

When You Arrive But Your Bags Don't...



Remedies for Loss, Damage or Delay of Airline Luggage

By M.R. Franks

Worldwide, airlines lose 30 million bags each year, roughly six per thousand.¹ About 200,000 of those bags will never be found.²

While most bags are eventually located, the delay is frustrating to the victims. Virtually everyone traveling does so for a reason and needs the packed items immediately on arrival or at the start of business the next morning. Even vacationers lose enjoyment of precious days of their holiday when deprived of their wardrobe, sporting gear and medications.

Clothing, toiletries and vital medicines typically do not arrive until late the next day. The average delay is 31.2 hours from the passenger's filing of the lost luggage report.³

Causes of Lost or Delayed Luggage

Lost luggage is usually caused by negligence.⁴ More sinister causes include offloading passenger baggage to accommodate cargo. The attitude here is let the passenger who has already paid be damned, just take the cargo for yet more

revenue. Airlines also have been known to "ferry" fuel, buying more than they need for the flight⁵ in a city where fuel is cheaper, carrying it to destinations where fuel is costlier. Passenger baggage may be offloaded to accommodate fuel.

On one commuter flight, it was announced that the airplane was "overweight," even though there were 13 empty seats on the flight!⁶ Being "overweight" with empty seats is almost a sure sign of bumping baggage to accommodate cargo.

Exacerbating the delay is a reluctance to forward misdirected luggage via the next flight out on *any* carrier, waiting instead for the next flight on their own airline, perhaps next day.

Applicable Law

International flights are governed by the Warsaw Convention of 1929, as amended,⁷ a multilateral treaty. The treaty imposes strict liability.

The domestic segment of an international flight is subject to Warsaw.⁸ A person flying on one ticket from, say, Baton Rouge to Atlanta, and there connecting to London, is considered in inter-

national travel from the time he boards the flight in Baton Rouge.⁹

Rules differ between domestic and international travel.

The first step in either case is to give the airline prompt written notice of claim, preferably by certified mail to its legal department, listed in Westlaw's or Lexis's directory of corporate counsel. Attach exhibits to the letter including, as applicable, copies of:

- ▶ the ticket;
- ▶ any boarding passes;
- ▶ baggage claim checks;
- ▶ the lost baggage report;
- ▶ any e-mail sent to the airline to confirm a claim is being made; and
- ▶ receipts for expenses such as clothing, toiletries, repairs to luggage and the like.

Liability for Domestic Travel

If the trip is entirely domestic, Warsaw is inapplicable.

The case may sound in contract or tort. The U.S. 5th Circuit has held the Airline Deregulation Act does not preempt state-law-based claims for injury

from falling cabin cargo.¹⁰ Louisiana courts have jurisdiction to adjudicate lost luggage claims.¹¹ In a case asking both tort and contract damages, including mental distress, the 4th Circuit 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*, 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed. 2d 834 (1990), and *Tafflin v. Levitt*, 493 U.S. 455, 110 S.Ct. 792, 107 L.Ed. 2d 887 (1990). 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.¹²

Where the claim is for more than \$75,000, diversity jurisdiction is available.¹³

An attempt to remove a luggage claim to federal court based on federal-question jurisdiction¹⁴ failed in the 1976 case of *Security Insurance Co. of Hartford v. National Airlines, Inc.*¹⁵ Judge 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.¹⁶

A more recent federal decision holds otherwise. In *Balart v. Delta Airlines, Inc.*,¹⁷ Judge Thomas Porteous of the Eastern District of Louisiana permitted federal-question removal of a luggage claim. The court relied on the shipping company (not airline) case of *Sam L. Majors Jewelers v. ABX, Inc.*,¹⁸ which in turn relies on the Airline Deregulation Act.¹⁹

There is a relevant federal regulation. 14 C.F.R. § 254.4 reads as follows:

Carrier liability.

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 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.²⁰

A "large aircraft" is any aircraft having more than 60 seats.²¹

This regulation alone, unless plead in the petition, would not appear to justify removal. If the plaintiff wishes to file in federal court,²² the petition should articulate the federal nature of the claim, citing 14 C.F.R. § 254.4 and the *Sam L. Majors* case. If the plaintiff wishes to avoid federal removal, the petition should sound in state law and waive damages of more than \$75,000.²³

Windle Turley, in the book *Aviation Litigation*, says:

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.²⁴

In *Lowe v. Trans World Airlines*,²⁵ plaintiffs filed for wrongful death in New York state court. The airline sought federal-question removal. The court held federal preemption of the subject matter insufficient because "preemption is a matter of defense to a state law claim, and not a ground for removal."²⁶

If the defense removes to federal court, plaintiff may move to remand.²⁷ Or plaintiff may consider demanding a jury. Jury trial is available in federal court on any federal-question case involving more than \$20.²⁸ No jury fee or bond is required.

A prudent airline will not wish to wear out its welcome at the federal courthouse by removing to federal court for possible jury trial every small claims suit for a \$500 dented suitcase.

The defense may answer raising a "company policy" defense. The U.S. 5th Circuit has upheld an airline's right to limit liability in its contract of passage.²⁹

While other state courts have held limitation-of-damages clauses in airline tickets are governed by federal law,³⁰ fine print on the ticket may not apply unless actually read by the passenger. In *Gauthier v. Allright New Orleans, Inc.*,³¹ Louisiana's 4th Circuit held a limitation of liability on a parking lot's claim check does not bind a customer who never read it.

Federal courts hold that where notice on an airline ticket is "printed in such a manner as to virtually be both unnoticeable and unreadable," limited liability does not apply.³² So, too, if the notice is "camouflaged in Lilliputian print."³³

The plaintiff wishing to go the state court route should avoid mention of 14 C.F.R. § 254.4, waiting for the defense to raise the contractual limitation defense. Only after the 30-day window for removal has passed should plaintiff cite the regulation.

Liability for International Travel

In international travel, the Warsaw Convention³⁴ and the amending Montreal Convention³⁵ limit damages but provide strict liability. Warsaw provides the exclusive tort remedy,³⁶ but not the exclusive contract remedy.³⁷ The 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 which caused the damage so sustained took place during the carriage by air.³⁸

The treaty also provides:

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.³⁹

Warsaw limits damages to approximately \$1,519 per passenger.⁴⁰ Any attempt to set a lower limit is void.⁴¹

The damage cap is inapplicable if the airline's conduct was "reckless"⁴² or if the airline failed to deliver a proper ticket meeting Warsaw specifications⁴³ or if the claim check fails to comply with Article 4 of Warsaw.⁴⁴ Where carry-on baggage is "gate checked," the airline may not rely on the notice contained in other baggage claim checks.⁴⁵ The ticket and claim check must both comply with Warsaw for the airline to avail itself of the cap.⁴⁶

Notice on the ticket must be in 10-point type.⁴⁷ The U.S. 5th Circuit has held that a Warsaw notice printed in 9-point type gives the airline no protection of limited liability.⁴⁸ An electronic ticket may fall short of the requirements of a proper "ticket" under Article 3 of Warsaw.⁴⁹

Reckless conduct also deprives the airline of the benefit of limited liability.⁵⁰ In *Butler v. Aeromexico*,⁵¹ it was held that "willful misconduct" does not require specific intent. Failure to forward omit-

ted baggage on the very next flight on any carrier, holding it until the offending carrier's own next flight, may constitute willful misconduct.⁵²

If baggage is "bumped" from a flight, Warsaw is totally inapplicable and state law governs the contract claim.⁵³ A New York court awarded damages for a vacation ruined by delayed luggage, holding failure of the airline to retrieve the luggage for 15 days constituted "willful misconduct" justifying denying the airline the benefit of Warsaw's limited damages.⁵⁴

A person who suffers *damage* to bag-

gage must complain "forthwith and at the latest within seven days from the date of receipt in the case of baggage."⁵⁵ In the case of *delayed* baggage, the recipient has 21 days from receipt of the baggage to complain.⁵⁶ The complaint must be in writing, failing which no action shall lie.⁵⁷ One case holds electronic data in the airline's baggage claims computer satisfies the requirement of written notice.⁵⁸

No notice is needed in the case of total loss.⁵⁹ If several bags are checked but fewer arrive, the loss is considered damage and notice is required.⁶⁰



What's Prohibited? What's Permitted? Can I Carry It Onboard?

Travel restrictions in this post-9/11 world have become the norm. Frequent fliers may think they know them by rote, but rules can change weekly. On Aug. 10, a foiled terrorist plot in Britain created ripples in the travel industry and new bans on the transport of liquids, aerosols and gels were activated.

But, on Sept. 26, the Transportation Security Administration (TSA) adjusted the ban on liquids, aerosols and gels. First, travelers may now carry through security checkpoints travel-sized toiletries (3 ounces or less) that fit comfortably in one, quart-sized, clear plastic, zip-topped bag. Second, after clearing security, travelers may bring beverages and other items purchased in the secure boarding area onboard the aircraft.

The list of permitted and prohibited items is long and is often predicated on whether the items will be carried in hand luggage through security checkpoints or packed in checked baggage.

The easiest way to learn of the latest updates is via the Internet. The TSA's Web site includes the full list of allowable and prohibited items and general suggestions on how to make your screening experience hassle-free.

For the list of permitted/prohibited items, go to: <http://www.tsa.gov/travelers/airtravel/prohibited/permitted-prohibited-items.shtm#0>.

For general information on security screening, go to: <http://www.tsa.gov/travelers/airtravel/screening/index.shtm>.

Even though some travel restrictions have been relaxed a bit, you are still required to remove your shoes before entering the walk-through metal detector!

— Louisiana Bar Journal

Once written notice is timely given, the passenger has two years from his arrival at the ultimate destination to file suit.⁶¹

In the case of baggage carried by different airlines on one ticket, Warsaw 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.⁶²

Warsaw contains a venue provision.⁶³ It “allows suit in the location where the ticket was purchased if the carrier has a place of business in that location.”⁶⁴

Actions under Warsaw may be brought in state court.⁶⁵ An argument against removal can be made under the language of the treaty. One court accepted such an argument, finding removal improper.⁶⁶

Conclusion

Victims of luggage mishandling are not without recourse. The legal profession can help make the airlines aware of their obligations.

FOOTNOTES

1. “Seven Bags Lost on Every Jet,” (London) Daily Star, May 31, 2006, p. 25.
2. “Air Carriers’ Baggage Problems Get Worse,” Richmond Times Dispatch, March 21, 2006, at C-1.
3. *Hearing on Mishandled Baggage: Problems and Solutions*, U.S. House of Representatives, Subcommittee on Aviation, May 3, 2006.
4. *Id.*
5. The applicable regulation provides that an airplane must carry enough fuel to reach its intended destination, then to continue thereafter to an alternate airport, and then to fly for an additional 45 minutes. 14 C.F.R. § 91.167.
6. A 2006 experience of the author.
7. The Convention for the Unification of Certain Rules Relating to International Transportation by Air, 49 Stat., part II, p. 3,000 (hereafter, Warsaw). The full text may be found online at <http://www.iata.org/NR/ContentConnector/CS2000/Siteinterface/sites/legal/file/warsaw.pdf>.
8. *Id.* art. 1 (3).
9. *Gally v. Re-Al Brazilian International Airlines*, 29 Misc.2d 499, 211 N.Y.S.2d 208 (1961).
10. *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334 (5 Cir. 1995).
11. *Kibler v. Northwest Airlines, Inc.*, 563 So.2d 550 (La. App. 4 Cir. 1990). *Accord*, *Steber v. British Caledonian Airways, Ltd.*, 549 So.2d 986 (Ala. Civ. App. 1989).
12. *Id.* at 552.
13. 28 U.S.C. § 1332; 28 U.S.C. § 1441 (c).
14. 28 U.S.C. § 1441 (b).
15. 413 F.Supp. 493 (E.D. La. 1976).
16. *Id.* at 494.
17. 2001 WL 322065, 2001 U.S. Dist. LEXIS 4390 (E.D. La. 2001).
18. 117 F.3d 922 (5 Cir. 1997).
19. 49 U.S.C. § 41713.
20. 14 C.F.R. § 254.4.

21. 14 C.F.R. § 254.3.
22. 28 U.S.C. § 1331.
23. 28 U.S.C. § 1332.
24. *Windle Turley, Aviation Litigation*, Shepard’s/McGraw Hill (1986), p. 384.
25. 396 F. Supp. 9 (S.D.N.Y. 1975).
26. *Id.* at 12.
27. 28 U.S.C. § 1447 (c).
28. U.S. Const., amend. VII.
29. *Casas v. American Airlines, Inc.*, 304 F.3d 517 (5 Cir. 2002).
30. *Finestone v. Continental Airlines, Inc.*, 195 Misc.2d 795, 759 N.Y.S.2d 623 (App. Div. 2003); *Delta Air Lines, Inc. v. Barnard*, 799 So.2d 208 (Ala. Civ. App., 2001).
31. 417 So.2d 375 (La. App. 4 Cir. 1982). *See also Colgin v. Security Storage & Van Co.*, 208 La. 173, 23 So.2d 36 (1945).
32. *Mertens v. Flying Tiger Line, Inc.*, 341 F.2d 851, 857 (2 Cir. 1965), *cert. denied*, 382 U.S. 816 (1965).
33. *Lisi v. Alitalia-Linee Aeree Italiane*, 370 F.2d 508, 514 (2 Cir. 1966), *aff’d*, 390 U.S. 455 (1968).
34. Warsaw, *supra* note 7.
35. *Multilateral Convention for International Carriage by Air Done at Montreal* May 28, 1999, S. Treaty Doc. No. 106-45 (hereafter, *Montreal Convention*).
36. *Weiss v. El Al Israel Airlines, Ltd.*, 433 F.Supp.2d 361 (S.D.N.Y. May 2006); *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155 (1999). *But see King v. Eastern Airlines, Inc.*, 536 So.2d 1023 (Fla. App. 1988); *Abramson v. Japan Airlines Co., Ltd.*, 739 F.2d 130 (3 Cir. 1984).
37. *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1994).
38. Warsaw, art. 18 (2). *See also Montreal Convention*, art. 17 (2).
39. *Id.* art. 19. *See also Montreal Convention*, art. 19.
40. Warsaw, arts. 22 (2)(a) and 22 (5).
41. Warsaw, art. 23 (1).
42. Warsaw, art. 25.
43. Warsaw, 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.
44. Warsaw, art. 4.
45. *Schopenhauer v. Compagnie Nationale Air France*, 255 F.Supp.2d 81 (E.D.N.Y. 2003).
46. *Id.*
47. *Lee S. Kreindler, 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).
48. *In re Air Crash Disaster Near New Orleans*, 789 F.2d 1092 (5 Cir. 1986).
49. Warsaw, art. 3, requires that the ticket

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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.”

50. Warsaw, art. 25.

51. 774 F.2d 429 (11 Cir. 1985). *See also* Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller, 110 U.S. App. D.C. 282, 292 F.2d 775 (D.C. Cir. 1961).

52. While the author is unaware of any reported case involving intentional 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. *Cohen v. Varig Airlines*, 62 A.D.2d 324, 405 N.Y.S.2d 44 (App. Div. 1978).

53. *Weiss v. El Al Israel Airlines, Ltd.*, *supra* note 47.

54. *Kupferman v. Pakistan International Airlines*, 108 Misc.2d 485, 438 N.Y.S.2d 189 (1981).

55. Warsaw, art. 26.

56. *Id.*

57. *Id.*

58. *D’Arrigo v. Alitalia*, 192 Misc.2d 188, 745 N.Y.S.2d 816 (2002).

59. *Dalton v. Delta Airlines, Inc.*, 570 F.2d 1244 (5 Cir. 1978); *Hughes-Gibb & Co., Ltd. v. Flying Tiger Line, Inc.*, 504 F.Supp. 1239 (N.D. Ill. 1981). However, where a horse being shipped died after the trip, notice was required. *Stud v. Trans International Airlines*, 727 F.2d 880 (9 Cir. 1984).

60. *Denby v. Seaboard World Airlines, Inc.*, 575 F.Supp. 1134 (E.D.N.Y. 1983). *Contra*, *Leather’s Best, Inc. v. Aerolinas Argentinas*, 131 Misc.2d 426, 500 N.Y.S.2d 492 (1986).

61. Warsaw, art. 29 (1).

62. Warsaw, article 30 (3).

63. Warsaw, art. 28 (1).

64. *Kreindler, supra* note 47, § 11-80, citing *Eck v. United Arab Airlines, Inc.*, 360 F.2d 804, 808 n.8 (2 Cir. 1965); *Mertens v. Flying Tiger Line, Inc.*, *supra* note 43, at 816; *Bryant v. Finnish National Airline*, 15 N.Y.2d 426, 260 N.Y.S.2d 625 (N.Y. 1965).

65. *L.B. Smith, Inc. v. Circle Air Freight Corp.*, 128 Misc. 2d 12, 488 N.Y.S.2d 547

(1985); *Eli Lilly Argentina, S.A. v. Aerolinas Argentinas, supra* note 60. *See also* *Clark v. United Parcel Service*, 778 F. Supp. 1209 (S.D. Fla. 1991); *Air Express International, Inc., v. Aerovias De Mexico S.A. d/b/a Aeromexico*, 977 F. Supp. 1191 (S.D. Fla. 1997).

66. *Rogers v. American Airlines, Inc.*, 192 F.Supp.2d 661, 671 (N.D. Tex. 2001).

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