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### Legal Responses to Airline Passenger Misconduct (April 2011)

Since 9/11, in-flight disruptions have been a matter of enhanced concern for air carriers. Passenger misconduct can take many forms, ranging from a refusal to comply with seatbelt instructions to violence against crew and/or other passengers. Although incidents of “airline passengers gone wild” are not novel, they are now more likely to be treated as safety/security threats.<sup>1</sup>

This article briefly addresses the question of “what happens next?” – i.e., once an aircraft has landed (either at its intended destination or due to a diversion), what legal consequences await the disruptive passenger?<sup>2</sup>

#### I. Private Remedies – Banning Passengers

Since deregulation, air carriers that serve the U.S. have been free to choose with whom they will do business, subject to laws that prohibit discrimination on grounds of race, color, national origin, sex, or disability.<sup>3</sup> A federal statute also explicitly allows air carriers to refuse to transport any passenger whom “the carrier decides is, or might be, inimical to safety.”<sup>4</sup> Accordingly, although there is no on-point case law, it appears that an air carrier can internally “blacklist” a passenger and refuse to provide future air transportation to him because of his involvement in misconduct. Air carriers do not typically publicize these lists, but a 2004 article recounted that American Airlines alone had banned 138 passengers.<sup>5</sup>

However, air carriers should be cautious in making a decision to ban a passenger. Although there are no reported cases specifically involving airline blacklists,<sup>6</sup> a carrier’s refusal to transport a passenger should not be “unreasonably or irrationally formed.”<sup>7</sup> Accordingly, the reasons for a permanent ban on a passenger should be documented; and indeed, many carriers set forth in their contract of carriage the specific reasons that a passenger may be refused transportation. Moreover, lists of banned passengers should be confidential. Even if a ban is justified, a passenger might have a claim based on privacy, defamation, or even antitrust grounds



The firm’s practice encompasses virtually every aspect of aviation law, including advising domestic and foreign airlines about the statutes and FAA and DOT regulations that apply to passenger misconduct.

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# Legal Responses to Airline Passenger Misconduct

Page 2 of 4

if the information were shared with another air carrier, or with the general public.

## II. Private Remedies – Restitution

An air carrier may have a claim against a disruptive passenger for the costs of dealing with the results of any disruption (e.g., fuel and ground handling expenses if the flight is diverted). Indeed, at least one U.S. carrier explicitly warns in its contract of carriage that it may seek reimbursement for any loss or damages caused by a disruption.<sup>8</sup> But there do not appear to have been many examples of a carrier pursuing a passenger for the costs of a flight disruption – likely because most passengers do not have deep pockets, and the cost of litigation is likely to exceed any recovery. Although an in-flight disruption was not at issue, in 2001 AirTran Airways sued a passenger of another air carrier who had breached security at Atlanta by running down an "up" escalator, which caused a four-hour shutdown of the airport. AirTran stated that its damages to the disruption amounted to more than \$1 million, but subsequently settled the lawsuit for an amount described in the press as "very modest."<sup>9</sup>

## III. Criminal Remedies

Federal law generally prohibits passengers from "assaulting or intimidating a flight crew member or flight attendant of the aircraft, interfer[ing] with the performance of the duties of the member or attendant or lessen[ing] the ability of the member or attendant to perform those duties."<sup>10</sup> Violations can be punished by a prison term of up to 20 years (or up to life, if a dangerous weapon is used) and a fine of up to \$250,000.<sup>11</sup> This statute is applicable to an "aircraft in flight," which is generally defined to be "from the moment all external doors are closed following boarding ... through the moment when one external door is opened to allow passengers to leave the aircraft."<sup>12</sup> Additionally, other federal criminal statutes – such as prohibitions on assault, murder, and sexual abuse – are applicable to passenger misconduct in-flight.<sup>13</sup>

Section 46504 has been interpreted broadly. A violation of the law is a general intent crime; a passenger need not have had a specific intent to interfere with the duties of a member of the flight crew or attendant. The purpose of the law has been described to be to "deter the commission of crimes which, if committed on the terrain below, might be considered relatively minor, but when perpetrated on an aircraft in flight would endanger the lives of many."<sup>14</sup> Nor does the law require that there have been a physical altercation; for example, a passenger's refusal to take his seat and yelling of profanity at attendants was enough to trigger section 46504. "[I]t is sufficient that the conduct and words of the accused would place an ordinary, reasonable person in fear."<sup>15</sup>

In addition, federal law allows a court to sentence a defendant convicted of violating section 46504 to pay restitution to the affected air carrier.<sup>16</sup> For example, in the second case cited above, the defendant was not only sentenced to probation but ordered to pay the affected air carrier \$2800.<sup>17</sup> Accordingly, in cases in which a passenger is arrested and prosecuted for in-flight conduct, an air carrier may want to document the damages that the disruption caused, and ask that prosecutors include a request for restitution in the sentencing process; such a request is likely to be simpler – and receive less adverse publicity – than any efforts to recover directly from the passenger.

## IV. Civil Penalties

Violations of section 46504, in addition to being a basis for a criminal prosecution, can also be the basis for the FAA to impose a civil penalty on a passenger. FAA regulations prohibit much the same misconduct that is prohibited by the statute, which the agency refers to as "unruly" passenger misconduct.<sup>18</sup> Other regulations impose additional specific compliance obligations on passengers, including that they obey smoking and seatbelt signs,<sup>19</sup> obey instructions for the use of portable electronic

# Legal Responses to Airline Passenger Misconduct

Page 3 of 4

devices,<sup>20</sup> and obey instructions to properly stow baggage.<sup>21</sup> FAA may impose a civil penalty of up to \$27,500 for violations that involve a physical assault or a threat of a physical assault,<sup>22</sup> and of up to \$1100 for other violations.<sup>23</sup>

According to the FAA, the peak year for civil penalties involving unruly passengers was 2005, in which there were 304 proceedings; in contrast, as of December 17, 2010, there had been only 92 proceedings for the year.<sup>24</sup> The agency only publishes decisions in which the decision of an Administrative Law Judge is appealed to the FAA Administrator, so it is unclear how severe civil penalties typically are; but recent examples of appeals decisions suggest that they are typically below the maximum. For example, in 2008 the FAA upheld a fine of \$1500 levied against a passenger for two regulatory violations (improperly operating a portable electronic device and interfering with crewmembers in the course of their duties);<sup>25</sup> in 2007, the FAA upheld a \$6100 fine levied against a passenger for assaulting a flight attendant and interfering with crewmembers in the course of their duties (which was stated to have been the first appeals proceeding which involved the higher penalty ceiling for physical assaults).<sup>26</sup>

Given that each incident of passenger misconduct may involve unique facts, it is impossible to provide universal guidance as to the legal responses that may follow; air carriers should consult counsel about their specific situations. The firm of Zuckert, Scutt & Rasenberger, L.L.P. is available to consult with air carriers and other affected parties about the applicable statutes and FAA and DOT regulations.

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<sup>1</sup> Previously, the Federal Aviation Administration (“FAA”) issued guidance regarding how airlines should prepare for and respond to passenger misconduct, but the document appears to have been withdrawn due to the transfer of its security-related responsibilities to the Transportation Security Administration (“TSA”), which typically discourages the public dissemination of information about security-related procedures. See “Interference with Crewmembers in the Performance of their Duties,” Advisory Circular 120-65 (October 18, 1996).

<sup>2</sup> This article does not address the separate-but-important question of when an air carrier is justified in taking action against a passenger. Despite the new security environment, not all misconduct should be treated as a threat. For example, the Department of Transportation (“DOT”) has cautioned air carriers that passengers with disabilities, such as Tourette’s syndrome, may display behaviors in-flight that, while potentially annoying, do not comprise a genuine problem. “Nondiscrimination on the Basis of Handicap in Air Travel,” 55 Fed. Reg. 8008 (March 6, 1990).

<sup>3</sup> 49 U.S.C. § 40127 and § 41705. But even long before deregulation, common carriers were not “deprived of the right to make reasonable and proper rules for the conduct of its business, among which may be enumerated the right to ... refuse passage or exclude from its vehicle a person of notoriously bad character, or one habitually guilty of misconduct, when it is apparent that the safety and comfort of the other passengers will be endangered by the presence of such person in the conveyance.” Reasor v. Paducah & Illinois Ferry Co., 153 S.W. 222, 223 (Ky. 1913).

# Legal Responses to Airline Passenger Misconduct

Page 4 of 4

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<sup>4</sup> 49 U.S.C. § 44902(b). See also Cerqueria v. American Airlines, Inc., 520 F.3d 1 (1st Cir. 2008) (passenger was removed from flight and denied rebooking but subsequently was told that “[t]here is no indication that you will be denied boarding in the future”; held that air carrier decisions to refuse transportation are not subject to liability unless arbitrary or capricious).

<sup>5</sup> “Airlines blacklist passengers,” <http://www.elliott.org/the-travel-critic/airlines-blacklist-passengers/> (Dec. 14, 2004).

<sup>6</sup> Pignatelli v. Delta Airlines, Inc., 2005 WL 957940 (Cal. Ct. App. April 27, 2005) alleged that a passenger was told that he had been blacklisted, but that he subsequently flew on the same carrier without incident.

<sup>7</sup> Cordero v. CIA Mexicana De Aviacion, S.A., 681 F.2d 669, 671 (9th Cir. 1982). Likewise, the discretion of common carriers to bar passengers prior to deregulation was not unlimited: “The fact that, on a former occasion, a passenger had been guilty of misconduct, drunk, boisterous and indecent in his behavior toward other passengers, will not justify the carrier in refusing to permit him to again travel upon its conveyance, if, when he presents himself for passage, he is sober, and is conducting himself in a decent and orderly manner.” Reasor v. Paducah & Illinois Ferry Co., 153 S.W. 222, 223 (Ky. 1913). See also State ex rel. Atweater v. Delaware, L. & W. R. Co., 2 A. 803, 807 (N.J. 1886).

<sup>8</sup> Continental Airlines, Inc. Contract of Carriage, Rule 19(A), [http://www.continental.com/web/en-US/content/co\\_contract\\_of\\_carriage.2010020101.pdf](http://www.continental.com/web/en-US/content/co_contract_of_carriage.2010020101.pdf) (Feb 1, 2010).

<sup>9</sup> “Fan Gets Jail Time for Airport Shutdown,” <http://www.cbsnews.com/stories/2002/03/06/national/main503151.shtml> (March 6, 2002).

<sup>10</sup> 49 U.S.C. § 46504.

<sup>11</sup> 18 U.S.C. § 3571.

<sup>12</sup> 49 U.S.C. § 46501.

<sup>13</sup> 49 U.S.C. § 46506.

<sup>14</sup> U.S. v. Meeker, 527 F.2d 12, 14 (9th Cir. 1975).

<sup>15</sup> U.S. v. Gilady, 62 Fed. Appx. 481, 484 (4th Cir. 2003), quoting Meeker.

<sup>16</sup> 18 U.S.C. § 3663.

<sup>17</sup> See also U.S. v. Hicks, 980 F.2d 963 (5th Cir. 1992) (requiring restitution to air carrier of \$1871.35).

<sup>18</sup> 14 C.F.R. § 91.11, § 121.580, and § 135.120.

<sup>19</sup> 14 C.F.R. § 121.317.

<sup>20</sup> 14 C.F.R. § 121.306.

<sup>21</sup> 14 C.F.R. § 121.589. Additionally, security violations – which pre- 9/11 were also within FAA’s jurisdiction, are now the responsibility of the Transportation Security Administration. “Civil Aviation Security Rules,” 67 Fed. Reg. 8340 (February 22, 2002).

<sup>22</sup> 49 U.S.C. § 46318.

<sup>23</sup> 49 U.S.C. § 46301.

<sup>24</sup> “Unruly Passengers,” [http://www.faa.gov/data\\_research/passengers\\_cargo/unruly\\_passengers/](http://www.faa.gov/data_research/passengers_cargo/unruly_passengers/) (Jan. 24, 2011).

<sup>25</sup> In re Abroms, FAA Order No. 2008-2, Docket No. FAA-2005-21939 (January 28, 2008).

<sup>26</sup> In re Conger, FAA Order No. 2007-8, Docket No. FAA-2004-20530 (August 2, 2007).