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WHERE IS THE ACAA TODAY? TRACING THE LAW DEVELOPING FROM THE AIR CARRIER ACCESS ACT OF 1986

JAMES S. STRAWINSKI*

I. INTRODUCTION

WHILE THE AIRLINE industry in the United States has been deregulated, it is far from being unregulated. The federal government has specifically regulated the way in which airlines accommodate the needs of handicapped and disabled passengers. The focus of the federal government's effort is found in the regulations promulgated pursuant to the Air Carrier Access Act of 1986 (ACAA). Now that the ACAA has been in effect for more than a decade and a half, a sufficient number of judicial decisions flesh out the implementation of the ACAA to allow for a useful discussion of its development. The following discussion traces the ACAA from its inception to the present, touching on all the issues the courts have addressed, organized in a simple and straightforward format. It provides answers to how the ACAA came about, whom it benefits, what benefits are created, and who must provide those benefits.

II. HISTORICAL BACKGROUND OF THE ACAA

The Air Carrier Access Act of 1986 (ACAA)¹ has a heritage which traces all the way back to the Federal Aviation Act of 1958.² Section 404 of the Federal Aviation Act had two pertinent passages: under section 404(a)(1), air carriers must "provide safe and adequate service, equipment, and facilities;" under section 404(b) air carriers must not "subject any particular per-

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¹ Air Carrier Access Act of 1986, 49 U.S.C. §§ 41310, 41501, 41702, 41705 (Supp. IV 1986).

² 49 U.S.C. app. § 1374 (1982), *repealed* by Pub. L. No. 103-272, 108 Stat. 1141 (1994).

son . . . to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever." First, the Civil Aeronautics Board (CAB), then later, the Department of Transportation (DOT), promulgated regulations under section 404(a)(1) providing for non-discriminatory treatment of handicapped individuals by air carriers.³ At the same time, courts found a private cause of action in favor of handicapped individuals against air carriers based on section 404(b).⁴

Additionally, Section 504 of the Rehabilitation Act of 1973⁵ provided as follows:

No otherwise qualified individual with handicaps in the United States, as defined in Section 706(8) of this Title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits, or be subjected to discrimination under any program or activity receiving federal financial assistance. . . .⁶

Because of this last phrase, the CAB was using Section 504 of the Rehabilitation Act to regulate only those particular air operations that received federal subsidies for transporting mail and passengers to small communities.⁷

The Airline Deregulation Act of 1978⁸ (ADA) repealed section 404(b) of the Federal Aviation Act, thereby eliminating the main basis on which courts allowed a private cause of action for discrimination by air carriers. So, by the early 1980s, disabled passengers retained relatively few protections against perceived discriminatory behavior of commercial airlines. In this context, the ACAA owes its existence most directly to a single case: *U.S. Department of Transportation v. Paralyzed Veterans of America*.⁹ In that case, organizations representing handicapped people challenged the CAB's interpretation of section 504. They argued that since all airlines received federal financial assistance in the form of airport development programs and air traffic control systems, that CAB ought to use section 504 to regulate all air

³ 14 C.F.R. § 382, subpart A (1988).

⁴ *Hingson v. Pac. S.W. Airlines*, 743 F.2d 1408, 1411-12 (9th Cir. 1984); *Nader v. Allegheny Airlines*, 512 F.2d 527, 537 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976).

⁵ 29 U.S.C. § 794 (2000).

⁶ 29 U.S.C. § 794(a).

⁷ *United States Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 600-01 (1986) [hereinafter *DOT v. PVA*].

⁸ 49 U.S.C. App. § 1301, *repealed* by Pub. L. No. 103-272, 108 Stat. 1141 (1994) (current version at 49 U.S.C. § 4011).

⁹ *DOT v. PVA*, 477 U.S. at 606-07.

carriers, as opposed to just those particular air carriers receiving direct federal subsidies. The Supreme Court rejected that argument, agreeing with the CAB that section 504 did not apply to air carriers generally.

Congress responded promptly by passing the Air Carrier Access Act. The pertinent provisions of the ACAA, which are now codified under 49 U.S.C. § 41705, are as follows:

§ 41705. Discrimination against handicapped individuals.

In general. – In providing air transportation, an air carrier, including (subject to 40105(b)) any foreign air carrier, may not discriminate against an otherwise qualified individual on the following grounds:

the individual has a physical or mental impairment that substantially limits one or more major life activities.

the individual has a record of such an impairment.

the individual is regarded as having such an impairment.

Each act constitutes separate offense. – For purposes of section 46301(a)(3)(E), a separate violation occurs under this section for each individual act of discrimination prohibited by subsection (a).

Investigation of complaints. –

In general. – The Secretary shall investigate each complaint of a violation of subsection (a).

Publication of data. – The Secretary shall publish disability-related complaint data in a manner comparable to other consumer complaint data.

Review and report. – The Secretary shall regularly review all complaints received by air carriers alleging discrimination on the basis of disability and shall report annually to congress on the results of such review.

Technical assistance. – Not later than 180 days after the date of the enactment of this subsection, the Secretary shall - implement a plan, in consultation with the Department of Justice, the United States Architectural and Transportation Barriers Compliance Board, and the National Council on Disability, to provide technical assistance to air carriers and individuals with disabilities in understanding the rights and responsibilities set forth in this section; and

ensure the availability and provision of appropriate technical assistance manuals to individuals and entities with rights or responsibilities under this section.¹⁰

The ACAA began as 49 U.S.C. § 1374. It was recodified in 1994, and can now be found at 49 U.S.C. § 41705. Most re-

¹⁰ 49 U.S.C. § 41705 (1999).

cently, it was amended on April 5, 2000, to increase its application to foreign air carriers.¹¹

The issue of whether the ACAA can be applied retroactively has come up from time to time in the case law. In *Anderson v. USAir, Inc.*,¹² a blind attorney was inadvertently seated in an emergency exit row. When he refused to move to a different seat, he was arrested by an FAA police officer and taken off the flight. The occurrence took place on February 6, 1985. As of January 1, 1983, the Airline Deregulation Act of 1978 had repealed section 404(b) of the Federal Aviation Act. Between the time *Anderson* was argued and when it was decided, Congress passed the Air Carrier Access Act (ACAA) on October 2, 1986. Even though the plaintiff made no claim pursuant to the ACAA, the court discussed the question of whether it could be applied retroactively. Reasoning that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect," and finding no applicable exception to that rule, the court held that the ACAA would not be applied retroactively.¹³

In *Squire v. United Airlines, Inc.*,¹⁴ job applicants sought to recover under the ACAA because they had been refused employment as flight officers due to the fact that they had received radial keratotomy eye surgery. Following *Anderson*, the court noted that the ACAA was passed on October 2, 1986, "well after United's rejection of [the applicants'] applications."¹⁵ The court refused to apply the ACAA retroactively.¹⁶

The "retroactivity" issue arose again after the ACAA was amended on April 5, 2000, by the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century. *Alino v. Aerovias De Mexico*,¹⁷ involved a paraplegic wheelchair-bound passenger who alleged a violation of the ACAA when his confirmed flight reservations were changed by the issuance of boarding passes "subject to space" only. He was denied boarding for his scheduled flight. The question of retroactive application of a statute, in this case an amendment, was potentially critical because the amendment in question had expanded the applica-

¹¹ 49 U.S.C. § 41705 (1999), amended by Pub. L. No. 106-181, § 707(a)(2) (2000).

¹² 818 F.2d 49 (D.C. Cir. 1987).

¹³ *Id.*

¹⁴ 973 F. Supp. 1004 (D. Colo. 1997).

¹⁵ *Id.* at 1009.

¹⁶ *Id.*

¹⁷ 129 F. Supp. 2d 1341 (S.D. Fla. 2000).

tion of the ACAA to foreign air carriers such as the defendant. On the surface, it would appear that since the occurrence took place on January 3, 2000, and the amendment to the ACAA occurred on April 5, 2000, that the amendment would not be applied retroactively. The court acknowledged the general presumption against retroactivity, discussed above, but then looked deeper. One exception to the general presumption occurs when the legislation itself gives some indication of the legislature's intent to apply it retroactively. In the "Reform Act" the language indicates that "except as otherwise specifically provided, this Act and the amendments made by this Act shall apply only to fiscal years beginning after September 30, 1999."¹⁸ Relying on that expression of legislative intent, the court retroactively applied the amended version of the ACAA.¹⁹

In *Bower v. Federal Express Corp.*,²⁰ the court skirted the retroactivity issue in a different manner. In that case, Richard A. Bower, an employee of Federal Express Corporation, suffered from spina bifida, requiring him to use leg braces and crutches. Based on his disability, Federal Express denied him jumpseat privileges, which were generally extended to employees. He sought a recovery under the ACAA, forcing the court to address the issue of which version of the ACAA applied. Shortly before Bower filed suit, Congress recodified the ACAA. The recodification contained language indicating that it was not intended to effect any substantive change. Reasoning that the plaintiff was attacking a Federal Express practice that was on-going at the time he filed his complaint, the court concluded that the district court had erred in applying the former version of the statute, and held that the latter version of the statute should be utilized.²¹ The opinion, however, does not identify any difference in the outcome that results from selecting the recodified version.

Over the years since passage of this legislation, the courts have set about the task of answering those many questions that inevitably arise regarding the proper construction of a new statute. The following discussion aims to catalogue those issues that have been addressed, noting the results and the reasoning, as well as those issues that have not been resolved.

¹⁸ *Id.* at 1344.

¹⁹ *Id.*

²⁰ 96 F.3d 200 (6th Cir. 1996).

²¹ *Id.* at 203.

Only part of the impact of the ACAA flows directly from the language of the statute itself. The full picture can only be understood by reference to the regulations promulgated to implement the ACAA. Those regulations are found at 14 C.F.R. § 382.

III. SCOPE OF REGULATIONS IMPLEMENTING THE ACAA

The combination of the ACAA and the regulations implementing the ACAA constitutes a comprehensive collection of rules governing the interaction between disabled passengers and air carriers. The overall purpose is to prevent discrimination against handicapped individuals. To achieve that goal, the regulations contain a general prohibition against discrimination and a series of particular mandates ranging from general concepts to specific details. In short, the regulations address virtually every aspect of the relationship between the disabled passenger and the air carrier from the moment the passenger contacts the air carrier. The ACAA regulates the relationship when the passenger arrives at the airport parking lot, passes through the terminal, undergoes security screening, is transported through the airport, waits in the gate area, goes through the boarding process, is seated, and uses aircraft facilities during flight. While there may be some aspect of the relationship that is not regulated, it is not apparent.

IV. QUALIFIED INDIVIDUALS UNDER THE ACAA

The ACAA is intended to benefit handicapped and disabled individuals seeking non-discriminatory air transportation. Although most of the cases construing the ACAA skip over the step of determining whether the plaintiff is entitled to the benefits of the statute, usually by a stipulation of the parties, it remains a potential threshold issue. While the definition of a qualified individual has undergone some evolution over the years,²² today it is found in 14 C.F.R. § 382.5.²³

²² In *Tallarico v. Trans World Airlines*, 881 F.2d 566 (8th Cir. 1989), the court directly addressed the question of whether Polly Tallarico was an "otherwise qualified handicapped individual" pursuant to the regulations. Polly Tallarico was a 14-year-old child suffering from cerebral palsy, who desired to travel unaccompanied. She could not walk, but she could crawl; she could not talk, but she could communicate using various devices, and she could speak short words. She possessed normal intelligence and she could hear and understand the spoken word. The ACAA requires the Secretary of Transportation "to promulgate regulations

The *Bower v. Federal Express Corp.*²⁴ opinion contained a lengthy discussion of whether an employee (not a customer in the normal sense) could fit the definition of “qualified handicapped individual.” By the time the *Bower* case came along, the regulations had been promulgated to implement the ACAA. The critical regulation is found at 14 C.F.R. § 382.5, which contains the following definition:

Qualified handicapped individual²⁵ means an individual who –
 With respect to accompanying or meeting a traveler, use of ground transportation, using terminal facilities, or obtaining information about schedules, fares or policies, takes those actions necessary to avail himself or herself of facilities or services offered by an air carrier to the general public with reasonable accommodations, as needed, provided by the carrier;
 With respect to obtaining a ticket for air transportation on an air carrier, offers, or makes a good faith attempt to offer, to purchase or otherwise validly to obtain such a ticket;
 With respect to obtaining air transportation, or other services or accommodations required by this part:
 Purchases or possesses a valid ticket for air transportation on an air carrier and presents himself or herself in the airport for the purpose of traveling on the flight for which the ticket has been purchased or obtained; and

to ensure non-discriminatory treatment of qualified handicapped individuals.” At the time *Tallarico* was decided, no regulations had been promulgated pursuant to the ACAA. The legislative history, however, directed the court to the definition contained in 14 C.F.R. § 382.3(c) (1988). That regulation contained the following definition of “qualified handicapped person”:

A handicapped individual (1) who tenders payment for air transportation, (2) whose carriage will not violate Federal Aviation Administration (FAA) regulations, and (3) who is willing and able to comply with reasonable safety requests of the airline personnel or, if unable to comply, who is accompanied by a responsible adult passenger who can ensure compliance with such a request.

Polly had clearly tendered payment for air transportation, and there was no reason to think that her carriage would violate FAA regulations. The only question discussed by the court was whether she was “willing and able to comply with reasonable safety requests of the airline personnel.” In concluding that she qualified on this factor as well, the court relied on the evidence indicating that she was able to understand, that she was able to move about independently, and that she could communicate her own needs as well as understand the requests of the crew. The court held that she fit the definition and that the ACAA applied. Today the definition is different and it can be found in 14 C.F.R. § 382.5 (2002).

²³ See 14 C.F.R. § 382.5 (2002).

²⁴ *Bower v. Fed. Express Corp.*, 96 F.3d 200, 206-10 (6th Cir. 1996).

²⁵ Today the same regulation uses the term “qualified individual with a disability” in place of “qualified handicapped individual” but the definition remains the same. See 14 C.F.R. § 382.5 (2002).

Meets reasonable, non-discriminatory contract of carriage requirements applicable to all passengers²⁶

The Sixth Circuit went to great lengths analyzing the "qualified handicapped individual" definition. The court did not, however, ultimately decide this issue, preferring instead, to refer the issue back to the district court. Because of other procedural issues, the district court never published an opinion directly resolving the issue.²⁷

Another case raises the question of whether a person's height could qualify him or her as a "qualified handicapped individual." The Tall Club of Silicon Valley brought suit against American Airlines pursuant to the ACAA, seeking to enjoin the airlines to reserve specific seating for persons who were so tall that they needed extra leg room.²⁸ The federal district court in California remanded the case to the state court without reaching the issue in question.

V. THE ACAA MAY CREATE A PRIVATE CAUSE OF ACTION

Given the legislative history of the ACAA, having been created in direct response to the Supreme Court's decision in *DOT v. PVA*,²⁹ it should not be surprising that courts found that the ACAA created a private cause of action. *Tallarico v. Trans World Airlines, Inc.*,³⁰ was the first federal court of appeals opinion directly addressing that issue. Polly Tallarico suffered from cerebral palsy. Although she could not walk, she could use a wheelchair and she could crawl. Although she could not talk except for speaking short words, she could hear and she could respond using a communication board, a memo writer, and a "Minispeak."³¹ After she arrived at the airport for a flight from Houston to St. Louis, unaccompanied, the airline determined that it would be necessary for her to be accompanied. The intended flight was on November 25, 1986, shortly after the enactment of the ACAA.

²⁶ 14 C.F.R. § 382.5.

²⁷ *Bower v. Fed. Express Corp.*, 156 F. Supp. 2d 678 (W.D. Tenn. 2001).

²⁸ *Tall Club of Silicon Valley v. Am. Airlines, Inc.*, 2000 WL 868524 (N.D. Cal. filed June 19, 2000).

²⁹ *DOT v. PVA*, 477 U.S. 597 (1986).

³⁰ *Tallarico v. Trans World Airlines, Inc.*, 881 F.2d 566, 570 (8th Cir. 1989).

³¹ *Id.* at 568.

The ACAA does not expressly create a private cause of action. The question, then, becomes whether there is an *implied* private cause of action under the ACAA. Both the Missouri District Court and the Eighth Circuit Court of Appeals agreed that the analysis for making that determination is found in the case of *Cort v. Ash*.³² That test includes four factors that are set out as follows:

First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted,' that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And, finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?³³

To determine whether Polly Tallarico was "one of the class for whose *especial* benefit the statute was enacted,"³⁴ the court addressed the question of whether she was an "otherwise qualified handicapped individual" under the terms of the statute.³⁵ The statute did not contain a definition of that term, but the legislative history indicates that it was intended to be consistent with the DOT's definition in 14 C.F.R. § 382.3(c) (1988). That definition has three parts. A "qualified handicapped person" is an "individual (1) who tenders payment for air transportation, (2) whose carriage will not violate Federal Aviation Administration regulations, and (3) who is willing and able to comply with reasonable safety requests of the airline personnel or, if unable to comply, who is accompanied by a responsible adult passenger who can ensure compliance with such a request."³⁶ Polly Talliarco had tendered payment. Her carriage would not violate any FAA regulations. Accordingly, the only real analysis undertaken by the court was whether she was willing and able to comply with reasonable safety requests. The jury, the trial court, and the court of appeals all agreed that since she possessed normal intelligence, could crawl from place to place, and was capable of

³² *Id.*; *Cort v. Ash*, 422 U.S. 66 (1975).

³³ *Tallarico*, 881 F.2d at 568 (citing *Cort*, 422 U.S. at 78).

³⁴ *Id.* (emphasis added).

³⁵ *Id.* at 569.

³⁶ *Id.* (citing 14 C.F.R. § 382.3(c) (1988)).

communicating through various alternative methods, she fit the definition of a "qualified handicapped person."³⁷

The court resolved the second *Cort v. Ash* factor by noting that the implicit legislative intent was revealed in the fact that the ACAA was a direct response to the Supreme Court's decision in *DOT v. PVA*.³⁸ That case found that section 504 of the Rehabilitation Act of 1973 applied only in an extremely limited fashion to commercial airlines. The congressional record revealed legislative history suggesting that the ACAA was created to prevent discriminatory treatment of handicapped individuals by air carriers. For these reasons, the court found an implied intent to create an implied cause of action.³⁹

The court also found that to allow a private cause of action was consistent with the underlying purposes of the legislative scheme and that such a cause of action was not one traditionally relegated to state law. In short, the *Tallarico* court found that the ACAA provided a private cause of action.⁴⁰

The same reasoning emanating from *Cort v. Ash* and *Tallarico v. Trans World Airlines, Inc.*, was followed by the Fifth Circuit in *Shinault v. American Airlines, Inc.*⁴¹ While the New Jersey District Court in *Waters v. Port Authority of New York & New Jersey*⁴² points out that it is still unsettled whether 49 U.S.C. § 41310(a) (the former § 404(a) of the FAA) provides a private cause of action, it followed *Tallarico* and *Shinault* in holding that 49 U.S.C. § 41705(a) (ACAA) does create a private cause of action.

After it seemed that the issue was settled, the U.S. Supreme Court handed down *Alexander v. Sandoval*,⁴³ apparently clarifying, or retreating from, the opinion in *Cort v. Ash*. In *Sandoval* the Court, in a 5 to 4 decision, explained that the four factors to be considered in *Cort v. Ash* are not all to be given the same weight. The correct analysis is whether Congress intended to create a private cause of action, and in that analysis the other three factors are only to be used to help understand the clear meaning of the statute's text.⁴⁴

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 569-70.

⁴⁰ *Id.* at 570.

⁴¹ *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796, 800 (5th Cir. 1991).

⁴² *Waters v. Port Auth. of N.Y. & N.J.*, 158 F. Supp. 2d 415, 430-32 (D.N.J. 2001).

⁴³ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

⁴⁴ *Id.* at 287-88.

Taking guidance from *Cort v. Ash* and *Sandoval*, one court held that an air carrier's failure to have a Complaint Resolution Officer present at all times, in violation of Section 382.65 of the applicable regulations effecting the ACAA, did not "state a claim upon which relief may be granted in the federal courts under the ACAA."⁴⁵

While *Sandoval* was not an ACAA case, the Eleventh Circuit followed *Sandoval* in deciding whether an implied private cause of action was available under the ACAA. In *Love v. Delta Air Lines, Inc.*,⁴⁶ the district court considered *Sandoval*, but chose to follow *Tallarico* in finding the existence of a private cause of action under the ACAA. The Eleventh Circuit Court of Appeals reversed. The Eleventh Circuit applied the analysis in *Sandoval*, rather than *Cort v. Ash*, and concluded that Congress did not intend to create a private cause of action when it enacted the ACAA.⁴⁷

Love is the most recent case on the issue, and it is grounded on a perceived evolution of the United States Supreme Court's holdings on implied private rights of action. So, while the Supreme Court has not addressed the issue in the context of the ACAA, it seems that if there is to be a private cause of action under the ACAA it will have to be the result of further legislation by Congress. Given the original legislative history of the ACAA, it would not be surprising for Congress to address the issue. Nonetheless, absent a reversal of *Love* by the Supreme Court or new legislation by Congress, the following discussion of particular rights under the ACAA may be only historical.

VI. THE ACAA MAY PROVIDE CERTAIN REMEDIES

Given the fact that the ACAA does not expressly provide a private cause of action, and the fact that no particular remedies are addressed in the ACAA, there are a number of cases in which courts have been forced to address the question of exactly which remedies are available to a private litigant.

Courts that determined, or assumed, that the ACAA provided a private cause of action had no difficulty allowing compensatory damages.⁴⁸ The most complete discussion of the develop-

⁴⁵ *Deterra v. Am. W. Airlines, Inc.*, 226 F. Supp. 2d 298, 312 (D. Mass. 2002).

⁴⁶ *Love v. Delta Air Lines, Inc.*, 310 F.3d 1347, 1350 (11th Cir. 2002).

⁴⁷ *Id.* at 1351, 1360.

⁴⁸ See e.g., *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796 (5th Cir. 1991); *Tallarico v. Trans World Airlines*, 881 F.2d 566, 570-71 (8th Cir. 1989); *Am. Disabled for*

ment of the rationale by which implied rights are identified under federal statutes is found in *Shinault*. That discussion is most aptly summarized by the following quote contained therein: "The existence of the statutory right implies the existence of all necessary and appropriate remedies."⁴⁹

Similarly, the courts have had little trouble recognizing a private cause of action for emotional distress.⁵⁰ There is one exception. The Utah district court, in *Americans Disabled For Accessible Public Transportation (ADAPT), Salt Lake Chapter v. SkyWest Airlines, Inc.*⁵¹ declined to follow *Tallarico*. Instead, it found that the ACAA was to be read *in pari materia* with the Rehabilitation Act.⁵² Since section 504 of the Rehabilitation Act did not provide for emotional distress damages, and since the ACAA was viewed by this court to be simply an extension of section 504 to include air carriers generally, the court concluded that the ACAA did not provide for emotional distress damages.⁵³ Since both the Eighth Circuit in *Tallarico* and the Fifth Circuit in *Shinault*, held that emotional distress damages are available, it seems that the weight of authority is on the side of allowing emotional distress damages under the ACAA.

Punitive damages, on the other hand, are another question. Presently, no court has allowed for the recovery of punitive damages under the ACAA. At the same time, however, there is no clear ruling that prohibits the recovery of punitive damages under the ACAA. In *Tallarico* neither the district court nor the court of appeals directly addressed the question of whether punitive damages would be allowed under the ACAA. Instead, they both concluded that there was insufficient evidence of "oppression, malice, gross negligence, willful or wanton misconduct, or reckless disregard for the rights of the plaintiff"⁵⁴ in order to raise the issue.⁵⁵ In *SkyWest Airlines, Inc.*, the case that declined to follow *Tallarico*, the court held that the ACAA clearly does not

Accessible Public Transp. v. SkyWest Airlines, Inc., 762 F. Supp. 320 (D. Utah 1991).

⁴⁹ *Shinault*, 936 F.2d at 804 (quoting *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)).

⁵⁰ *See id.* at 803-05; *Tallarico*, 881 F.2d at 570.

⁵¹ *SkyWest Airlines*, 762 F. Supp. at 326-27.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Tallarico*, 881 F.2d at 571.

⁵⁵ *Id.* at 571-72.

allow for punitive damages.⁵⁶ That court's rationale, however, may be questionable in light of the extent to which the circuit courts are taking a different approach.

In *Shinault*, the district court held that punitive damages were not recoverable under the ACAA. The court of appeals, in turn, disagreed with the district court's reasoning, but declined to address the issue of punitive damages because the plaintiff had not alleged the type of conduct necessary to recover punitive damages.⁵⁷ More recently, in *Rivera v. Delta Air Lines, Inc.*,⁵⁸ the Pennsylvania district court took the same approach. It avoided the issue of whether punitive damages are available under the ACAA because the plaintiff had not established the necessary factual predicate to raise that issue.⁵⁹

Similarly, the Vermont district court in *Price v. Delta Air Lines, Inc.*⁶⁰ made no direct ruling on the issue, leaving the door open for the plaintiff to present additional evidence. In so doing, the court observed that there is some precedent for a federal standard relating to the award of punitive damages for violating the Federal Aviation Act. Punitive damages were found available following proof of conduct evidencing "evil motive, actual malice, deliberate violence or oppression" in violation of the Federal Aviation Act's provisions prohibiting discrimination by air carriers.⁶¹

In the most recent case of *DeGirolamo v. Alitalia-Linee Aeree Italiane, S.p.A.*,⁶² the New Jersey district court seemed to assume that punitive damages are available under the ACAA. Without directly addressing the issue of whether punitive damages may be awarded under the ACAA, however, this court, too, simply held that the plaintiff had failed to allege or prove facts that would support an award of punitive damages.⁶³ While the ACAA is, itself, silent on the issue of punitive damages, and presently no case allows punitive damages under the ACAA, it appears

⁵⁶ *Am. Disabled for Accessible Public Transp. v. SkyWest Airlines, Inc.*, 762 F. Supp. 320, 326-27 (D. Utah 1991).

⁵⁷ *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796, 805 (5th Cir. 1991).

⁵⁸ *Rivera v. Delta Air Lines, Inc.*, No. Civ-A 96-CV-1130, 1997 WL 634500 (E.D. Pa. Sept. 26, 1997).

⁵⁹ *Id.* at *7.

⁶⁰ *Price v. Delta Air Lines, Inc.*, 5 F. Supp. 2d 226 (D. Vt. 1998).

⁶¹ *Id.* at 238 (citing *Nadar v. Allegheny Airlines, Inc.*, 512 F.2d 527, 549 (D.C. Cir. 1975), *rev'd on other grounds*, 426 U.S. 290 (1976)).

⁶² *DeGirolamo v. Alitalia-Linee Aeree Italiane*, 159 F. Supp. 2d 764 (D.N.J. 2001).

⁶³ *Id.* at 769.

that the test, when ultimately reached, will be whether punitive damages are "necessary and appropriate" remedies in order to fulfill the intent of the statute.⁶⁴

With respect to attorney's fees as damages recoverable under the ACAA, almost no authority exists. What little authority there is, clearly states that attorney's fees are not recoverable.⁶⁵ In *Rivera v. City of Philadelphia*,⁶⁶ the court found that Congress has reserved to itself the policy decision regarding whether attorney's fees can be recovered. Congress declined to address the issue, therefore attorney's fees are not recoverable by the prevailing party under the ACAA.⁶⁷

The final remedy to discuss is injunctive relief. In *Shinault*, the district court denied injunctive relief under the doctrine of primary jurisdiction.⁶⁸ The Fifth Circuit defines that doctrine as follows:

When legal disputes develop that directly affect an industry subject to regulation, the need arises to integrate the regulatory agency into the judicial decision making process. One method to accomplish integration is to have an agency pass in the first instance on those issues that are within its competence. In short, the agency should have the first word.⁶⁹

While noting that this opinion did not constitute a "blanket proscription on judicially issued injunctions under the ACAA," the court nonetheless declined to address any prospective relief, leaving that to the Department of Transportation.⁷⁰

Other courts have not followed the Fifth Circuit's lead in this regard. In *Rowley v. American Airlines, Inc.*, the Oregon district court held that the Department of Transportation did not have primary jurisdiction over a disabled passenger's claim against American Airlines for injunctive relief under the ACAA.⁷¹ Jan Rowley was a person with impaired mobility. She alleged that: the air carrier failed to provide her with an aisle chair; she was not given adequate assistance; her seat had no moveable arm-

⁶⁴ See *Shinault v. Am. Airlines, Inc.*, 936 F.2d 796, 804 (5th Cir. 1991).

⁶⁵ *Rivera v. City of Philadelphia*, No. Civ.-A 97-CV-1130, 1998 WL 67538, at *2 (E.D. Pa. Feb. 19, 1998).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Shinault*, 936 F.2d at 804-05.

⁶⁹ *Id.* (citing *Miss. Power & Light Co. v. United Gas Pipe Line*, 532 F.2d 412, 417 (5th Cir. 1976)).

⁷⁰ *Id.* at 805.

⁷¹ *Rowley v. Am. Airlines, Inc.*, 875 F. Supp. 708, 714 (D. Or. 1995).

rest; and she was left unattended for more than an hour in a chair from which she was not independently mobile.⁷² Although the opinion clearly states that she sought injunctive relief under the ACAA, it does not indicate what particular sort of injunctive relief she sought. Nonetheless, the Oregon district court took a different tactic with respect to the doctrine of primary jurisdiction. It chose to follow a Ninth Circuit opinion that stated:

The doctrine of primary jurisdiction "is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." It "comes into play whenever [judicial] enforcement of the claim requires the resolution of issues which . . . have been placed within the special competence of an administrative body." In deciding whether to apply the doctrine in a particular case, courts should be guided by two principles: the importance of uniformity of regulation and the need for specialized knowledge. We hold that no purpose would be served by invoking the doctrine of primary jurisdiction in this case. By promulgating and periodically revising a general rule, the Commission has applied its special expertise to the problem of terminal areas and has insured uniformity in the regulations of terminal area services. The district court's application of the general rule to the facts of this case was a mechanical act, requiring no special administrative expertise.⁷³

Following that rule, the court in *Rowley* found that because the Department of Transportation had promulgated regulations applicable to the case (14 C.F.R. § 382.1) injunctive relief would be an appropriate judicial remedy.⁷⁴

In the case of *Gottlieb v. American Airlines, Inc.*,⁷⁵ the Pennsylvania district court denied the defendant's motion to dismiss under the doctrine of primary jurisdiction. Plaintiff Gottlieb alleged violations of the ACAA and specific regulations promulgated thereunder.⁷⁶ Distinguishing *Shinault*, where the court based part of its decision on the fact that the plaintiff was unlikely to encounter the same circumstances again, this court noted that Gottlieb was arguing that he might encounter the same circumstances again. In the final analysis, the court rea-

⁷² *Id.* at 710.

⁷³ *Id.* at 713-14 (quoting *Transway Corp. v. Hawaiian Express Serv., Inc.*, 679 F.2d 1328, 1332 (9th Cir. 1982)).

⁷⁴ *Id.* at 714.

⁷⁵ *Gottlieb v. Am. Airlines, Inc.*, No. Civ. A 94-4933, 1995 WL 41345 (E.D. Pa. Feb. 2, 1995).

⁷⁶ *Id.* at *2.

soned that it would not apply the doctrine of primary jurisdiction because it was "unable to conclude that the Plaintiff can prove no set of facts that could entitle him to injunctive relief of a type that does not intrude upon the agency's expertise or disrupt the agency's regulatory scheme."⁷⁷ Injunctive relief will be addressed by the court, or deferred to allow the DOT to act, on a case-by-case basis.

VII. DEPARTMENT OF TRANSPORTATION ENFORCEMENT OF THE ACAA

The impact of the ACAA is not confined to civil litigation. Its impact may be as great or greater in the administrative environment of enforcement proceedings conducted by the Department of Transportation (DOT). Enforcement proceedings result from both independent investigations conducted by the DOT and as a result of formal complaints filed by citizens.⁷⁸ Enforcement proceedings may result in injunctions and civil penalties (fines). The published DOT orders contain more examples of complaints that were dismissed, for a variety of reasons, than examples of sanctions. When the DOT does sanction an air carrier, however, the sanctions may be significant. The following paragraphs discuss complaints that were dismissed, followed by a discussion of complaints and investigations that resulted in sanctions.⁷⁹

The first example of an order of dismissal under the regulations implementing the ACAA resulted from the formal complaint lodged by a Mr. Robert Greenberg against American Airlines.⁸⁰ In that complaint, Mr. Greenberg contended that he was discriminated against, citing 14 C.F.R. § 382.3(c), when the airline refused to allow him to sit in an emergency exit row because of his blindness. The DOT had already established a policy of not instituting enforcement actions when airlines refused to seat blind passengers in exit row seats. Finding that the air-

⁷⁷ *Id.*; See generally *Am. Disabled for Accessible Public Transp. v. SkyWest Airlines, Inc.*, 762 F. Supp. 320, 327 (D. Utah 1991).

⁷⁸ See generally *Greenberg v. Am. Airlines, Inc.*, No. 45335, 1988 WL 239227 (D.O.T. Sept. 16, 1998); 14 C.F.R. § 302.201 (2002).

⁷⁹ While foreign carriers may not fall within the ambit of the regulations promulgated to implement the ACAA, similar treatment and sanctions may be visited on foreign air carriers pursuant to 49 U.S.C. § 41310. See *Lufthansa German Airlines Violation*, Consent Order No. 98-9-23, 1998 WL 652072 (D.O.T. Sept. 23, 1998); *Alitalia Violation*, Consent Order No. 98-12-19, 1998 WL 865086 (D.O.T. Dec. 15, 1998).

⁸⁰ *Greenberg*, 1988 WL 239227, at *6.

lines' policy, in this situation, was consistent with the Federal Aviation Administration's own Advisory Circular 120-32 issued on March 3, 1977, the DOT dismissed Mr. Greenberg's "Third Party Complaint."⁸¹

Joseph Sontag and Nancy Kruger filed a complaint against Simmons Airlines, Inc. alleging a violation of section 382.14(b). These individuals were legally blind. They were upset because the airline did not allow them to keep long, white flexible canes with them at their seats. Section 382.14(b) requires carriers to permit passengers to keep their canes near them so long as it can be done in a safe manner. The DOT reviewed these particular complaints and concluded that because of the configuration of the particular aircraft, in this instance a Shorts 360, the canes could not be safely stowed as requested by the passengers. It was not possible to safely stow the canes underneath their seats, either perpendicular to the aisle or parallel to the aisle and the canes could not have been safely placed between the seats and the fuselage. Accordingly, the DOT found that an airline could require a passenger's cane to be stored overhead, over the passenger's objection, in the Shorts 360 aircraft.⁸²

Norberta Vasquez lodged a formal complaint against Southwest Airlines Company when she was refused boarding, unaccompanied, on a flight. She used a wheelchair and suffered from cerebral palsy. Ms. Vasquez's story directly contradicted the testimony of the Southwest Airlines employees. The dispute involved the information given to, or not given to, the airline employees who concluded that Ms. Vasquez was not sufficiently able to assist herself. The airline had safety concerns, on which it was forced to act at the gate. The DOT defined the problem as a question of whether Ms. Vasquez was a "qualified handicapped person" because there was a fact question as to whether she was "able to comply with reasonable requests of airline personnel." Partly because of the great discrepancy between the testimony of the interested parties, the DOT determined that it was "not in the public interest" to pursue an enforcement action. The complaint was dismissed.⁸³

While attempting to board a Southwest Airlines flight on January 28, 1993 as a standby passenger, Kathy Hacker perceived

⁸¹ *Id.*

⁸² *Sontag v. Simmons Airlines, Inc.*, No. 45316, 1989 WL 255671, at *1 (D.O.T. Feb. 3, 1989).

⁸³ *Id.* at *4; *Vasquez v. Southwest Airlines Co.*, No. 45974, 1989 WL 255895, at *6 (D.O.T. June 9, 1989).

that she was not boarded because she was confined to a wheelchair. The airline, on the other hand, indicated that a number of standby passengers, including Ms. Hacker, were not accommodated because it was necessary to close the doors to achieve an on time departure. While the DOT indicated that it might well violate section 382.7(a)(3) if an airline gave preference to an ambulatory standby passenger over a wheelchair-bound standby passenger, there was no clear evidence that this had taken place.⁸⁴ The order also dismissed a claimed violation of section 382.65(a)(5)(iii). That alleged violation involved the carrier's obligation to provide a Complaint Resolution Officer (CRO) pursuant to the terms of the regulations. The regulations require the airline to have, located at the airport and available, a person knowledgeable to address issues raised by handicapped individuals. That group of regulations also contains additional requirements to respond to a complaint in writing within a particular period of time and in a particular manner. The DOT did not take action against the airline in this circumstance because the airline had been in contact with Ms. Hacker in some form, if not exactly in the form prescribed by the regulations, and because the airline did not have a history of similar violations.⁸⁵

Adam and Juliana Seligman both have Tourette's syndrome. When they sought to fly on a Northwest Airlines flight on April 26, 1994, they came to the airport early, requested special seating, and made efforts to inform the airline about their condition and otherwise smooth the process of flying with that airline. When their situation was brought to the attention of the captain and the crew, the captain obtained limited information, in the short time available, and the captain directed the customer service supervisor to remove the Seligmans from the aircraft. In the terminal, the situation was further discussed and they were re-boarded during the general boarding process. Their complaint was that they were not treated properly and that it was improper for the captain to question them concerning their condition. In its order of dismissal, the DOT specifically sanctioned the captain's "brief investigation into whether particular passengers with Tourette's syndrome present real safety con-

⁸⁴ Hacker v. Southwest Airlines Co., No. 48625, 1993 WL 393372, at *2 (D.O.T. Oct. 5, 1993).

⁸⁵ *Id.* at *3.

cerns.”⁸⁶ The order expressly finds no violation of section 382.7 (general prohibition against discrimination) and no violation of section 382.31 (refusal of transportation).⁸⁷

A case was dismissed against American Airlines, Inc., where the complainant alleged that allowing smoking in the Admirals Club violated a passenger’s rights because he was hypersensitive to environmental tobacco smoke.⁸⁸ The allegation had been founded on the general prohibition against discrimination found in section 382.7. Since the DOT had never banned smoking at airports and specifically permitted smoking on international flights, Mr. Williams’ complaint was dismissed.⁸⁹

The same Mr. Williams, now with a companion, Patricia L. Young, later sought a revocation of Delta’s air carrier certificate on the same basic theory he previously alleged against American Airlines. This time, he alleged that allowing smoking at airport facilities rendered those facilities inaccessible to people who were hypersensitive to tobacco smoke. The result in this case was the same: dismissal of the complaint.⁹⁰

Possibly more instructive, are the published orders in which the DOT has sanctioned various air carriers in the process of enforcing the ACAA. Almost all of the orders containing a sanction begin by ordering the airline to cease and desist from any further violations of the regulation at issue. Additionally, the DOT has the power to assess a fine of \$1,100 as a civil penalty for each infraction.⁹¹ Also, a formal complaint lodged by a citizen, or a series of such complaints, may lead the DOT to initiate its own formal investigation, which in turn may lead to further civil penalties. Thus, the published orders imply that the airlines have had the greatest difficulty in complying with the ACAA in its regulation of the treatment of wheelchair-bound passengers.

John D. Del Colle alleged violations of sections 382.21 and 382.61 for failure to provide a reservation system capable of assigning seats with moveable armrests and failure to adequately train employees charged with accommodating the needs of

⁸⁶ *Seligman v. Northwest Airlines, Inc.*, No. 49532, 1994 WL 716691, at *3 (D.O.T. Dec. 28, 1994).

⁸⁷ *Id.*

⁸⁸ *Williams v. Am. Airlines, Inc.*, No. 49692, 1994 WL 716681, at *1 (D.O.T. Dec. 28, 1994).

⁸⁹ *Id.* at *4.

⁹⁰ *Williams v. Delta Air Lines, Inc.*, No. OST 2000-7891, 2001 WL 273258, at *3 (D.O.T. Mar. 12, 2001).

⁹¹ 49 U.S.C. § 46301 (2000); 14 C.F.R. § 383 (2002).

handicapped individuals. Mr. Del Colle was a wheelchair user. He had experienced one particular airline's failure to efficiently identify and assign to him a seat with a removable armrest in violation of section 382.45. While the DOT fined the airline \$3,000, it appears that the fine was small because the airline had already installed a computerized system which allowed for the identification and assignment of seats with moveable armrests.⁹²

Another airline was fined \$25,000 when it failed to provide prompt assistance to wheelchair passengers within its terminal facilities. The airline was found to have violated sections 382.31, 382.39, 382.41, 382.43, 382.45, 382.53, 382.61, and 382.65. The airline had responded by spending large amounts of money to improve its services to disabled passengers. It also purchased additional wheelchairs and took other steps to rectify the situation. Of the \$25,000 fine, the order expressly allowed the airline to offset \$15,000 of the fine by using that money to purchase larger wheelchairs with adjustable armrests.⁹³

Arthur Moody complained that a particular airline had violated several regulations involving treatment of wheelchair travelers. Part of his complaint was that the wheelchairs provided did not have hand rims, allowing the occupant to be self-propelled. The result was that a wheelchair traveler could be stranded in the sense that he could be left unattended in a wheelchair in which he is not independently mobile for more than thirty minutes in the gate area. He also alleged that the airline failed to make a Complaint Resolution Officer available and failed to provide a timely written response to his complaints. Ultimately, this airline, too, was fined \$25,000, of which \$15,000 could be offset by purchase of wheelchairs. This decision involved violations of sections 382.39(a)(1) and (a)(3).⁹⁴

Sherry Layne traveled with a guide dog due to her blindness. A problem developed when the passenger next to her refused to sit next to a dog. The airline resolved the issue by moving Ms. Layne and her dog from her first class seat to a coach seat where the neighboring passengers did not object. The airline was fined \$1,000 for violation of section 382.55. The order offers

⁹² Del Colle v. Continental Airlines, No. 49619, 1994 WL 716698, at *2 (D.O.T. Dec. 28, 1994).

⁹³ Am. Airlines, Inc. Violations, No. 95-9-1, 1995 WL 518759 (D.O.T. Sept. 1, 1995).

⁹⁴ Moody v. Delta Air Lines, Inc., No. 49744, 1995 WL 644268, at *5 (D.O.T. Nov. 3, 1995).

the following practical advice for handling this problem if it arises in the future:

If another passenger objects to the presence of a service animal, the carrier is obliged to advise that passenger of the rights of the disabled traveler and, if necessary, find an alternative seat for the objecting passenger or remove that person from the aircraft.⁹⁵

Wheelchair passengers are entitled to be treated just like ambulatory passengers when going through the security screening process. At Dulles International Airport, disabled travelers complained when they were required to be subjected to a private screening simply because they were in a wheelchair. Even though the airline was fulfilling its security screening function through an independent contractor, it was the airline that was subject to a \$50,000 fine, even though evidence was presented to the effect that many wheelchair passengers in the past had requested private screening. The order indicated that it would be permissible to *offer* private screening, but impermissible to *require* private screening.⁹⁶ The airline was found to have violated section 382.49.⁹⁷

One airline was fined \$50,000 for a series of problems with handling wheelchair passengers. The problems included violations of sections 382.39(a), 382.41(e)(2) and 382.65. All of these violations amounted to violation of the ACAA, resulting in the \$50,000 fine. Another airline was fined \$25,000 for violation of sections 382.41 and 382.65. It was, however, given the opportunity to offset \$10,000 of that penalty through the purchase of new hydraulic lift boarding chairs for disabled passengers.⁹⁸

A complaint involving a wheelchair-bound passenger and the airline's refusal to board him arose when the airline's gate agent failed to accurately ascertain the passenger's situation with respect to his ability to assist in his own evacuation of the aircraft should an emergency evacuation be necessary. As it turned out, the passenger would be qualified to fly unaccompanied, but the gate agent determined otherwise at the time of the proposed boarding. This constituted a violation of section 382.35(b)(3). The airline was fined \$5,000 with an allowance of \$2,500 toward

⁹⁵ Layne v. Am. W. Airlines, Inc., No. OST-99-5135, 1999 WL 759702, at *2 (D.O.T. Sept. 28, 1999).

⁹⁶ United Airlines Violation, No. 2000-1-5, 2000 WL 4959, at *2 (D.O.T. Jan. 5, 2000).

⁹⁷ *Id.*

⁹⁸ Maxwell v. Delta Air Lines, Inc., No. OST-00-7591, 2001 WL 109519, at *3 (D.O.T. Feb. 7, 2001).

the purchase of new wheelchairs or similar equipment, as a potential set off.⁹⁹

VIII. DEFENSES TO ACAA CLAIMS GENERALLY

Successful defenses to claims of discrimination under the ACAA fall in two general categories. Defendants can appropriately avoid liability if the circumstances at issue do not fall within the regulations. Additionally, within the regulations, a defendant can avoid compliance if it would compromise safety.

In some cases, the defense was raised that the plaintiff was not a qualified handicapped individual entitled to the benefits of the statute.¹⁰⁰ Another "definitional" sort of defense can be interposed if the defendant is not an air carrier or is not an air carrier subject to the provisions of this statute.¹⁰¹ Similarly, if the offensive behavior is not discriminatory the carrier may avoid liability.¹⁰² Furthermore, the Warsaw Convention, when it applies, can preempt the ACAA.¹⁰³

The regulations expressly authorize allowing an airline to refuse to transport any person on the basis of safety, including both safety of flight¹⁰⁴ and the passenger's own safety.¹⁰⁵ If this authority is properly exercised, the airline may refuse transpor-

⁹⁹ Atl. Southeast Airlines Violation, No. 2001- 8-17, 2001 WL 987943 (D.O.T. Aug. 21, 2001).

¹⁰⁰ See *Bower v. Fed. Express Corp.*, 96 F.3d 200, 206 (6th Cir. 1996), *remanded*, 156 F. Supp. 2d 678 (W.D. Tenn. 2001) (whether a disabled employee can be a qualified individual); *Squire v. United Airlines, Inc.*, 973 F. Supp. 1004, 1009 (D. Colo. 1997) (whether the ACAA protects job applicants as well as fare paying passengers/customers); *Tall Club of Silicon Valley v. Am. Airlines, Inc.*, 2000 WL 868524, at *2 (N.D. Cal. June 19, 2000) (whether extreme height can be a qualifying disability).

¹⁰¹ See *Bower*, 156 F. Supp. 2d at 689 (whether FedEx is exempt by reason of an express exemption); *Wilson v. United Air Lines, Inc.*, No. 94 C 5411, 1995 WL 530653, at *2 (N.D. Ill. Sept. 7, 1995) (whether the ACAA applies to ground service providers); see also *United Airlines Violation*, Order 2000-1-5, 2000 WL 4959, at *2 (D.O.T. Jan. 5, 2000) (fining the airline and not its contractor for security screening violations).

¹⁰² *Deterra v. Am. W. Airlines, Inc.*, 226 F. Supp. 2d 298, 312 (D. Mass. 2002).

¹⁰³ *Turturro v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001); *Brandt v. Am. Airlines, Inc.*, No. C 98-208951, 2000 WL 288393, at *3 (N.D. Cal. Mar. 13, 2000).

¹⁰⁴ 14 C.F.R. § 382.31(d) (2002); 49 U.S.C. § 44902(b) (2002); see *Price v. Delta Air Lines, Inc.*, 5 F. Supp. 2d 226, 223 (D. Vt. 1998).

¹⁰⁵ 14 C.F.R. § 382.53(b)(2) (2002); *Newman v. Am. Airlines, Inc.*, 176 F.3d 1128, 1131 (9th Cir. 1998).

tation to a qualified disabled passenger without violating the regulations.¹⁰⁶

It should also be noted that these regulations do not establish strict liability.¹⁰⁷ While an unreasonable delay in providing required services may be a violation of the regulations, it is a perfectly good defense to show that the delay was reasonable.¹⁰⁸ This concept applies most frequently and most aptly to the provision of wheelchair services to handicapped passengers. Similarly, the standard concept of "proximate cause" can come into play. If a delay in provision of services, or a failure to provide services, is in no way the proximate cause of a plaintiff's injuries, the alleged failure to comply with the regulations will not lead inevitably to liability.¹⁰⁹

The defenses of "statute of limitations" and pre-emption addressed by the Warsaw Convention are discussed in more detail in the next two sections.

IX. STATUTE OF LIMITATIONS DEFENSES IN THE CONTEXT OF THE ACAA

In the civil litigation arena, some plaintiffs have found their claims time barred. Sadie Pearl Vaughn sued Northwest Airlines, Inc. because of the way she was treated on October 11, 1992. She suffered from fibromyalgia, a connective tissue disorder. She came to the airport with a suitcase, box, garment bag, purse satchel, and a paper bag containing her coat and umbrella. She notified Northwest that she was under a doctor's care and requested assistance with her baggage. Northwest allegedly told her that unless she paid a \$45 fee, she would have to carry one of the items on board with her. She was not able to make the payment. In the process of carrying and stowing her baggage, she asserts that she "injured her back, chest, neck, arm, hand, and right shoulder and permanently injured her left

¹⁰⁶ 14 C.F.R. § 382.31(d) (2002); *Price*, 5 F. Supp. 2d at 233; *Greenberg v. Am. Airlines, Inc.*, No. 45335, 1988 WL 239227, at *5 (D.O.T. Sept. 16, 1998). See generally *Anderson v. USAIR, Inc.*, 818 F.2d 49, 53 (D.C. Cir. 1987).

¹⁰⁷ *Adiutori v. Sky Harbor Int'l Airport*, 880 F. Supp. 696, 701 (D. Ariz. 1995) ("The Court finds that the plaintiff has not met his burden of establishing a violation of ACAA, which the Court notes is not a strict liability statute, based upon his argument that he had to wait for a wheelchair after deplaning the America West flight.")

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 703; *Glatfelter v. Delta Air Lines, Inc.*, 558 S.E.2d 793, 797 (Ga. Ct. App. 2002).

shoulder.”¹¹⁰ Exactly two years later Vaughn filed suit, alleging discrimination under the ACAA.¹¹¹

The Minnesota Supreme Court found no limitations provision provided by Congress with respect to Vaughn's ACAA claim. It sought, then, to find the most closely analogous or appropriate limitations period under the law of the forum state. Selection of the state limitations period was held to be a matter of federal law, but the court held that state law governed the length of the selected limitations period. Finding that the Minnesota Human Rights Act contained the most analogous cause of action in Minnesota state law, the court applied its one-year statute of limitations. In a lengthy discussion, the court distinguished other situations in which various courts have applied a state's residual statute of limitations for personal injuries. Based on this reasoning, the Supreme Court of Minnesota dismissed Vaughn's case as untimely.¹¹²

In *Squire v. United Airlines, Inc.*,¹¹³ various job applicants alleged that the air carrier's refusal to hire them as flight officers due to radial keratotomy eye surgery violated the ACAA. That court, too, looked for the most analogous state statute of limitations, finding that “on April 15, 1986, the Colorado statute of limitations for claims based on federal statutes was two years and the ‘residuary’ statute of limitations for which no cause of action was specified was three years.”¹¹⁴ Two of the three plaintiffs filed their complaints at least seven years after the claims had accrued. So, without deciding which statute of limitations to employ, the court found that these plaintiffs' claims were time barred.¹¹⁵

¹¹⁰ Vaughn v. Northwest Airlines, Inc., 558 N.W.2d 736, 738 (Minn. 1997).

¹¹¹ *Id.* This opinion is also of interest for its in-depth discussion of the quantum of duty owed to a disabled person by an air carrier. The court finds that an air carrier must use reasonable care to provide additional services to a disabled person if the carrier is made aware of the disability and the need for special assistance, and can foresee the harm that might result from lack of assistance. The court does not hold the air carrier to a higher standard of care, but rather requires the air carrier to provide additional services, contrary to the report of at least one commentator. See Erin M. Kinahan, *Despite the ACAA, Turbulence Is Not Just In the Sky for Disabled Travelers*, 4 DEPAUL J. HEALTH CARE L. 397 (Winter-Spring 2001).

¹¹² Vaughn, 558 N.W.2d at 742.

¹¹³ Squire v. United Airlines, Inc., 973 F. Supp. 1004, 1006 (D. Colo. 1997).

¹¹⁴ *Id.* at 1007.

¹¹⁵ *Id.* at 1007-08.

Based on the *Vaughn* case, it would appear that various statutes of limitations may apply in a given case. No general rule can be stated regarding the amount of time available for filing a claim under the ACAA. The amount of time available will depend on the forum state's law and which particular law the court finds most analogous to the ACAA.

X. PRE-EMPTION OF THE ACAA BY THE WARSAW CONVENTION

An additional defense may arise where claims under the ACAA appear destined to be pre-empted any time a case falls within the parameters of the Warsaw Convention.¹¹⁶

Sidney Brandt boarded a flight from Dallas, Texas to San Francisco, California. It was the last leg on his trip from Winnipeg, Canada to San Francisco, via Calgary and Dallas. He suffered from myasthenia gravis, a condition causing unusual muscle weakness, slow movement, and the need to take medication that must be consumed with food. On this leg, the flight did not provide snacks or any food to coach passengers. After explaining his medical need, he was still denied food by the flight crew. The flight crew also denied him the opportunity to deplane in order to get food while the aircraft was at the gate. Ultimately, the plaintiff deplaned in order to avoid being arrested for causing a disturbance.¹¹⁷ After reviewing the various elements that bring a case within the Warsaw Convention, the court addressed the issue of whether plaintiff's ACAA claims were pre-empted by the Warsaw Convention. Following the case of *El Al Israel Airlines v. Tseng*,¹¹⁸ which held that the Warsaw Convention pre-empted local law claims even when the plaintiff could not establish liability under the Warsaw Convention, the court in *Brandt v. American Airlines*¹¹⁹ concluded that federal discrimination claims under the ACAA were also pre-empted.

¹¹⁶ Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C.A. § 40105 (West 2001) [hereinafter Warsaw Convention]. "Warsaw Convention" here refers to the original convention and all subsequent modifications.

¹¹⁷ *Brandt v. Am. Airlines, Inc.*, No. C 98-2089 SI, 2000 WL 288393, at *3 (N.D. Cal. Mar. 13, 2000).

¹¹⁸ *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999).

¹¹⁹ *Brandt*, 2000 WL 28393, at *4.

In the *Turturrow v. Continental Airlines*¹²⁰ case, the Southern District of New York faced problems arising from another passenger's difficulties with medication. Joan Turturrow was under the treatment of a doctor who prescribed Xanax for anxiety. This medication was particularly important since she had a long-standing fear of flying. While waiting to board an international flight, her purse was stolen. She later discovered that her Xanax had been in the stolen purse, forcing her to face the 5-1/2 hour flight without medication. She then asked to be deplaned. After her requests met with repeated refusals, she used her cell phone to call "911." The aircraft was ultimately stopped and she was deplaned. She sought recovery under the ACAA, in addition to other theories. Since it was an international flight, from Newark to Costa Rica, the Warsaw Convention applied. While most of the court's effort was devoted to determining that she could not recover under the Warsaw Convention, the court also concluded that the plaintiff's ACAA claims were pre-empted.¹²¹ The court reached its result in spite of the fact that the Wendell H. Ford Aviation Investment and Reform Act for the Twenty-First Century,¹²² had just extended the application of the ACAA to foreign carriers. The court holds that the ACAA functions "subject to bilateral obligations" such as the Warsaw Convention.¹²³

XI. PRE-EMPTION OF STATE LAW CLAIMS BY THE ACAA

Pre-emption has been raised in a variety of different fashions relating to the ACAA. It can be the focus of legal analysis if the ACAA is pre-empted by the Warsaw Convention as discussed above; it can also be at issue if the ACAA pre-empts state law claims. Following passage of the ACAA, defendants argued that the ACAA pre-empted state law tort claims arising out the same occurrence giving rise to the ACAA claim.

In *Williams v. Express Airlines I, Inc.*,¹²⁴ the plaintiff alleged that he was falsely imprisoned when he was stopped from boarding a flight on which he had a reserved seat. He also made a separate allegation against another defendant, Northwest Airlines, for having strapped him into an immobile aisle chair, leaving him

¹²⁰ *Turturrow v. Continental Airlines*, 128 F. Supp. 2d 170 (S.D.N.Y. 2001).

¹²¹ *Id.* at 180.

¹²² Pub. L. 106-181, Apr. 5, 2000, 114 Stat. 61 (codified at 49 U.S.C. § 41705(a)).

¹²³ *Id.*

¹²⁴ *Williams v. Express Airlines I, Inc.*, 825 F. Supp. 831 (W.D. Tenn. 1993).

unattended for over thirty minutes in the gate area. He sued both airlines under the ACAA, and also sought to prosecute state tort law false imprisonment claims. Although the court's decision was actually based on pre-emption by the ADA, the ACAA played a part in its reasoning. The court initially denied any pre-emption, but following the United States Supreme Court decision in *Morales v. Transworld Airlines, Inc.*,¹²⁵ the court reconsidered. The ADA does, of course, contain an express pre-emption. That statute states: "(N)o State. . . shall enact or enforce any law, rule, regulation, standard, or other provision, having the force and effect of law relating to rates, routes, or services of any air carrier. . . ." ¹²⁶ Following *Morales*, and its reliance on ERISA cases, this court had little trouble concluding that the plaintiff's false imprisonment claims "relate[d] to" airline "rates, routes, or services." In reaching that conclusion, it further pointed out that "the conduct complained of in both the false imprisonment and ACAA discrimination claims is essentially the same."¹²⁷ Given that context, the court stated that the occurrence fell squarely within the ACAA. That being the case, this court held that the federal law pre-empted the state law claims.

In *Rowley v. American Airlines*,¹²⁸ the plaintiff was a wheelchair-bound passenger who alleged that the air carrier failed to provide her with an aisle chair; she was not assisted to and from her seat; her seat did not have immovable arm rests; and she was left unattended at a baggage claim area for more than an hour in a chair from which she was not independently mobile.¹²⁹ She alleged both claims under the ACAA and state law tort claims for infliction of emotional distress. The defendant countered by arguing that the plaintiff's state law tort claims were pre-empted first by the ADA, and then, by the ACAA. This court, like the *Williams* court, looked to *Morales* for guidance in deciding the case. Employing a more detailed analysis than that contained in *Williams*, the court concluded:

If to allow the tort claims advanced by Rowley under the laws of the States of Oregon and Texas would contravene the goals of

¹²⁵ *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

¹²⁶ 49 U.S.C. § 1305(a)(1), *repealed*, current version at 49 U.S.C. § 41713 (2000).

¹²⁷ *Williams*, 825 F. Supp. at 833.

¹²⁸ *Rowley v. Am. Airlines Inc.*, 875 F. Supp. 708 (D. Or. 1995); *see also* *Rowley v. Am. Airlines, Inc.*, 885 F. Supp. 1406 (D. Or. 1995).

¹²⁹ *Rowley*, 875 F. Supp. at 710.

deregulation or penalize airlines for practices which are accepted forms of price competition and reduction, they are pre-empted by § 1305 of the ADA. However, if Rowley's state law tort claims do not have a significant impact on the ability of an airline to administer services, the state law tort claims relate too tenuously to airline services to be pre-empted under § 1305.¹³⁰

So reasoning, the court concluded that the ADA did not pre-empt Rowley's state law tort claims.

The defendant then argued that the ACAA pre-empted those same claims. The court observed that the ACAA has no express pre-emption language contained within it. Any pre-emption under the ACAA must be implied pre-emption. The implied pre-emption, if any, arises from the ADA. Having already decided that the ADA did not pre-empt Rowley's state law tort claims, the court concluded that the ACAA did not pre-empt her state law tort claims.¹³¹

After the *Rowley* decision was handed down, the United States Supreme Court addressed the issue, again, in the case of *American Airlines, Inc. v. Wolens*.¹³² That case involved a state court challenge to the retroactive changes implemented by the airline with respect to the terms and conditions of its frequent flyer program. The court held that the ADA does not pre-empt state court actions to enforce private contract rights.¹³³ Courts addressing the pre-emption issue relating to the ACAA and the ADA have tended to look to these two United States Supreme Court decisions in *Morales* and *Wolens* for guidance.

In the case of *Knopp v. American Airlines, Inc.*,¹³⁴ the Supreme Court of Tennessee rendered an opinion concerning pre-emption under the ADA. Phyllis Knopp did not receive a requested wheelchair transfer. She then fell from an electric cart used instead of a wheelchair to transport her. She sued in state court on breach of contract and negligence theories and the airline raised pre-emption under the ADA as a defense. Following *Morales* and *Wolens*, the Supreme Court of Tennessee held that Knopp's claims were not pre-empted.¹³⁵

¹³⁰ *Id.* at 712.

¹³¹ *Id.* at 713; *see also* Newman v. Am. Airlines, Inc., 176 F.3d 1128, 1130-31 (9th Cir. 1999).

¹³² *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

¹³³ *Id.* at 220.

¹³⁴ *Knopp v. Am. Airlines, Inc.*, 938 S.W.2d 357 (Tenn. 1996).

¹³⁵ *Id.* at 363.

In *Rivera v. Delta Air Lines, Inc.*,¹³⁶ three passengers ticketed by Delta all requested wheelchair assistance, which they did not receive. Rivera alleged that she tripped and fell as a result of not having wheelchair assistance, leading to personal injury claims, while the two other ladies made only discrimination claims, including claims under the ACAA. The federal district court points out the fact that the lower courts are split on their interpretation of the pre-emption issue. After considering and discussing a great many of the cases mentioned herein, the court ultimately concluded that the negligence claims are not preempted by the ADA or the ACAA.¹³⁷

The Ninth Circuit addressed these issues in the case of *Newman v. American Airlines, Inc.*¹³⁸ Elizabeth Newman was blind and suffered from a heart condition. On a return flight, the airline refused her a seat until she could provide a doctor's certificate approving the flight. She brought suit under the ACAA as well as state tort law. The district court, finding that the ADA preempted her state law tort claims, granted the airline's motion for summary judgment both as to her ACAA claims and her breach of contract claim. The Circuit Court relied on its own *en banc* decision in *Charas v. Trans World Airlines, Inc.*,¹³⁹ in reversing the trial court on the pre-emption issue. Indeed, the Circuit Court reversed the trial court on all issues and remanded the case for further handling.¹⁴⁰

In *Price v. Delta Air Lines, Inc.*,¹⁴¹ the Vermont district court held that state law tort claims were not pre-empted by the ADA. Gregory Price boarded a flight from Burlington, Vermont destined for Miami, Florida with two intermediate stops. Gregory Price was suffering from AIDS and had Kaposi's sarcoma, which caused ulcerated and infected lesions on his legs, which, if not constantly dressed, would emit a foul odor. Ultimately, he was involuntarily deplaned because the flight attendants and passengers were becoming sick and nauseated as a result of the odor. After he succumbed to his disease, his executrix, seeking recovery under the ACAA in addition to various state law tort claims,

¹³⁶ *Rivera v. City of Philadelphia*, No. Civ-A 97-CV-1130, 1998 WL 67538, at *6 (E.D. Pa. Feb. 19, 1998).

¹³⁷ *Id.*

¹³⁸ *Newman v. Am. Airlines, Inc.*, 176 F.3d 1128, 1130-31 (9th Cir. 1998).

¹³⁹ *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) (*en banc*).

¹⁴⁰ *Newman*, 176 F.3d at 1132.

¹⁴¹ *Price v. Delta Air Lines, Inc.*, 5 F. Supp. 2d 226, 236-37 (D. Vt. 1998).

filed the lawsuit. The district court allowed the ACAA claims to proceed along with the state law tort claims, finding no pre-emption. The court relied on *Morales* and *Wolens* as primary guidance in reaching its conclusion.¹⁴²

Similarly, another district court in the Ninth Circuit addressed the pre-emption issue in *Tall Club of Silicon Valley v. American Airlines*, already discussed above. In that case, the Tall Club did not allege any violation of the ACAA or the ADA, but the defendants claimed that those statutes pre-empted the plaintiff's request for an injunction requiring the provision of seats with added legroom for tall people.¹⁴³ Following the authority discussed above, the court held: "Because complete federal pre-emption is so selective and because disability and personal injury are so tenuously related to rates, routes, and service under the ADA, plaintiff should be allowed to return to state court and attempt to litigate its claims in that forum."¹⁴⁴ While none of the courts have been willing to form a general rule, it seems apparent that preemption of state law claims by the ADA and the ACAA will continue to be handled on a case-by-case basis.¹⁴⁵ At the same time, it seems clear that private contract issues will not be pre-empted by the ADA or the ACAA.

XII. APPLICATION OF THE ACAA TO ALL-CARGO CARRIERS

The Sixth Circuit has concluded that an all-cargo carrier fits the definition of "air carrier" within the meaning of the ACAA, bringing all-cargo carriers within the ambit of the ACAA.¹⁴⁶ In the *Bower v. Federal Express Corp.* case, a plaintiff was denied jumpseat privileges due to his use of crutches and leg braces. The court was presented with the question of whether this admittedly disabled person fit within the ACAA in light of the fact that Federal Express was not an "air carrier" in the sense of transporting passengers as its business. At that time, the ACAA defined "air carrier" as "a citizen of the United States undertaking by any means, directly or indirectly, to provide air transpor-

¹⁴² *Id.* at 235.

¹⁴³ *Tall Club of Silicon Valley v. Am. Airlines, Inc.*, 2000 WL 868524, at *2 (N.D. Cal. June 19, 2000).

¹⁴⁴ *Id.* at *6.

¹⁴⁵ *See DeTerra v. Am. W. Airlines, Inc.*, 226 F. Supp. 2d 274, 277-78 (D. Mass. 2002).

¹⁴⁶ *Bower v. Fed. Express Corp.*, 96 F.3d 200, 205-06 (6th Cir. 1996).

tation.”¹⁴⁷ The definition of “air transportation” in turn includes “the transportation of passengers *or property* by aircraft.”¹⁴⁸ Since Federal Express transports property, the court concluded that it is an “air carrier” for purposes of the ACAA. This conclusion was supported by four additional factors: (1) under the previous version of the applicable statute, the same result would be reached since the revision was only a recodification without the intent to make any substantive change; (2) even though the Secretary of the DOT had the authority to exempt Federal Express from section 41705 by the issuance of a certificate under 49 U.S.C. § 41103(d)(1)(B), the Secretary had not chosen to do so; (3) Federal Express does have to comply with certain safety requirements promulgated by the Federal Aviation Administration when carrying passengers; and (4) other Federal Aviation regulations apply to non-revenue passengers.¹⁴⁹

This holding, while not overruled or reversed, may no longer reflect the actual state of affairs with respect to Federal Express due to the reasoning raised by the district court on remand.¹⁵⁰ In that opinion, the court notes that an all-cargo carrier can be exempt from the ACAA pursuant to 14 C.F.R. § 291.31 (1997). It reads as follows:

Each section 41102 or 41103 air carrier providing cargo operations and interstate air transportation is, with respect to such transportation, exempted from the following portions of the Statute only if and so long as it complies with the provisions of this part and the conditions imposed herein, *and to the extent necessary to permit it to conduct cargo operations in interstate air transportation:*

(1) Sections 41310, 41705.¹⁵¹

The district court, then, placed the burden on Federal Express to prove that it fell within the parameters of this regulation.¹⁵² The ACAA, in the final analysis, may or may not apply to an all-cargo air carrier, depending on the extent to which it has complied with the provisions of Part 291.

¹⁴⁷ 49 U.S.C. § 40102(a)(2) (2000).

¹⁴⁸ 49 U.S.C. §§ 40102(a)(23), (25) (2000) (emphasis added).

¹⁴⁹ *Bower*, 96 F.3d at 204-06.

¹⁵⁰ *Bower v. Fed. Express Corp.*, 156 F. Supp. 2d 678, 688 (W.D. Tenn. 2001).

¹⁵¹ *Id.* (citing 14 C.F.R. § 291.31 (1997)) (emphasis added).

¹⁵² *Id.* at 689 (“Therefore, to decide whether Defendant is exempt from the ACAA under section 291.31, the Court must determine which flight deck jumpseats and supernumerary seats, *if any*, could be removed without arresting Defendant’s ability to conduct its cargo operations in interstate air transportation.”).

XIII. APPLICATION OF THE ACAA TO FOREIGN CARRIERS

In *Alino v. Aerovias De Mexico*,¹⁵³ a disabled resident of Miami, Florida alleged discriminatory treatment on an Aero Mexico flight from Cabo San Lucas to Mexico City. The court chose to apply the newer version of the ACAA that expressly applies to any foreign air carrier.¹⁵⁴ The court went on, however, to conclude that the scope of the ACAA did not include this particular case. The ACAA applies to a foreign air carrier when it is providing air transportation.¹⁵⁵ Air transportation is defined as being between two places within the United States, or between a place in the United States and a place outside the United States. Accordingly, the court concluded that the ACAA “does not apply to a foreign air carrier operating a foreign domestic flight that does not travel to a place within the United States.”¹⁵⁶

In another circumstance, while the foreign air carrier had no liability, its domestic code-sharing partner was held liable. In *DeGirolamo v. Alitalia-Linee Aeree Italiane*,¹⁵⁷ the plaintiff was a wheelchair-bound traveler. He sought to travel from Newark to Rome on Alitalia. Alitalia refused to sell him a ticket unless he was accompanied, which in turn would require him to purchase a second ticket. He was forced to fly with a different carrier, purchase a more expensive ticket, purchase a ticket for an attendant, and to depart from a less convenient airport. Alitalia had a code-sharing agreement with Continental Airlines. Pursuant to that agreement, Continental would have flown the flight in question. All of this took place at a time before the ACAA had been amended to expressly include foreign air carriers. Regulations promulgated pursuant to the ACAA expressly prohibited Continental from treating a passenger in the way Mr. DeGirolamo was treated. Specifically, section 382.7¹⁵⁸ prohibits a regulated air carrier from doing something through a contractor that it could not do itself. Continental could not have required a passenger to pay for an attendant if the passenger

¹⁵³ *Alino v. Aerovias De Mexico*, 129 F. Supp. 2d 1341, 1342-43 (S.D. Fla. 2000).

¹⁵⁴ *Id.* at 1344.

¹⁵⁵ *Id.* at 1345 (citing 49 U.S.C. § 41705(a)).

¹⁵⁶ *Id.*

¹⁵⁷ *DeGirolamo v. Alitalia-Linee Aeree Italiane*, 159 F. Supp. 2d 764 (D.N.J. 2001).

¹⁵⁸ 14 C.F.R. § 382 (2002).

believed that he was capable of traveling independently.¹⁵⁹ The court found that under the regulations applicable to Alitalia, Alitalia's "restriction was not 'unreasonable,'" and granted Alitalia's motion for summary judgment.¹⁶⁰ At the same time, applying the different regulations that applied to Continental, the court granted plaintiff's motion for summary judgment against Continental on the count in the complaint alleging a violation of the ACAA.¹⁶¹ This result is notable partly because Continental never saw or spoke to the plaintiff. Alitalia might not receive the same treatment today, now that the ACAA has been amended to expressly apply to foreign air carriers.¹⁶²

XIV. APPLICATION OF THE ACAA TO NON-AIR-CARRIER CONTRACTORS

As noted immediately above, a regulated air carrier cannot avoid liability by delegating some task to an independent contractor. The independent contractor, however, may still be free from liability imposed by regulation. In *Wilson v. United Airlines*,¹⁶³ the plaintiff did not receive the wheelchair service she had requested. She sued the airline, United, and then later amended her complaint to sue ITS, a wheelchair services provider employed by United. The plaintiff alleged that ITS was liable for violating the ACAA. In determining whether ITS falls within the scope of the ACAA, the Court looked to various definitions of air carriers and indirect air carriers. While none of these definitions was contained within the ACAA, they were all definitions in the context of the Federal Aviation Act. The CAP used the following definition: "Indirect air carrier" is an "entity which publicly represents that it engages in air transportation."¹⁶⁴ Four indicia have been identified by various courts to aide in the definition of an indirect air carrier: "1) an 'indirect air carrier' holds itself out to the public that it engages in air transportation; 2) sells flights to the general public; 3) furnishes

¹⁵⁹ 14 C.F.R. § 382.45(c).

¹⁶⁰ *DeGirolamo*, 159 F. Supp. 2d at 767.

¹⁶¹ *Id.* at 769.

¹⁶² For a discussion of what the future may hold for foreign air carriers under the ACAA, see Lawrence Mentz, *Air Carrier Access Act And Foreign Air Carriers: "Handicapping" Regulations*, 15 AIR & SPACE L. 8 (Fall 2000).

¹⁶³ *Wilson v. United Airlines*, No. 94 C 54:1, 1995 WL 530653 (N.D. Ill. Sept. 7, 1995).

¹⁶⁴ *Id.* at *2 (citing *Arkin v. Trans Int'l Airlines, Inc.*, 568 F. Supp. 11, 13 (E.D.N.Y. 1982)).

flights otherwise not serviced by regularly scheduled airlines; or 4) solicits members of the general public to purchase tickets on the flights it arranges.”¹⁶⁵ None of these approaches recognizes ITS as an indirect air carrier. Accordingly, the court dismissed the claim against ITS, holding that it was not subject to the ACAA. It should be noted, however, that United Airlines was potentially liable because it could not do indirectly that which would be a violation if done directly. Furthermore, there was probably an indemnity agreement between ITS and United. Once all is said and done, there may be little value to the fact that ITS was dismissed from the case since the airline may have a non-delegable duty and the contractor may have agreed to indemnify the airline.

XV. ANTICIPATED FUTURE DEVELOPMENTS RELATING TO THE ACAA

There are presently before Congress bills seeking to create what has been called a “Passengers Bill of Rights.”¹⁶⁶ Each version of that proposed legislation addresses the rights of disabled passengers. Some form of passengers’ bill of rights may eventually be enacted. If that happens, the courts may be forced to address the question of which statute takes precedence and whether to construe the two statutory provisions *in pari materia*. Given the trend of legislation in the past two decades, it seems safe to predict that the future will bring increased benefits for handicapped and disabled passengers created by increasing the burden on air carriers to provide those accommodations.

¹⁶⁵ *Id.* (citations omitted).

¹⁶⁶ Airline Customer Service Act, H.R. 1792, 107th Cong. (1st Session 2001); Airline Customer Service Act, S. 319, 107th Cong. (1st Session 2001).

Comments

