonuses. The Department of Transportation (DOT) has not established a requirement that commercial air carriers upgrade their ticketing, scheduling, and internal communications to “state-of-the-art” systems.

When skies are clear and sunny, Southwest experiences little downside as the nation’s “analog carrier.” 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.<sup>7</sup>

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<sup>7</sup> Pete Muntean, *U.S. Transportation Dept. Investigating Southwest Holiday Travel Meltdown*, CNN.COM (Jan. 25, 2023, 8:43 PM), <https://www.cnn.com/2023/01/25/business/dot-southwest-airlines/index.html>.

Although Southwest Airlines bore the brunt of the criticism over the holidays, delays and cancellations are challenges that all passengers traveling across all airlines face on a daily basis. The CEO of United Airlines, in a recent interview, acknowledged that this is an industry-wide problem, not just a Southwest problem.<sup>8</sup>

Of the major U.S. carriers, Southwest's contract of carriage has historically been one of the least generous when it comes to refunds for delays and cancellations. 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.<sup>9</sup> Southwest, in contrast, has historically agreed only to refund the unused portion of the customer's fare, "[f]ollowing a request by the Customer"<sup>10</sup> (emphasis added). The DOT's Airline Customer Service Dashboard is a good resource to review the contract of carriage of each airline.<sup>11</sup>

Southwest passengers paid a heavy price for the December meltdown. Ultimately, they will get refunds, credits, compensation, reimbursements, and miles, but not because they are entitled to them under the contract of carriage. Nor is there a law that mandates any domestic carrier to do much to aid stranded passengers. Southwest is in the crosshairs of the federal government. The DOT 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. Southwest is desperate to claw back some

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<sup>8</sup> Tony Owusu, *United Airlines CEO Sees Southwest-Style Tech Problems Facing FAA, Airlines*, NEWSBREAK.COM (Feb. 7, 2023), [https://www.newsbreak.com/news/2917121163863-united-airlines-ceo-sees-southwest-style-tech-problems-facing-faa-airlines?noAds=1&\\_f=app\\_share&s=I3](https://www.newsbreak.com/news/2917121163863-united-airlines-ceo-sees-southwest-style-tech-problems-facing-faa-airlines?noAds=1&_f=app_share&s=I3).

<sup>9</sup> Delta Air Lines, *Customer Commitment*, <https://www.delta.com/us/en/legal/customer-commitment> (last updated Aug. 29, 2022).

<sup>10</sup> SW. AIRLINES CO., *CONTRACT OF CARRIAGE – PASSENGER* (Dec. 29, 2022), <https://www.southwest.com/assets/pdfs/corporate-commitments/contract-of-carriage.pdf>.

<sup>11</sup> Dep't of Transp., *Airline Customer Service Dashboard*, <https://www.transportation.gov/airconsumer/airline-customer-service-dashboard> (last updated Mar. 5, 2023). Interestingly, the Dashboard was updated as of March 15, 2023, and now indicates that Southwest Airlines has updated its Contract of Carriage to provide for, among other things, payment of hotel accommodations for overnight delays and payment of meals or a cash voucher for meals when the delay is longer than three hours. However, the published Contract of Carriage for Southwest Airlines as of March 19, 2023 does not reflect that those updates have been made to the actual Contract of Carriage. SW. AIRLINES CO., *supra* note 10, at 50 (sec. 9a.).

of the lost goodwill that was squandered by the public relations disaster.<sup>12</sup>

When it comes to safety, the airline industry is one of the nation’s most heavily regulated industries. With safety the top priority of regulators, there are specifications 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 factors other than the fine print of a contract of carriage.

When Congress enacted the 1978 Airline Deregulation Act,<sup>13</sup> it expressly barred states from regulating rates, routes, or 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, and the states have no say in the matter. 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. State regulators may believe an airline is guilty of unfair and deceptive practices with its advertising, promotions, and the fine print of its contract of carriage, but again, the states are on the sidelines.

Preempting the states, Congress has delegated to the DOT an obligation to investigate “unfair and deceptive practices” of airlines:

On the initiative of the Secretary of Transportation or the complaint of an air carrier, foreign air carrier, air ambulance consumer . . . or ticket agent,

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<sup>12</sup> Robert Chiarito et al., *Southwest’s Woes No Longer ‘Weather-Driven,’ Transportation Secretary Says*, NYTIMES.COM (Dec. 29, 2022), <https://www.nytimes.com/2022/12/28/us/southwest-airlines-canceled-flights.html>.

<sup>13</sup> Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.). The current language of the ADA refers to “prices, routes or services.”

and if the Secretary considers it is in the public interest, the Secretary may investigate and decide whether an air carrier, foreign air carrier, or ticket agent has been or is engaged in an unfair or deceptive practice or an unfair method of competition . . . . If the Secretary, after notice and an opportunity for a hearing, finds that the air carrier, foreign air carrier, or ticket agent is engaged in an unfair or deceptive practice or unfair method of competition, the Secretary shall order the air carrier, foreign air carrier, or ticket agent to stop the practice or method.<sup>14</sup>

Section 41712 is modeled on Section 5 of the Federal Trade Commission Act.<sup>15</sup> And the statute does not define “unfair,” “deceptive,” or “practice.” By regulation, however, the DOT has defined unfair and deceptive in ways to reflect the precedent of the Federal Trade Commission and the DOT’s “long-standing interpretation of those terms.”<sup>16</sup> Unfair is something that “causes or is likely to cause substantial injury, which is not reasonably avoidable, and the harm is not outweighed by benefits to consumers or competition.”<sup>17</sup> And a practice is defined to be deceptive if it “is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter.”<sup>18</sup>

There has been no published finding, whether from the DOT or the courts, that a contract of carriage is unfair or deceptive simply because it provides minimal rights of reimbursement or compensation because of delay or cancellation. Further, no court has held there is a private right of action under Section 41712.<sup>19</sup>

To the contrary, these contracts of carriage, which are authorized by federal law, and which are incorporated into each ticket, provide the exclusive rights and remedies available to passengers. There is typically no recourse to consumer protection laws under federal or state law, nor recourse to remedies under Federal Aviation Regulations. If a contract of carriage provides that a passen-

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<sup>14</sup> 49 U.S.C. § 41712(a) (2021).

<sup>15</sup> 15 U.S.C. § 45 (2021).

<sup>16</sup> Guidance Regarding Interpretation of Unfair and Deceptive Practices, 87 Fed. Reg. 52,677, 52,678 (Aug. 29, 2022).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See Casas v. American Airlines, Inc.*, 304 F.3d 517 (5th Cir. 2002).

ger “shall have no other claims in law or equity for actual, compensatory or punitive damages” except for those listed in the contract, then those limitations and restrictions will be enforced.<sup>20</sup>

In contrast to the *laissez faire* approach to these issues in the United States, airline passengers in Europe have clear legal rights in the event of flight disruptions. European Union Regulation 261/2004<sup>21</sup> 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).”

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 (a) a return flight to the first point of departure, at the earliest opportunity; (b) rerouting, under comparable transport conditions, to their final destination at the earliest opportunity; or (c) 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 regulation, which concerns payment for meals, hotels, phone calls, and other expenses, is entitled “Right to Care.” Yes, in the United States, we have the “Air Carrier Access Act”<sup>22</sup> 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.<sup>23</sup> But there is no overarching thematic ideal in American statutory and regulatory law of an

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<sup>20</sup> 14 C.F.R. §§ 1.1 & 253.4(a); *Herrera v. Cathay Pac. Airways Ltd.*, No. 20-CV-03019-JCS, 2021 WL 673448 (N.D. Cal. Feb. 21, 2021).

<sup>21</sup> Council Regulation 261/2004, Establishing Common Rules on Compensation and Assistance to Passengers in the Event of Denied Boarding and of Cancellation or Long Delay of Flights, and Repealing Regulation (EEC) No. 295/91 (Text with EEA relevance), 2004 O.J. (L 46) 1, <http://data.europa.eu/eli/reg/2004/261/oj/eng>.

<sup>22</sup> Dep’t of Transp., *Passengers with Disabilities*, <https://www.transportation.gov/airconsumer/passengers-disabilities> (last updated Nov. 19, 2022).

<sup>23</sup> 14 C.F.R. pts. 244 & 259.

airline's obligation to "care" for its passengers when there is a flight cancellation or delay.

The 2023 Airline Passengers' Bill of Rights is an update of a similar bill introduced by Senator Blumenthal in 2021.<sup>24</sup> The earlier bill, like the current proposal, makes airlines responsible for the care of passengers displaced by delay or cancellation.<sup>25</sup> It would have required the DOT to establish passenger remedies for canceled and delayed flights, as well as other service mishaps.<sup>26</sup> When a cancellation or delay is within the carrier's control, such remedies would include automatic refunds of amounts paid for cancelled or significantly delayed flights, as well as payment for meals, hotels, and other related expenses.<sup>27</sup> For flights delayed by four hours or more, an additional cash payment of \$1,350 would have been required.<sup>28</sup>

The 2021 bill faced stiff opposition from the airline industry. The legislation was referred to the Committee on Commerce, Science, and Transportation on November 17, 2021, where it languished. But have attitudes in Congress changed in the aftermath of the meltdown in December of 2022? 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>29</sup> Will the investigation of the DOT improve the chances for the newest bill, or decrease them?

The 2023 Airline Passengers' Bill of Rights<sup>30</sup> addresses many points in addition to flight delays and cancellations. For example, it provides for minimum compensation to passengers involuntarily denied boarding and protections relating to disclosure of flight information and transparency in pricing of tickets and frequent flyer programs. It provides protections relating to seating

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<sup>24</sup> Airline Passengers' Bill of Rights, S. 3222, 117th Cong. (2021).

<sup>25</sup> *Id.* § 103.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* § 103(a)(2).

<sup>28</sup> *Id.* § 103(a)(2)(C).

<sup>29</sup> David Koenig, Associated Press, *Buttigieg's Transportation Department Says It's Investigating Southwest Airlines 'Holiday Debacle that Stranded Millions'*, FORTUNE.COM (Jan. 26, 2023, 3:04 AM), <https://fortune.com/2023/01/26/southwest-airlines-investigation-dept-transportation-pete-buttigieg-holiday-flights-cancelled-debacle-stranded/>.

<sup>30</sup> S. 178, 118th Cong. (2023).

space for passengers on aircraft. It addresses availability of lavatories and potable water on passenger aircraft. It provides protections relating to the imposition of fees that are not reasonable and proportional to the costs incurred. But at the heart of the bill, and the driving force behind the bill, at least initially when the updated bill was reintroduced, was the continuing and persistent inconvenience to passengers from delays and cancellations.<sup>31</sup>

The bill would require the DOT to prescribe regulations “requiring, if a passenger’s flight is delayed or cancelled for any reason within the control of the air carrier (including crew scheduling, routine maintenance, functioning of information technology systems, passenger service issues, issues related to baggage services, issues related to ground handling of aircraft, or other reasons as specified by the Secretary)” and the passenger’s “arrival at the passenger’s destination is delayed by more than 1 hour and less than 4 hours after the originally scheduled arrival”: (a) to “automatically refund” the ticket price “and” to find a seat for the passenger on another aircraft or “alternative means of transportation, at no additional expense to the passenger, that results in the passenger arriving at the passenger’s destination not later than 4 hours after the original scheduled arrival time . . . .”<sup>32</sup>

Significantly, if the passenger’s “arrival” at the passenger’s destination is delayed by more than four hours after the originally scheduled “arrival” of the passenger, the airline must do the things mentioned in the preceding paragraph and, in addition, provide compensation to the passenger of \$1,350 cash and to provide the passenger with an amount equal to the “cost of a meal.”<sup>33</sup>

And if the passenger’s “departure” is delayed until the next day, the airline must provide the passenger with “an amount equal to the cost of hotel lodging, in addition to the preceding items.”<sup>34</sup>

The language of the bill suggests there is zero or less than zero value to a passenger when the airline delivers the passenger to the intended destination more than one hour behind schedule. The

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<sup>31</sup> Ali Bauman, *Connecticut Sen. Richard Blumenthal Calls for Airline Passenger Bill of Rights after Recent Travel Meltdown*, CBS N.Y. (Jan. 2, 2023, 11:38 PM), <https://www.cbsnews.com/newyork/news/airline-passenger-bill-of-rights/>.

<sup>32</sup> S. 178 § 103(a)(1).

<sup>33</sup> *Id.* § 103(a)(2).

<sup>34</sup> *Id.* § 103(a)(3).

price of the ticket is refunded to the passenger and there is no compensation to the airline for incurring the additional costs of the transportation. And the language further implies a structured statutory damage that is quantified because the airline must purchase alternative transportation for the passenger at no additional expense to the passenger, and if the delay is four hours or more there is a mandated \$1,350 payment to each passenger.<sup>35</sup>

The bill makes it an “unfair or deceptive practice” for an airline to attribute a delay or cancellation of a flight to a *force majeure* event “unless the delay or cancellation is caused by an event not within the control of the air carrier operating the flight, such as weather, an act of God, or a war or other hostilities.”<sup>36</sup> And the bill authorizes a “private right of action” for “damages and injunctive relief” in federal and state court where there has been an unfair or deceptive practice by the airline.<sup>37</sup>

The bill goes further in two material ways. It expressly states there is no preemption of consumer protection claims for civil damages or injunctive relief based on a state consumer protection statute,<sup>38</sup> and it invalidates all pre-dispute arbitration and class-action waiver clauses relating to passenger air transportation.<sup>39</sup>

The “trigger” for compensation is a delay that is the fault of the airline. This might be easy to apply when the delay is a mechanical issue with the aircraft, or a failure to have the required complement of pilots and flight attendants available. But the standard becomes problematic when the delay is a mix of factors, one of which is beyond the control of the airline, and the other, an overburdened or out-of-date scheduling and communication infrastructure.

This was the situation in December where delays and cancellations were first and foremost the result of a massive and early winter storm. All airlines operating in the affected areas were impacted and experienced delays and cancellations. But the delays and cancellations suffered by Southwest were compounded by its “point-to-point” routing system and its “analog” communication and scheduling systems.

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<sup>35</sup> *Id.* § 103(a)(2).

<sup>36</sup> *Id.* § 104.

<sup>37</sup> *Id.* § 208.

<sup>38</sup> *Id.* § 211.

<sup>39</sup> *Id.* § 212.

Where to draw the line between delays that were the "act of God" and delays that were the "act (or non-act) of Man?" The desire to provide "care" for passengers is admirable, but Congress must be careful and understand this desire is double-edged and a bewitching siren song that threatens to draw us off-course and wreck us upon the shoals of unintended consequences.

The vast majority of passengers still derive substantial value from their transportation, even when they are delivered to their destination late. It is a false assumption to conclude otherwise. And it appears punitive to impose the full cost of transportation on the airline when the passenger arrives at the intended destination, although late.

There is no greater truism in aviation that it is "better to be on the ground wishing you were in the air, than to be in the air wishing you were on the ground." The law of unintended consequences suggests the bill, as drafted, creates an atmosphere of speed over safety, and hence an accident waiting to happen. The last thing anyone wants is a dispatcher urging a pilot to hurry up and take off to avoid a financial penalty to their airline employer, rather than taking additional time to troubleshoot any lingering questions about the aircraft or the weather.

The legislation should not be about penalizing an airline for delay and cancellations. There are better ways to advance consumer protection than by enacting punitive measures against airlines. Encouraging or incentivizing investment in up-to-date technology, possibly setting regulatory minimum standards for scheduling and communication systems, even though such investment may postpone or reduce returns to shareholders or bonuses to executives, would be better.

And rather than treating compensation for delay and cancellation as a penalty to be paid by an airline, reducing the operational funds of an airline, a better approach would be to create a standing fund that is available to pay the compensation, a fund that could be held in a protected account by the DOT, or the airline (if protections against loss from bankruptcy or use by the airline could be provided), and administered by either the airline or the Department.

How could this work? A small surcharge could be added to each ticket sold to each passenger. The funds would be paid into the segregated account and would be available for disbursement to every passenger who has suffered the minimum delay or can-

cellation. And the key phrase is “any” qualifying delay or cancellation without quibbling over whether the delay or cancellation is the “fault” of the air carrier. Essentially, the surcharge becomes an insurance premium against delays and cancellations. And airlines are incentivized to maximize safety over speed.

The most controversial provision of the bill is the “right of private action” that would include the right to sue under state consumer protection laws. The private right of action includes a parallel right to bring a class action. The financial exposure to air carriers would be huge, and will no doubt bring out the airline lobbyists swinging. Are these provisions a “bridge too far?” Is the private right of action limited to the statutorily authorized compensation, or does it include the right to recover for emotional distress because a passenger could not make it to a funeral or wedding, or the economic loss from a business deal gone awry because the passenger could not make it to the key business conference to close the deal. And are there recoverable attorney’s fees available to the passenger, as are often authorized under state consumer protection laws?

The aviation insurance industry, a multibillion-dollar business itself, will be considering whether losses paid out for prohibited delays and cancellations qualify as “damages” caused by “occurrences,” and hence possibly claims that are “covered” by their liability insurance policies. There would be the potential for an exponential increase in coverage litigation indirectly reminiscent of the Covid-19 coverage lawsuits for business interruption losses. Regardless of how courts might interpret terms used for decades in aviation insurance policies, would a new insurance market result, whereby insurers offer third party liability coverage by special endorsement for these losses? Think of an automobile policy that provides you with a defense when you are sued for a car crash, and which indemnifies you for damages that are awarded against you in favor of an injured third party. Or, alternatively, would there be a market for mandated first party insurance that insures each passenger for losses recoverable for delays and cancellations under the Airline Passengers’ Bill of Rights? Think of a disability insurance policy that pays you directly as the insured when you sustain a covered disability.

In the rush to provide protection and care to passengers, it is helpful to slow down and consider these questions. For example, even at a statutorily prescribed compensation rate of \$1,000 per

passenger, the amounts that would have been paid out by Southwest for the 16,700 delayed and cancelled flights in December would be enormous, and potentially business destroying, the last thing we want from remedial legislation. Assuming 150 passengers on each of the 16,700 flights comes to 2,505,000 passengers. At \$1,000 per passenger the total “hit” to the airline would be \$2,505,000,000. That is two-and-one-half billion dollars. That is a lot of money, and for an industry with historically large boom-and-bust cycles, could be enough to wipe out any corporate profit for the year, and in a worst-case scenario, sufficient to make it financially difficult or impossible to invest in upgrading the very infrastructure that is necessary to avoid the “technological debt” that contributed to the massive delays and cancellations in the first place.

Without a surcharge protocol or insurance buffer, the compensation pay-out scheme mandated by the Airline Passengers’ Bill of Rights would materially increase the risk of financial loss to each air carrier. The natural impulse would be to raise ticket prices to offset the risk of that loss. How much of an increase the passenger-flying market could absorb is debatable. The airlines themselves would probably have to bear some amount of the risk. Ironically, if the issue is put directly to the passengers – would they rather pay for a lower cost ticket and gamble that their flights are not delayed or cancelled, or pay a higher fare for each ticket in the hope they might receive a statutorily quantified compensation payment when their flights are sometimes delayed or cancelled – the proponents of the Airline Passengers’ Bill of Rights might be surprised by the results of the survey.

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 shortchanged 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 – perhaps – or choose another mode of transportation.

Long ago, the Supreme Court, in *Ward v. Maryland*, interpreted the “Privileges and Immunities” to guarantee the right of

“citizens” to travel freely between the states.<sup>40</sup> The *Ward* decision was handed down when Wilbur Wright was a three-year-old child and before Orville was born. Yet, the right to travel has found its greatest fulfillment in their inspiration at Kill Devil Hill.

In 2019, more than 915,000,000 passengers flew domestically and another 253,000,000 flew internationally to/from the United States. There are 45,000 flights each day, with sometimes more than 5,400 commercial aircraft aloft at any one time.

We may ponder whether and when disrupted, delayed, and cancelled flights of federally certified air carriers become so extreme that the “right to travel” is unfairly or deceptively infringed upon. When Congress is debating whether and how to legislate to provide a “care net” to stranded and vulnerable passengers, enhancing the enjoyment of the right to travel, it should focus on consumer protection of passengers rather than penalizing the air carriers, incentivizing the airline industry to maintain state-of-the-art scheduling and communication systems, and refrain from killing the Golden Goose that is the commercial aviation world.

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<sup>40</sup> 79 U.S. 418 (1870).