

WHERE'S THE LUGGAGE?

Subrogating For Lost Or Damaged Luggage

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“Did you ever notice that the first piece of luggage on the carousel never belongs to anyone?” - Erma Bombeck

The rings of Saturn are not entirely comprised of lost airline luggage, as some theorists have rumored - but at times it seems entirely possible. Subrogation involving lost or damaged luggage is a recurring theme, and one which continues to perplex and frustrate insurance carriers and claims handlers. It seems so straightforward that if an airline loses your bags, they are liable for the contents. But it is not quite that simple. Subrogation professionals need to be familiar with what can and cannot be recovered when an airline destroys or loses valuable luggage and contents of that luggage, for which an insurance company pays a claim and attempts to subrogate.

Baggage issues fall into two broad categories: 1) bags that are delayed-for example, those that are routed to Bangkok instead of Boston but end up finding their way back to you, and 2) bags that are destroyed, stolen or lost forever. In both cases, it is important to remember to obtain all paperwork, receipts for necessary replacement items, claim tags and names of personnel involved, in order to support your best chance for a recovery. U.S. government regulations state that if an airline loses your bag for good, it is required to reimburse you a maximum of \$2,500 for the depreciated value of the declared contents. This does not mean the airline will automatically give you \$2,500 if it loses your bags. It means this

is the airline's limit of liability-or the maximum amount it must pay you if your belongings are never recovered.

When reporting lost luggage to the airline, the insured must attempt to list the entire contents of the bag (including the bag itself) and the value of each item on the airline's Lost Baggage Report. If you have receipts (or credit card statements) for the purchases of these items, you're in great shape. If not, guess, but aim high since most airlines automatically depreciate the value of your claim by about 30 percent. Once the airline determines that your belongings will never be recovered, it should review your claim and cut you a check. Reimbursement is much less generous when pas-

sengers are traveling outside the United States, which is governed by an international airline treaty called the Warsaw Convention (look for mention of it in the fine print on the back of your airline ticket). International travelers are reimbursed for lost baggage based on the weight of their bags. Currently, a paltry \$9.07 per pound (or \$20 per kilogram) is all you will get if your bags are lost on an international flight (on either a U.S. or foreign carrier).

American Airlines, for example, posts this notice on its website: "Liability for loss, delay, or damage to baggage will be limited as indicated below, unless a higher valuation for checked baggage has been declared and additional

charges paid at check-in." For domestic flights, "liability is limited to \$2800 per ticketed passenger for travel on or after October 22, 2004." American also utilizes exculpatory clauses, another common limitation of liability, which provides, "[n]o liability for baggage carried in a passenger cabin. No liability for photographic equipment, computer, and any other electronic equipment including, software, or components, jewelry, cash, documents, furs, works of art, or other similar valuable items." Are such limitations binding? They can be.

Federal regulations provide the authority through which domestic airlines may limit their liability for delay, loss and damage to baggage. 14 C.F.R. Parts 253 & 254. Part 254 of these federal regulations requires airlines to conspicuously display a sign stating the extent to which liability is limited. This notice may be on your ticket or boarding pass, posted at the ticket gate, and/or located on their website. Part 253 permits airlines to incorporate contract terms on a passenger's ticket so long as certain uniform disclosure requirements are met. See 14 C.F.R. §§ 253.1, 253.4, 253.5, 253.7. These regulations also allow the airlines to meet the notice requirement "not later than check-in." § 253.8. In other words, for today's "ticketless" transactions, the boarding pass becomes the critical document.

The key issues in subrogation cases involving baggage lost or damaged by the airline are whether, and to what extent, the limitations of liability within the contract of carriage are communicated to the passenger, whether the airline allowed the passenger to purchase excess valuation and whether the airline is attempting to enforce its exculpatory language.

In domestic travel, federal common law currently governs the validity of an air carrier's limitation of its liability. Under federal common law, courts employ a "reasonable communicativeness" test to liability limitations based on a contract of carriage. See *Deiro v. American Airlines*, 816 F.2d 1360, 1364 (9th Cir. 1987). The reasonable communicativeness test employs a two-pronged approach on a case-by-case basis. First, the court assesses the "Physical Characteristics of the Ticket/Contract," including "[f]eatures such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provision in question." *Id.* at 1364. Second, the court examines the circumstances surrounding

the passenger's purchase and retention of the ticket/contract. *Id.* Under this second prong, courts will consider factors such as the passenger's travel experience, familiarity with the ticket, and the circumstances surrounding purchase. When applying this test, courts have continually found that the standard printed limitations provide adequate notice even where a ticketless passenger is presented with that notice only minutes before departing. *Masouth v. American Airlines, Inc.*, 24 Fed.Appx 809 (9th Cir. 2001). However, in one case, the court was willing to grant an exception where the passenger was an inexperienced traveler who had never purchased an airline ticket before, or one who had never before shipped an animal. *Gluckman v. American Airlines, Inc.*, 844 F. Supp. 151, (S.D.N.Y. 1994).

Some courts also apply the "released valuation doctrine" before a limitation of liability will be enforced. Under this doctrine, the passenger is deemed to have released the airline from liability above the stated amount in cases where the airline grants the passenger the opportunity to declare a higher valuation and purchase additional insurance. Therefore, if the airline does not offer the passenger an opportunity to choose between higher or lower liability, a court will not allow the airline to later take advantage of limited liability. Although some courts have held that the released valuation doctrine only applies to freight or cargo cases, see e.g., *Wells v. American Airlines, Inc.*, 1991 WL 79396 (S.D.N.Y. May 9, 1991), the majority of courts following *Deiro*, have continued to apply the doctrine in the passenger baggage setting. See e.g., *Coughlin v. Trans World Airlines*, 847 F.2d 1432 (9th Cir. 1988); *Mauseth v. American Airlines, Inc.*, 2001 WL 1646973 (9th Cir. Ariz.); *Harger v. Spirit American Airlines*, 2003 WL 21218968 at 9 (N.D. Ill. 2003).

Exculpatory clauses are another favorite limitation of liability used by the airlines. These clauses prohibit passengers from purchasing excess valuation for items like jewelry, computers and cameras. Courts have provided mixed enforcement of these clauses. A number of courts have invalidated these exculpatory clauses as contrary to public policy. E.g., *First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc.*, 731 F.2d 1113 (3d Cir. 1984); *Klicker v. Northwest Airlines, Inc.*, (9th Cir. 1977). These courts have found that the prohibitions on liability found in exculpatory clauses run contrary to the released valuation doctrine, and

therefore, allow unlimited liability. However, some courts have weighed in on the other side, upholding exculpatory clauses, provided that the passenger had sufficient notice of the terms. E.g., *Lichten v. Eastern Airlines*, 189 F.2d 939 (2nd Cir. 1951).

For the legal practitioner and subrogation professional, it is important to note that a plaintiff's potential claims are limited to only one, namely breach of contract. Under federal common law, courts apply the "economic loss doctrine," which prohibits recovery in tort for purely economic losses where a contract governs the incident. This economic loss doctrine applies not only to contracts for the sale of goods, but also to service contracts, because the duties of a provider of services may be defined by the contract he enters into with his client. So, while the negligence of an airline will not abrogate the baggage liability limitation, a breach of the contract by the airline might.

As happens frequently these days, a passenger is not allowed to bring a carry-on item on board, and is told he has to check it even though it contains valuables, etc. In that case, results might be different. For example, in *Coughlin*, a passenger was wrongfully told that she could not carry a small package on board containing her husband's ashes. *Coughlin v. Trans World Airlines*, 847 F.2d 1432 (9th Cir. 1988). That court found that the liability limitation was not applicable because of a breach of the carriage contract by the airline. Even so, some courts have insisted that this breach of the contract of carriage must be a "special liability-limitation-related condition that the carrier failed to fulfill," in order for it to void the liability limitation. *Hill Const. Corp. v. American Airlines, Inc.*, 996 F.2d 1315 (1st Cir. 1993); *Harger v. Spirit American Airlines*, 2003 WL 21218968 (N.D. Ill. 2003).

Subrogation recoveries in this area are very difficult, but not impossible, to achieve. Obviously, if the claim is less than \$2,500, the recovery will be simple, limited only by the amount of documentation you can provide to the culpable carrier. However, if it exceeds this amount, issues such as the conspicuousness of the limitation notice, the means of its communication, the passenger's opportunity to purchase excess insurance, and even the individual passenger's travel experience all come into play. So do special circumstances or facts under which an airline

requires a passenger to check a piece of luggage, which is otherwise acceptable to be carried on board. Subrogation professionals should be alert to the rare, yet sometimes effective fact scenarios, which might allow a subrogating carrier to pierce the otherwise impenetrable boilerplate liability limitation, which is invariably cited by airlines seeking to avoid liability.

Airlines realize that they have made a mistake, and tend to play the liability limitation and disclaimer card only when there are significant damages involved. However, they don't want long and drawn out legal battles any more than you do. In-house lawyers and claims professionals deal with such transportation law issues on a daily basis, and have a distinct advantage over the typical subrogation professional. Understanding the issues involved, and meeting the airline claims handler on his or her own turf by using the appropriate vernacular and focusing on the salient issues, will go a long way toward getting some conciliation and possibly settlement of your claim. Subrogation, like flying, is all about the shortest distance between two points. Knowing the route to take can make all the difference in the world.

SEVEN WAYS TO AVOID LOST LUGGAGE

1. If you travel with anything especially valuable, such as prescriptions, electronics or jewelry, keep it on you or stow it in your carry-on bag.
2. If you are traveling for business, fly in appropriate attire. That way, if the rest of your suits are lost, you are already dressed for success.
3. Make a list of what goes into each bag. That way, if you have to file a lost-luggage claim, you have a good place to start. Borrowing a bag? Jot down a good description of that too, in case you have to report it missing.
4. Pack a carry-on bag designed to get you through the first 24 hours if you lose everything else. That way, if your bags disappear, you can survive.
5. Make certain that the airline baggage tags are firmly attached to your checked luggage. Have your own ID on the outside and the inside.
6. When you check bags, verify that the three-letter destination tags airline personnel attach to your luggage actually match your stops.
7. If you are traveling to catch a tour or cruise ship, get there one full day ahead of time. Then if a bag does not arrive, it has time to catch up before you leave.