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CivilLITIGATION

Been bumped recently? Lessons for the stranded lawyer

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You know the routine: A smiling, friendly but stern person says — in as sympathetic a voice as can be feigned — “Oops. Sorry. We oversold your vacation flight.” Hold the frozen pina coladas.

Or, “Yes, we do have a seat available but ... sorry, Mr. and Mrs. Lawyer, we have only one, so only one of you can get to your daughter's graduation on time.”

Like a good trial lawyer, you plead your case, expecting that somehow a brilliant impassioned plea will result in a miraculous increase in the plane's seating capacity by “just one seat.” Can you say “standby”?

Rebuked and now stranded, you fume, mutter vulgarities under your breath, exhale and decide: “I'll make a federal case out of this injustice.” Get ready for more bumps on the flight to recovery.

Where does every good story about shunned-consumers-seeking-recovery start? With Ralph Nader, of course.

He sued the old Alleghany Airlines when he was bumped in the early 1970s and the U.S. Supreme Court took his case. The court defined bumping as an airline industry practice whereby passengers are denied seats due to intentional overselling, which is intended to minimize the number of empty seats due to cancellations. *Nader v. Alleghany*, 426 U.S. 290, 296 (1976).

His case survived in the high court, but his victory was short-lived. On remand, the circuit court tossed out his negligence-based claims and he had to settle for simple contract damages of \$10. *Nader v. Alleghany Airlines*, 626 F. 2d 1031 (D.C. Cir. 1980).

In the legion of cases since Nader's, the plaintiffs victimized by bumping include a parent who, after protesting the failure to accommodate his large family, was arrested for protesting too much (*Showell v. US Airways Group Inc.*, 2007 U.S. Dist. LEXIS 84788 [W.D. N.C. 2007]); the law student who left her study materials home, was bumped and missed the bar exam (*Minhas v. Biman Bangladdash Airlines*, 1999 U.S. Dist. LEXIS 9849 [S.D.N.Y. 1999]); and stranded law students in Ghana (*Paradis v. Ghana Airways Ltd.*, 348 F. Supp. 2d 106 [S.D.N.Y. 2006]).

The bumped also include the ungrateful man who sued for punitive damages because his mother-in-law was bumped from a flight home and presumably had to stay longer with her son-in-law (*Mraz v. Lufthansa German Airlines*, 2006 U.S. LEXIS 3961 [E.D.N.Y.

2006]); the woman who almost missed the funeral (*Fields v. BWIA International Airways*, 2000 U.S. Dist. LEXIS 9397 [E.D.N.Y. 2000]); the man who almost missed the wedding and claimed “humiliation, annoyance and distress” (*Lopez v. Eastern Airlines Inc.*, 677 F. Supp. 181 [S.D.N.Y. 1988]); the surgeon who missed a week of surgery after he was mistakenly bumped because he was referred to as a security risk (*Ikepeazu v. Air France*, 2004 U.S. Dist. LEXIS 24580 (D. Conn. 2004); the wife who was bumped from first

class and the father who had to care for his two young children in first class because the airline would not let his wife walk from coach to first class (*Sobol v. Continental Airlines Inc.*, 2006 U.S. Dist LEXIS 71096 [S.D.N.Y. 2006]).

Oh, there's also the vegan who lost her special meal because she was bumped (*Braunstein v. United Airlines Inc.*, 684 F. Supp. 387 [S.D.N.Y. 1988]).

Weddings seem to account for a big share of the bumping litigation. One plaintiff was a bumped groomsman who missed the rehearsal dinner but, according to the circuit court, “performed flawlessly at the wedding” (*Smith v. Piedmont Aviation Inc.*, 567 F. 2d 290 [Fifth Cir., 1978]). He got reimbursed for his rental car expenses.

In all of these cases, the bumpees met with big roadblocks: pre-emption either by federal law in domestic flights or the recent Montreal Convention in international flights. Even if a litigant survives pre-emption, the courts generally have frowned on any tort-related damages.

On domestic flights, the rules for the bumped are set by the Federal Aviation Administration, codified at 14 CFR 250.9. The airline must offer the bumped passenger the face value of the tickets with a \$200 maximum. That is unless the airline cannot arrange alternate transportation (a flight that arrives at your destination within two hours of the original flight). In that case, the value is doubled to \$400. If a passenger accepts the alternate transportation, the airline has no further liability. If the passenger rejects the offer, he may seek only contractual damages in a court of law.

On international flights, the Montreal Convention, which replaced the long cited Warsaw Convention, dooms most bumping complaints to convention-created damages-for-delay limitations. *Knowlton v. American Airlines Inc.*, 2007 U.S. Dist. LEXIS 6882 (D. Md. 2007). Convention damages involve “special drawing rights,” a “floating valuation formula used by the International Monetary Fund to calculate values in a given nation's currency.” *Malik v. Societe Air*



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France, 13 Misc 2d 723 (City Ct., NYC, 2006). This hocus-pocus calculation limits damages for delays and lost luggage: Most litigants will need an expert witness just to figure out those losses.

However, the Second Circuit, at least for the moment, has refused to close the door on whether bumping claims for breach of contract or other state law claims are “delay” claims that fall within the Montreal Convention pre-emption. *King v. American Airlines Inc.*, 284 F. 3d 352, 261-263 (Second Cir. 2002). As evidence, the court in *Weiss v. El Al Israel Airlines Ltd.*, 433 F. Supp 2d 361 (S.D.N.Y. 2006) noted bumping was “contractual non-performance and not delay” and held the breach of contract claims were not pre-empted, while adding “the federal courts appear to be divided on this issue.” 433 F. Supp 2d at 366. See also *Wolgel v. Mexicana Airlines*, 821 F. 2d 442 (Seventh Cir. 1987).

Pre-empted or not, the bumped litigator faces skepticism among the courts for the damages that arise from bumping. Most courts

scold litigants, stating that bumping is a common feature of air travel. They also tend to repeat the “buyer beware” admonition from ancient case law: Damages for the simple breach of contract claims have been limited to just out-of-pocket costs.

By the way, if the airline cancels your promised “complimentary \$3 breakfast,” do not complain. Myra Knowlton did just that, filing a class action on behalf of other hungry passengers. The court dismissed her case, concluding that “as a matter of public policy, airlines should not be subject to contract claims in state court involving a three-dollar breakfast.” *Knowlton v. American Airlines Inc.*, 2007 U.S. Dist. LEXIS 6882 at 8 (D. Md. 2007).

Enjoy the flight, all you hungry would-be bumpees.

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