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M. R. Franks

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## AIRLINE LIABILITY FOR LOSS, DAMAGE, OR DELAY OF PASSENGER BAGGAGE

*M. R. Franks\**

In the United States, “[l]ost or misdirected luggage incidents increased by roughly 25 percent among all airlines from 2004—the largest increase in the 16-year history of the survey—while customer complaints rose 17 percent.”<sup>1</sup> In Europe, “the Air Transport Users’ Council (AUC) said that the number of written complaints it received increased to 6,094 in the 12 months prior to March 31, 2006, compared with 2,204 in the previous year.”<sup>2</sup> Worldwide, an estimated 30 million bags are lost each year, roughly six per thousand.<sup>3</sup> One newspaper reports:

An estimated 30 million bags were temporarily lost by airlines in 2005, and 200,000 of those bags were never reunited with their owners, according to an industry report released yesterday. The report by SITA Inc., a company that provides technology services for the air-transport industry, also noted that “the problem of mishandled baggage is worsening on both sides of the Atlantic.”

The 30 million misdirected bags made up only 1 percent of the 3 billion bags processed last year by airports, up from 0.7 percent in 2004, said SITA, which is promoting technology it says would reduce the problem.

Last year, mishandled luggage cost world airlines \$2.5 billion, compared with \$1.6 billion during 2004, SITA said in a report released before today’s airline and airport passenger services exposition in Paris. The jump partly reflects improvements in data collection but also the increasing costs that result from inadequate

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\* Professor of law, Southern University, Baton Rouge, Louisiana. Formerly associate professor of law; l’Université de Cergy Pontoise, Paris, France. The author holds his Bachelor of Science and Juris Doctor degrees from the University of Memphis. He also holds an airline pilot’s license (ATP certificate).

1. Zach Ahmad, *Customer Service Falls at Airlines*, ATLANTA J. CONST., Apr. 4, 2006, at 6C.

2. Air Transport Users Council, Annual Report, at 8 (July 24, 2006).

3. *Seven Bags Lost on Every Jet*, DAILY STAR (London), May 31, 2006, at 25.

baggage management.<sup>4</sup>

Although most bags are eventually found, the delay is frustrating and expensive to the passengers. Businesspersons fly to attend meetings or make presentations at which they are expected to arrive in proper business attire. Lawyers fly to appear in court or take depositions. Entertainers fly to perform in their needed clothing and with their needed musical instruments. Even vacationers, when deprived of their wardrobe, sporting gear and medications, can lose the enjoyment of precious days of their hard-earned holiday. Virtually everyone traveling is doing so for a reason and has a genuine need for their packed items. This need is usually immediate—necessary on the day of arrival or at the start of business early the next morning. Clothing in a lost suitcase typically does not arrive until the next day, well after the event for which it was needed has begun. Toiletries, vital medicines and other required items are likewise delayed. Delays average 31.2 hours from the passenger's filing of the lost luggage report.<sup>5</sup>

Gone are the days when airlines would present a traveler whose luggage has been lost with a voucher and kit of overnight toiletries. The airlines' attitude today when they lose luggage is one of callous indifference. Though required to do so by regulation, airlines often fail to inform passengers of their rights.<sup>6</sup> The new response is that "company policy" does not permit reimbursement of damages for delayed luggage<sup>7</sup>—a policy often in direct violation of applicable law.

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4. *Air Carriers' Baggage Problems Get Worse*, RICHMOND TIMES DISPATCH, Mar. 21, 2006, at C1.

5. *Mishandled Baggage: Problems and Solutions: Oversight Hearing Before the Subcommittee on Aviation of the House Committee On Transportation and Infrastructure*, 109th Cong. available at <http://209.85.165.104/search?q=cache:RZI9Tegk1MJ:gopher.house.gov/transportation/aviation/05-03-06/05-03-06memo.html+Mica+Mishandled+Baggage&hl=en&ct=clnk&cd=39&gl=us> (2006) [hereinafter *Hearings*].

6. 14 C.F.R. § 254.5 (2007). This regulation may also be cited as Federal Aviation Regulation 254.5 (F.A.R. 254.5) and within the aviation industry is usually cited as F.A.R. 254.4. Under 14 C.F.R. § 254.4 the passenger has a right to written notice of either (a) any monetary limitation on airline's baggage liability to passengers; or (b) the following: "Federal rules require any limit on airline's baggage liability to be at least \$3,000 per passenger."

7. Letter from Ms. T. Townsend, Central Baggage Services, American Airlines, to author (Apr. 26, 2006) (on file with author). The airline wrote: "The policy for compensation for consequential expenses states: 'Consequential expenses authorized in advance of purchase by [this airline's] representative can be reimbursed with original receipts at any of our airport or city ticket locations.' Because you have no record of any

## CAUSES OF LOST OR DELAYED LUGGAGE

Although luggage may be lost for a variety of reasons, baggage-handling systems are often to blame. Evidence presented in recent hearings before the U.S. House of Representatives Subcommittee on Aviation shows:

In the United States, baggage handling systems are typically owned and operated by the airlines, rather than the airport. The situation varies from airport to airport and from airline to airline. Some airlines have their own baggage system, some share baggage systems with other airlines, and some hire third party companies to provide a baggage system. Elsewhere in the world, airports typically lease baggage handling systems that are then used by all airlines operating at the airport.<sup>8</sup>

Lost luggage is usually caused by negligence. The recent congressional hearings reviewed industry statistics showing that causes of delayed baggage in 2005 were as follows:

Transfer baggage mishandling	61 %
Failure to load at originating airport	15 %
Ticketing error/passenger bag switch/security.other	9 %
Loading/offloading error	4 %
Space-weight restriction	5 %
Arrival station mishandling	3 %
Tagging errors	3 % <sup>9</sup>

More sinister causes (not discussed in the congressional report) include the offloading of passenger baggage to accommodate revenue cargo. This reason for losing a passenger's luggage seems to say that the airline's attitude here is to just take the cargo, for more revenue, while letting the passenger who has already paid be damned. Airlines also have been known to "ferry" fuel, buying more than they need for the flight<sup>10</sup> in

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authorizations, I regret that I will be unable to reimburse you for the expenses you have submitted." This airline's "policy" appears to contradict the applicable law.

8. *Hearings, supra* note 5.

9. *Id.*

10. *See* 14 C.F.R. § 91.167 (West 2007). The applicable regulation provides that an airplane must carry enough fuel to reach its intended destination, then to continue

a city where fuel is cheaper, and carrying it to destinations where fuel is costlier. This author, in his experience as a pilot, has seen evidence that passenger baggage may be offloaded to accommodate the extra fuel.

Of course, passengers will not be told the real reason. While traveling on one commuter flight, this author heard an announcement that the airplane was “overweight,” even though there were thirteen empty seats on the flight! It goes without saying that an aircraft is designed to accommodate a full load of passengers and their normally expected baggage. But how can an aircraft be “overweight” with empty seats? Again this author’s experience has led him to believe that this is almost a sure sign of offloading luggage to accommodate heavy cargo or ferried fuel. A “load manifest” must be kept by the airline, showing the weight of the aircraft, fuel and oil, cargo and baggage, passengers and crewmembers.<sup>11</sup> This can be subpoenaed or discovered.

Most airlines are reluctant to forward misdirected luggage via the next flight out on *any* airline, thereby exacerbating the problem of delayed baggage. Some airlines prefer to make passengers wait until the next flight out on their own airline, which may not be until the next day.

#### APPLICABLE LAW

Rules differ between purely domestic travel and international travel, and must be discussed separately. Before discussing the applicable law of domestic and international flights, the following information is offered for passengers wishing to initiate claims for loss, damage, or delay of passenger property.

To initiate a claim for loss, damage, or delay of passenger property the first step is to give the airline notice of the claim promptly and in writing, preferably by certified mail. The letter can be sent to the airline’s legal department, usually listed in Westlaw’s or Lexis’s directory of corporate counsel. It is wise to attach numbered or lettered exhibits to the letter, including as applicable: (1) a copy of the ticket; (2) a copy of any boarding passes, if available; (3) a copy of the baggage claim checks, if available; (4) a copy of the lost baggage report filed on arrival at the destination; (5) a copy of any email sent to the company to confirm a claim is being made; and (6) copies of receipts for out-of-pocket expenses such as clothing, toiletries, repairs to luggage and the

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thereafter to an alternate airport, and then to fly for an additional 45 minutes.

11. 14 C.F.R. § 121.693 (West 2007).

like. Expect the letter to be ignored.

Applicable law depends on whether the flight is international or domestic. International flights are governed by the Warsaw Convention of 1929, as amended,<sup>12</sup> an international multilateral treaty. Most countries are signatories. The treaty imposes strict liability for loss, damage or delay of passenger baggage in international travel. “International [transportation]” is defined under the Warsaw Convention as:

Any [transportation] in which . . . the place of departure and the place of destination, whether or not there be a break in the transportation or transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory of another State, even if that State is not a High Contracting Party.”<sup>13</sup>

The domestic segment of an international flight is subject to the Warsaw Convention.<sup>14</sup> For example, a person flying via commuter airline from Memphis to New York, there connecting with a flight from New York to London, and there connecting with a British domestic commuter flight from London to Manchester, is considered in international travel from the time the passenger boards the commuter flight in Memphis until he arrives in Manchester, and likewise on the full return trip to Memphis. If all flights (including the domestic segments) are contracted on the same ticket (even if via different airlines), the presumption of international travel is conclusive.<sup>15</sup>

#### LIABILITY FOR DOMESTIC TRAVEL

If the trip is entirely domestic, meaning no destinations or stopover points in a foreign country, the Warsaw Convention does not apply. State law usually applies to aviation accidents.<sup>16</sup> There is generally a

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12. Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. (part II) 3000 [hereinafter Warsaw Convention].

13. Warsaw Convention, art. 1(2).

14. *Id.*, at art. 1 (3).

15. *See generally* Gally v. Re-Al Braz. Int’l Airlines, 29 Misc. 2d 499, 500 (N.Y. Sup. Ct. 1961).

16. *See generally* Kilberg v. Ne. Airlines, Inc., 172 N.E.2d 526 (N.Y. 1961).

cause of action in contract or tort.<sup>17</sup> Federal courts have generally agreed that state law applies,<sup>18</sup> moreover this same logic applies regarding claims for loss, damage or delay of luggage.<sup>19</sup> The Fifth Circuit has held that the Airline Deregulation Act does not preempt state-law-based claims for injury from a falling box of cabin cargo.<sup>20</sup> State courts have jurisdiction to adjudicate lost luggage claims.<sup>21</sup>

In a case asking for both tort and contract damages, including damages for mental distress and inconvenience, the Louisiana Court of Appeal wrote:

Since this is a claim under federal statutes and regulations the next question is whether such a claim may be asserted in the state court. If there were any doubt before, this has been resolved by the United States Supreme Court in *Yellow Freight System, Inc. v. Donnelly and Tafflin v. Levitt*. In these cases the court held that under our system of dual sovereignty state courts have the inherent power, and are presumptively competent, to adjudicate claims arising under the laws of the United States. The court held that to give federal courts exclusive jurisdiction over a federal cause of action, Congress must affirmatively divest state courts of their concurrent jurisdiction. We find nothing in the Federal Aviation Act which prevents the state courts from adjudicating a claim for consequential damages flowing from the delay in delivering luggage by the airline carrier.<sup>22</sup>

Most reported aviation cases are federal. Where the claim is for more than \$75,000, original diversity jurisdiction<sup>23</sup> or removal diversity jurisdiction<sup>24</sup> is available. In *Luckett v. Delta Airlines, Inc.*,<sup>25</sup> the plaintiff suffered a heart attack when the airline lost her luggage containing her heart medication. The court upheld diversity jurisdiction, but dismissed the case by applying Louisiana's one-year prescription

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17. *Id.*

18. *See, e.g.*, *Pearson v. Ne. Airlines, Inc.*, 309 F.2d 553, 564 (2d Cir. 1962).

19. *See generally* *Luckett v. Delta Airlines*, 171 F.3d 295 (5th Cir. 1994). The Fifth Circuit applied a state period of limitations and not the two-year period prescribed by the Warsaw Convention law to a suit for damages for a heart attack claimed to have resulted from the loss of luggage containing plaintiff's heart medication.

20. *See* *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995).

21. *See, e.g.*, *Kibler v. Nw. Airlines, Inc.*, 563 So.2d 550 (La. Ct. App. 1990); *accord*, *Steber v. British Caledonian Airways, Ltd.* 549 So.2d 986 (Ala. Civ. App. 1989).

22. *Kibler*, 563 So.2d at 522 (internal citations omitted).

23. 28 U.S.C.A. § 1332 (West 2007).

24. 28 U.S.C.A. § 1441(c) (West 2007).

25. *Luckett v. Delta Airlines*, 171 F.3d 295, 297 (5th Cir. 1994).

period.

An attempt to remove a luggage claim to federal court based on federal-question jurisdiction<sup>26</sup> failed in *Security Insurance Co. of Hartford v. National Airlines, Inc.*<sup>27</sup> The Honorable Alvin Rubin wrote:

The plaintiff might have chosen to proceed in federal court initially, and fashioned his complaint in such a way as to raise a federal question on the face of that pleading. However, since the plaintiff chose to proceed in state court, and relied solely on state law, removability is tested by the face of the complaint. Based on this criterion, the case was not properly removed and hence it is REMANDED.<sup>28</sup>

A more recent unreported federal decision, *Balart v. Delta Airlines, Inc.*,<sup>29</sup> has held otherwise. In *Balart*, Judge G. Thomas Porteous of the United States District Court for the Eastern District of Louisiana permitted removal of a lost luggage claim to federal court based on federal question jurisdiction rather than diversity of citizenship, stating that the applicable law is federal common law. The court relied on the express shipping company case of *Sam L. Majors Jewelers v. ABX, Inc.*,<sup>30</sup> a decision which in turn claims to rely on the Airline Deregulation Act.<sup>31</sup> It is far from clear, however, that federal substantive law even applies to such a claim, much less exclusive federal jurisdiction.

One federal regulation is of importance. The airlines are not always quick to tell their passengers about 14 C.F.R. § 254.4, which reads as follows:

On any flight segment using large aircraft, or on any flight segment that is included on the same ticket as another flight segment that uses large aircraft, an air carrier shall not limit its liability for provable

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26. 28 U.S.C.A. § 1441(b) (West 2007).

27. 413 F. Supp. 493 (E.D. La. 1976).

28. *Id.* at 494.

29. 2001 WL 322065, (E.D. La. Apr. 2, 2001) (holding that a passenger's lost luggage claim arises under federal common law based on the Fifth Circuit's analysis of the Airline Deregulation Act of 1978 in *Sam L. Majors Jewelers v. ABX, Inc.* 117 F.3d 922 (5th Cir. 1997)).

30. 117 F.3d 922 (5th Cir. 1997). Congress included a savings clause (now 49 U.S.C.A. § 40120(c)) in the Airline Deregulation Act ("ADA") of 1978 and the Fifth Circuit reasoned that this savings clause "had the effect of preserving the clearly established federal common law cause of action against air carriers for lost shipments." *Id.* at 928.

31. 49 U.S.C.A. § 41713 (West 2007).



direct or consequential damages resulting from the disappearance of, damage to, or delay in delivery of a passenger's personal property, including baggage, in its custody to an amount less than \$2,800 for each passenger.<sup>32</sup>

A "large aircraft" is generally any airplane weighing more than 12,500 pounds<sup>33</sup>—a definition which would include most commuter aircraft. For purposes of this section, however, a "large aircraft" is any aircraft having more than 60 seats.<sup>34</sup> Note that it is only necessary that any one of the connecting flights be on a "large aircraft" for this section to apply to *all* flights on the same ticket. It is not necessary that the "large aircraft" be used for the same flight on which the luggage became lost.

This regulation alone, unless pleaded by the plaintiff in the petition, would not appear to justify federal jurisdiction removal of the case. If the plaintiff wishes to bring the case in federal court regardless of the amount in controversy,<sup>35</sup> he may of course file the petition clearly articulating the federal nature of the claim, citing 14 C.F.R. § 254.4 and the *Sam L. Majors* case.

The cause of action for luggage lost, damaged or delayed on a domestic flight is, however, normally a matter of state contract law, even though the United States District Court for the Eastern District of Louisiana has held that lost luggage is a matter of federal common law. If the plaintiff wishes to avoid federal court, it would be best if the petition makes clear that the claim is for less than the requisite sum for diversity jurisdiction, expressly waiving all damages in excess of \$75,000.<sup>36</sup> If a plaintiff does not desire a jury trial in state court, then that plaintiff may waive all damages in excess of the state law's minimum amount-in-controversy requirement for jury trials.<sup>37</sup> If plaintiff files suit in a court of limited jurisdiction, there should instead be a waiver of all damages in excess of that particular court's jurisdictional limit.

Waiver of damages will avoid a removal based on diversity jurisdiction, but not a removal based on federal question jurisdiction. Turning to the federal question jurisdiction, Aviation Litigation expert

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32. 14 C.F.R. § 254.4 (West 2007).

33. 14 C.F.R. § 1.1 (West 2007).

34. 14 C.F.R. § 254.3 (West 2007).

35. 28 U.S.C.A. § 1331 (West 2007).

36. 28 U.S.C.A. § 1332 (West 2007).

37. *See, e.g.*, LA. CODE CIV. PROC. ANN. art 1732(1) (2006).

Windle Turley tells us:

Under the *well-pleaded complaint* rule, federal jurisdiction will lie only if the federal law upon which jurisdiction is based appears clearly on the face of the plaintiff's complaint. Under the rule, federal jurisdiction cannot be based upon the likelihood that a federal issue will be addressed during the course of the litigation or that the defendant will plead a federal law in defense. . . . Since the Federal Aviation Regulations do not create a private cause of action, and, therefore, do not preempt common law tort claims, most aviation cases involving wrongful death or personal injury claims do not necessarily present a federal question, even if the crash resulted from a violation of federal regulations.<sup>38</sup>

In *Lowe v. Trans World Airlines, Inc.*,<sup>39</sup> the plaintiffs' decedent died when a bomb exploded aboard his flight, and plaintiffs filed a wrongful death claim in New York state court. The airline sought federal question removal.<sup>40</sup> The federal district court quoted *Washington v. American League of Professional Baseball Clubs*<sup>41</sup> in its ruling, stating that claiming federal preemption of the subject matter is insufficient because "federal preemption is a matter of defense to a state law claim, and not a ground for removal."<sup>42</sup> The *Lowe* case may be distinguishable, however, in that the wrongful death there occurred on an international flight governed by the Warsaw Convention, which contains its own venue provisions (to be discussed below). The well-pleaded complaint rule was more clearly articulated by Judge Alvin Rubin in *Security Insurance Co. of Hartford v. National Airlines, Inc.*,<sup>43</sup> which involved a domestic flight.

To deter federal question removal, therefore, the petition should clearly articulate a claim in either contract, tort or both, based solely on state law.<sup>44</sup> Moreover, to avoid diversity removal, the petition should waive all damages in excess of the appropriate amount.<sup>45</sup>

If the defense removes the case to federal court, the plaintiff may wish to consider filing a motion to remand.<sup>46</sup> The defendant then has

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38. Windle Turley, AVIATION LITIGATION, 384 (Shepard's/McGraw Hill (1986).

39. 396 F. Supp. 9, 9 (S.D.N.Y. 1975).

40. *Id.* at 10.

41. 460 F.2d 654 (9th Cir. 1972).

42. *Lowe*, 396 F. Supp. at 12.

43. 413 F. Supp. 493, 493-94 (E.D. La. 1976).

44. 28 U.S.C.A. § 1331 (West 2007), *see also id.* at 494.

45. 28 U.S.C.A. § 1332 (West 2007).

46. 28 U.S.C.A. § 1447(c) (West 2007).

only thirty days from service in which to petition the federal court for removal.<sup>47</sup> The plaintiff will then have thirty days in which to petition the federal court to remand the case to state court.<sup>48</sup> Likewise, the plaintiff should consider demanding a jury in the federal court. A jury trial is available in federal court on any federal-question case involving more than twenty dollars, and no jury fee or bond is required in federal court.<sup>49</sup> A plaintiff has ten days in which to file a jury demand in federal court following the filing of the defendant's petition for removal.<sup>50</sup> There is no reason why a plaintiff cannot file both a motion to remand and a demand for jury trial, arguing in the accompanying memorandum that while the case really belongs in state court, plaintiff wants a jury trial if a substantial federal claim is found to exist. The defense may or may not attempt removal. A prudent airline will not wish to wear out its welcome at the federal courthouse by removing every small claims suit for a \$500 dented suitcase to federal court for possible jury trial.

The defense may ultimately file an answer raising a contract or "company policy" defense. This was actually allowed, with summary judgment for the airline granted in *Balart v. Delta Airlines, Inc.*<sup>51</sup> The court's unreported opinion is devoid of any reference to, and the court apparently was totally unaware of, 14 C.F.R. § 254.4 or its predecessor. The Fifth Circuit Court of Appeals, however, has upheld an airline's right to limit its liability in its contract of passage.<sup>52</sup>

While various state courts have held that limitation-of-damages clauses in airline tickets are to be decided according to federal law,<sup>53</sup> it is by no means clear that limitations of liability expressed in fine print on the back of the ticket—an adhesion contract to be sure—apply unless those limitations are actually read by the passenger. In *Colgin v. Security Storage & Van Co.*,<sup>54</sup> the Louisiana Supreme Court held that a depositor of goods in a warehouse is not bound by the limitation of liability on the

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47. 28 U.S.C.A. § 1446(b) (West 2007).

48. 28 U.S.C.A. § 1447(c) (West 2007).

49. U.S. CONST. amend. VII.

50. FED. R. CIV. P. 81(c).

51. No. Civ.A.00-2092, 2002 WL 535460 (E.D. La. Apr. 9, 2002). Court granted summary judgment to defendant airline because the contract of carriage limited defendant's liability to \$1250 per passenger and the defendant had already paid that amount to plaintiff.

52. *See Casas v. Am. Airlines, Inc.*, 304 F.3d 517, 524-25 (5th Cir. 2002).

53. *See generally* *Finestone v. Cont'l Airlines, Inc.*, 759 N.Y.S. 2d 623 (App. Div. 2003); *Delta Airlines, Inc. v. Barnard*, 799 So.2d 208 (Ala. Civ. App., 2001).

54. 23 So.2d 36 (La. 1945).

warehouse receipt where the depositor was not admonished to read the receipt and the limiting clause was not specifically brought to his attention. In *Gauthier v. Allright New Orleans, Inc.*, Louisiana's Fourth Circuit held that a limitation of liability on a parking lot's claim check does not bind a customer who never read the claim check.<sup>55</sup> Federal courts have held that where a limitation of liability on an airline ticket is "printed in such a manner as to virtually be both unnoticeable and unreadable," limited liability does not apply.<sup>56</sup> Federal courts reach that same conclusion if the notice is "camouflaged in Lilliputian print."<sup>57</sup>

The plaintiff wishing to go the state court route would do best to avoid mention of 14 C.F.R. § 254.4 in his petition, waiting for the defense to file answer raising the contractual limitation or company policy defense. Only after the thirty-day window for removal has passed should the plaintiff file a memorandum of law calling the court's attention to 14 C.F.R. § 254.4.

#### LIABILITY FOR INTERNATIONAL TRAVEL

The international passenger is actually in the stronger position. The Warsaw Convention<sup>58</sup> and the amending Montreal Convention<sup>59</sup> limit damages but provide strict liability for loss, damage or delay of luggage. The U.S. Supreme Court ruled that the Warsaw Convention provides the exclusive remedy for damages that occur on international flights.<sup>60</sup> The Warsaw treaty as amended provides:

The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, any registered baggage if the occurrence

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55. 417 So.2d 375 (La. App. 4th Cir. 1982).

56. *Mertens v. Flying Tiger Line*, 341 F.2d 851, 857 (2d Cir.), *cert. denied*, 382 U.S. 816 (1965).

57. *Lisi v. Alitalia*, 370 F.2d 508, 514 (2d Cir. 1966), *aff'd*, 390 U.S. 455 (1968).

58. *See* Warsaw Convention, *supra* note 13.

59. *See* Multilateral Convention for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45 [hereinafter Montreal Convention].

60. *See* *El Al Isr. Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 172 (1999) (holding that a claim for psychological injuries during a pre-flight security search was governed by the Warsaw Convention). *But see* *King v. E. Airlines, Inc.*, 536 So.2d 1023 (Fla. App. 1988) (holding that a claim for purely psychological in-flight injuries is governed by state common law and Warsaw does not apply); *see also* *Abramson v. Japan Airlines Co.*, F.2d 130 (3d Cir. 1984) (holding that where Warsaw was inapplicable due to the non-accidental nature of the injuries, the trial court erred in not considering plaintiff's tort theories of recovery).

which caused the damage so sustained took place during the carriage by air.<sup>61</sup>

The treaty also provides that the carrier will be liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.<sup>62</sup> The treaty continues:

In the carriage of passengers and baggage, and in the case of damage occasioned by delay in the carriage of cargo, the carrier shall not be liable if he proves that he and his servants and agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures.<sup>63</sup>

Very few delay cases make the national reporters. Most delay cases making their way into reported decisions involve delay of passengers or cargo, not of baggage.<sup>64</sup> It is not unreasonable to surmise that most cases involving loss, delay, or damage to luggage are settled long before they reach an appellate court.

The Warsaw Convention and its amending Montreal Convention limit damages in terms of a gold standard<sup>65</sup> and “special drawing rights.”<sup>66</sup> This presently works out to approximately \$1,519.00 per passenger. Any attempt by the airline to set a lower limit is null and void.<sup>67</sup> The damage cap is rendered inapplicable if the conduct of the airline was “reckless”<sup>68</sup> or if the airline failed to deliver a proper ticket meeting Warsaw specifications<sup>69</sup> or if the claim check fails to comply with Article 4 of the Warsaw Convention.<sup>70</sup> Where carry-on baggage is “gate checked,” the airline may not rely on the notice of limitation of

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61. Warsaw Convention, art. 18(2). *See also* Montreal Convention, art. 17(2).

62. Warsaw Convention, art. 19. *See also* Montreal Convention, art. 19.

63. Warsaw Convention, art. 20. *see also* Montreal Convention, art. 19.

64. *See, e.g.*, Harpalani v. Air India, Inc., 622 F. Supp. 69 (N.D. Ill. 1985). For a delayed baggage case, see Suarez v. Lufthansa Airlines, 337 F. Supp. 60 (D. P.R. 1971).

65. Warsaw Convention, art 22(5).

66. Warsaw Convention, art 22(2)(a).

67. Warsaw Convention, art. 23(1).

68. Warsaw Convention, art. 25. Article 25 specifically states that “limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servants, or agents done . . . recklessly and with knowledge that damage would probably result.” *Id.*

69. Warsaw Convention, art. 3. The required contents of the ticket are detailed, and it is highly possible that many electronic tickets do not comply. The result would be to render caps on damages inapplicable.

70. Warsaw Convention, art. 4.

liability contained in the ticket or other baggage claim checks. If the gate claim check itself does not comply with Warsaw, the limitation of liability is inapplicable.<sup>71</sup> Many claim checks, particularly on commuter flights, are written with domestic flight in mind, and simply fail to comply with the Warsaw Convention requirements. It is necessary that both the ticket and the baggage claim check comply with Warsaw for the airline to avail itself of the convention's limitation on damages.

To comply with Warsaw, the baggage claim check must contain: (a) "an indication of the places of departure and destination;" (b) an indication of at least one foreign stopping place; and (c) notice that "the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers in respect of loss of or damage to baggage."<sup>72</sup> If the airline fails to record the weight of the baggage on the claim check given the passenger, the airline may not rely on Warsaw's limits of liability.<sup>73</sup> The separate notice on the ticket must be in 10-point type.<sup>74</sup> The United States Court of Appeals for the Fifth Circuit has held that a Warsaw notice printed in 9-point type does not give the airline the protection of limited liability.<sup>75</sup> An electronic ticket may easily fall short of the requirements of a proper "ticket" under Article 3 of Warsaw for want of all the required Warsaw notices in ten-point type.<sup>76</sup>

Reckless conduct also deprives the airline of the ability to rely on the limits of liability.<sup>77</sup> In *Butler v. Aeromexico*,<sup>78</sup> the court held that

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71. See generally *Schopenhauer v. Compagnie Nationale Air Fr.*, 255 F. Supp.2d 81 (E.D.N.Y. 2003).

72. Warsaw Convention, art. 4.

73. See generally *Perri v. Delta Airlines, Inc.*, 104 F. Supp. 2d 164 (E.D.N.Y. 2000).

74. Kriendler, AVIATION ACCIDENT LAW, § 11.04[1], (citing Montreal Proceedings (International Civil Aviation Organization, Special ICAO Meeting on the Limits for Passengers Under the Warsaw Convention and the Hague Protocol (1966))).

75. See *In re Air Crash Disaster Near New Orleans*, 789 F.2d 1092, 1095, 1098 (5th Cir. 1986).

76. Convention for the Unification of Certain Rules Relating to International Carriage by Air, May 28, 1999, art. 3, 1999 U.S.T. LEXIS 175, \*80 [hereinafter Carriage Convention]. The Carriage Convention requires that the ticket indicate "the places of departure and destination," indicate at least one foreign stopping place, and give notice that "the Warsaw Convention may be applicable and that the Convention governs and in most cases limits the liability of carriers for death or personal injury and in respect of loss of or damage to baggage."

77. *Id.* at 99.

78. 774 F.2d 429, 430-31 (11th Cir. 1985). See also *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller* 110 U.S. App. D.C. 282, 293

recklessness does not require specific intent to do harm. Failure to put baggage left off the plane on the very next flight out on any carrier, and holding the baggage until the offending carrier's own next flight out, may very well constitute willful conduct.<sup>79</sup> If baggage is "bumped" from a flight, Warsaw may be totally inapplicable and state law will govern the contract claim.<sup>80</sup> A New York court has held that tourists are entitled to damages for a vacation ruined by delayed luggage, that failure of the airline to retrieve the luggage for fifteen days constituted "willful misconduct" justifying denying the airline the benefit of Warsaw's limitation on damages, and that in any case the baggage claim checks failed to comply with Warsaw, also justifying denying the airline the benefit of the cap.<sup>81</sup>

A person who complains of *damage* to baggage must complain to the airline "forthwith and at the latest within seven days from the date of receipt in the case of baggage."<sup>82</sup> In the case of *delayed* baggage, the recipient has 21 days from receipt of the baggage in which to complain.<sup>83</sup> The complaint must be in writing,<sup>84</sup> but one case holds that an electronic data entry in the airline's baggage claims computer satisfies the requirement of written notice.<sup>85</sup>

No notice is needed in the case of total loss of baggage.<sup>86</sup> But if several bags are checked, and only some arrive, the loss is treated as damage, for which notice is needed.<sup>87</sup> There is, however, some authority

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F.2d 775 (D.C. Cir. 1961).

79. While the Author is unaware of any reported case involving international offloading, one reported decision holds refusal to unload baggage at the passenger's destination constitutes "willful misconduct" but does not warrant damages for mental suffering. *See* Cohen v. Varig Airlines, 405 N.Y.S.2d 44 (App. Div. 1978).

80. Weiss v. El Al. Isr. Airlines, Ltd., 433 F. Supp. 2d 361, 364 (S.D.N.Y. 2006).

81. Kupferman v. Pak. Int'l Airlines, 108 Misc. 2d 485, 489 (N.Y. Civ. Ct. 1981).

82. Warsaw Convention, *supra* note 74, at 99.

83. *Id.*

84. *Id.*

85. D'Arrigo v. Alitalia, 192 Misc.2d 198 (N.Y. Civ. 2002).

86. *See* Dalton v. Delta Airlines, Inc., 570 F.2d 1244 (5th Cir. 1978); Hughes-Gibb & Co., Ltd. v. Flying Tiger Line, Inc., 504 F. Supp. 1239 (N.D. Ill. 1981). Where a horse being shipped died after the trip, however, notice was required. *See* Stud v. Trans Int'l Airlines, 727 F.2s 880 (9th Cir. 1984). Note that while these cases and the cases cited in footnotes 85 and 86 *infra* involve cargo rather than baggage, the notice requirements of Warsaw Convention, article 26 apply equally and without distinction to baggage and cargo.

87. Denby v. Seaboard World Airlines, Inc., 575 F. Supp. 1134 (E.D.N.Y. 1983).

stating that notice need not be given under this situation.<sup>88</sup>

Notice should comply with the applicable law, discussed above. Once written notice has been timely given, the plaintiff has two years in which to file suit, starting from the date of arrival of the passenger at the ultimate destination.<sup>89</sup>

In the case of baggage carried by several different airlines on the one ticket, the treaty provides:

As regards baggage or cargo, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage, or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee.<sup>90</sup>

Forum law determines procedure,<sup>91</sup> and prejudgment interest is permissible.<sup>92</sup> Furthermore, court costs and expenses of litigation are recoverable under the Warsaw conventions.<sup>93</sup> Since the term “expenses of litigation” is used in addition to the term “court costs,” one can argue that this includes attorney fees.<sup>94</sup> Warsaw also contains a venue provision:

An action for damages must be brought, at the option of the plaintiff,

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88. *See* *Leather’s Best, Inc. v. Aerolinas Argentinas*, 131 Misc.2d 426 (N.Y. Civ. Ct. 1986).

89. Warsaw Convention, art. 29(1).

90. Warsaw Convention, art. 30(3).

91. Warsaw Convention, art. 28(2).

92. *Domangue v. E. Airlines*, 722 F.2d 256, 263 (5th Cir. 1984); *accord*, *Eli Lilly Arg., S.A. v. Aerolineas Args*, 133 Misc. 2d 858, (N.Y. Civ. Ct. 1986).

93. Warsaw Convention, art. 22(4).

94. The comment to the U.S. Senate filing of Montreal Convention, art. 22(6) reads as follows:

This paragraph permits courts, in accordance with their own law, to award to plaintiffs court costs, other litigation expenses (including attorneys’ fees) incurred by the plaintiff, as well as interest, in addition to the amounts prescribed in Articles 21 and 22. However, if the carrier presents a written settlement offer to the plaintiff within six months of the occurrence that caused the damage or before the commencement of the action (whichever is later) and the amount offered is greater than the amount awarded, then the provision allowing the court to grant such additional amounts to the plaintiff does not apply.

*Id.* This “settlement inducement” provision is intended to encourage prompt settlement of claims. *See* Montreal Convention, *supra* note 57.



in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident or has his principal place of business, or has an establishment by which the contract was made, or before the court having jurisdiction at the place of destination.<sup>95</sup>

Regarding this venue provision, Kreindler states:

It is important to note that the locations specified in Article 28 refer to the national territory of the contracting party and not to political subdivisions. Thus, if the place of destination of a passenger's flight is New York, suit may properly be brought anywhere in the United States, subject to personal jurisdiction over the defendant.<sup>96</sup>

Kreindler further states "this provision allows suit in the location where the ticket was purchased if the carrier has a place of business in that location."<sup>97</sup> Kreindler cites several cases in support of this proposition.<sup>98</sup>

On a round-trip ticket, the ultimate destination, of course, is also the point of origin.<sup>99</sup> Note that the treaty gives the plaintiff the right to select the court. Clearly, actions under the Warsaw Convention may be brought in state court.<sup>100</sup> Although this is a federal treaty, it is one containing express venue provisions honoring the plaintiff's choice of forum.<sup>101</sup> An argument against removal can therefore be made under the very language of the treaty. One court has accepted such an argument, finding removal improper.<sup>102</sup>

#### DISCOVERY

No case is complete without discovery. The plaintiff who files in

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95. Warsaw Convention, art. 28(1).

96. Kreindler, *supra* note 74, at § 11-78.

97. *Id.* § 11-80.

98. Eck v. United Arab Airlines, Inc., 360 F.2d 804, 808 n.8 (2d Cir. 1965); Mertens v. Flying Tiger Line, Inc., 341 F.2d 851, 857 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965); Bryant v. Finnish Nat'l Airlines, 15 N.Y.2d 426, (N.Y. 1965).

99. See Al Zamil v. British Airways, 770 F.2d 3, 5-7 (2d Cir. 1985). See also Butz v. British Airways, 421 F. Supp. 127 (E.D. Pa 1976), *aff'd* 566 F.2d 1168 (3d Cir. 1977).

100. See generally L.B. Smith, Inc. Circle Air Freight Corp., 488 N.Y.S. 547 (1985); Eli Lilly Arg. S.A. v. Aerolineas Argentinas 133 Misc.2d 858 (N.Y. Civ. Ct. 1986); Clark v. United Parcel Service, 788 F. Supp. 1209 (S.D. Fla. 1991); Air Express Int'l, Inc. v. Aerovias De Mexico S.A. d/b/a Aeromexica, 977 F. Supp. 1191 (S.D.Fla. 1997).

101. Warsaw Convention, art. 28(1).

102. Rogers v. Am. Airlines, Inc., 192 F. Supp.2d 661 (N.D. Tex. 2001).

federal court may wish to commence with a summons, complaint, interrogatories, requests for production, and requests for admission. If filing in a state court, it is probably wiser for the plaintiff to wait until the thirty-day removal period has passed before commencing discovery. Discovery can be by way of a single-document combined form of interrogatories,<sup>103</sup> requests for production,<sup>104</sup> and requests for admission.<sup>105</sup>

The interrogatories should ask whether the legal department received a letter from plaintiff on or about the date shown on the return receipt, and whether exhibits were attached to that letter. The next questions can sequentially ask if the defendant airline has any reason to doubt the authenticity of each of the numbered exhibits. Furthermore, the next interrogatories should ask the exact routing (carrier, flight number, time of departure, time of arrival) actually taken by plaintiff's luggage.

If failure to forward baggage promptly is an issue, the interrogatories should also ask whether earlier flights on other carriers existed by which the omitted luggage could earlier have been delivered, asking such flights to be identified by name of carrier, flight number, and times of departure and arrival.

If intentional offloading of passenger baggage to accommodate cargo is at issue, the requests for production can ask production (and request indefinite retention) of a copy of the actual weight-and-balance calculation for the flight in question on the day in question, as well as a copy of the "load manifest" that must be kept by the airline, showing separately the weight of the aircraft, fuel and oil, cargo, baggage (as distinguished from cargo), passengers and crewmembers.

To avoid certification costs in cases involving international travel, the defense should be requested to produce a copy of the Warsaw Convention as amended. For domestic travel, the defense should be requested to admit the text of 14 C.F.R. § 254.4.

The requests for admission should include a request for admission that plaintiff was a revenue passenger on the flights in question on the days in question between the points in question. The defense should be requested to admit that plaintiff's luggage was delayed in reaching its destination until the time the client says he or she actually received it.

If tortious failure to forward on the next available flight

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103. *See, e.g.*, FED. R. CIV. P. 33 and corresponding state rules of procedure.

104. *See, e.g.*, FED. R. CIV. P. 34 and corresponding state rules of procedure.

105. *See, e.g.*, FED. R. CIV. P. 36 and corresponding state rules of procedure.

(unreasonable delay or reckless misconduct) is an issue in addition to strict liability in contract, the request for admissions should include a listing of specific other connections that the airline could have used to get the delayed baggage from origin to destination, including flights on competing airlines, and an admission that the luggage could have been sent via those connections but was not. The needed information on competing flights and connections easily can be obtained online. Furthermore, the defense should be requested to admit that each of plaintiff's notices of claim were received by the company and that the exhibits to the demand letter are genuine. The request for admissions should track the interrogatories and ask separately for an admission of genuineness of each of the exhibits appended to the original demand letter.

#### CONCLUSION

Airline passengers who are the victims of luggage mishandling are not without legal recourse. The legal profession can do its part to make the airlines more aware of their obligations to their passengers. This article attempts to lay out steps that passengers can take in order to secure the recourse they deserve.