

# UNITED STATES TRAVEL LAW: TRIALS, TRENDS AND TAKEAWAYS



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*This article provides an overview of travel consumer protection measures in the US during a period of economic uncertainty. It is based on a paper presented at the IBA conference held in Madrid in October 2009.*

Travel law in the United States may be unfamiliar to most, and for good reason. Until recently, legal relations between consumers and travel agents have been governed by the general principles of contract, agency and tort law, along with general consumer protection laws that govern false and deceptive practices. It was not until the mid-1990s that certain states passed legislation aimed at governing the legal relations between consumers and the travel industry in the US. However, this type of regulation is supported by only a few states, and thus the travel industry remains largely unregulated and unlicensed, subjecting consumers to the theory of *caveat emptor* when making travel plans. Yet in this era of recent economic turmoil and the proliferation of internet travel sales, the need for more regulation - and uniform regulation - is escalating.

What legal issues may travel consumers face? The issues may depend on the travel service involved. Common travel problems involving tour operators, travel agents and internet travel sellers include failure to provide security, false advertising and deceptive business practices, physical injuries, inadequate hotel accommodation, failure to make or confirm reservations and failure to deliver travel services. If carriers are involved, common travel problems could also include delays and cancellations, overbooking, or lost, damaged or destroyed baggage. To seek relief

from these problems, travel consumers may bring claims such as breach of contract, negligence, fraud and illegality.

In order to determine what is practically compensable, travel consumers must first understand the extent of state regulation of the travel industry and how the effects of the current economic conditions on the travel industry may impede their chances for recovery. Once travel consumers have a realistic understanding of available remedies in the event of travel plan failure, they can limit their risk and readily protect themselves by adhering to some travel planning guidelines.

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## State Regulation of the Travel Industry

The lack of regulation in the travel industry is largely due to the fact that the States are left to their own devices to determine whether and to what extent travel laws should be passed, leaving the travel laws that have been enacted non-uniform. Only four states - California, Florida, Oregon and Washington - have passed statutes called 'Sellers of Travel Laws,' which protect consumers by requiring travel sellers to have mandatory registration or licensing, bonds, letters of credit or trust accounts, make disclosures to

consumers and refund obligations. The laws also provide civil and criminal remedies for deceptive practices. Legislatures in other states, namely Hawaii, New York, Massachusetts, Ohio, Iowa, Illinois, Rhode Island and Virginia, have passed statutes containing some, but not all, of these requirements. The remaining thirty-eight states have no laws directly specifically at the travel industry.

A common thread among the states is their prohibition of making materially false statements in connection with advertising or sale of travel services. Some state laws take this prohibition a step further to require mandatory disclosure obligations. New York, for instance, has a 'Truth in Travel Law' which requires all 'travel agreements' to contain disclosures regarding payment obligations and service descriptions. This type of regulation has become especially important amidst the rise of internet travel sales, where financial instability is often difficult to discern and travel scams are prevalent.

In the event of an insolvency or failure to provide services, consumers are likely to be concerned about quick reimbursement. To that end, certain financial safety nets have been instituted in some states such as bonds, trust accounts and travel consumer restitution funds ('compensation funds'). States vary on the specific protection that these vehicles afford depending on the type of activity that is covered. For instance, Ohio requires a \$50,000 bond for a tour promoter involved in interstate or international activity versus a \$20,000 bond for a tour operator involved in intrastate activity. Florida, on the other hand, requires a \$25,000 bond for sellers of travel that do not issue 'vacation certificates' and a \$50,000 bond for travel sellers that do issue such certificates. An alternative is the trust account, which saves travel sellers the expense of a bond premium but requires compliance and expensive audits. Still other states require regis-

tered sellers of travel to fund a compensation fund, which typically involves an initial payment and an annual fee. Consumers who have sustained a loss then file a claim against the plan.

## Effects of the Economic Downturn: A Focus on the Airline Industry

This lack of regulation has become more pronounced during the recent economic downturn. Among the various modes of travel in the industry, airlines seem to be suffering the effects of the economic downturn the most. With declining revenue and the current need for refurbishing aircraft, the

International Air Transport Association predicts a grim \$2.5 billion dollars of airline industry losses in 2009. Travel consumers are thus faced with potential airline bankruptcies, and limited options for recovery of services not provided. A passenger's rights arising from a contract of carriage with an airline remain unchanged when the airline enters bankruptcy proceedings. The reality, however, is that passengers will be stranded and refunds for cancelled flights will take time to recover, if they can be recovered at all. Passengers are best advised to charge airline tickets to a credit card, and dispute the charge after the airline cancels its flight. Otherwise, consumers are left to seek refunds from the airline directly through the bankruptcy court, where they have priority for unsecured claims up to \$2,100.

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The airline industry is regulated by both federal regulations and state statutes. The Federal Aviation Act regulates charter tour operators, travel agents and travel carriers, while the Department of Transportation (DOT) Public Charter Regulations regulates charter tour operators and operating air carriers. Under the

DOT Public Charter Regulations, a private right of enforcement is available. State statutes have also been enacted. For instance consumer frustration over inadequate services led to the New York legislature's passing of the New York State Passenger Bill of Rights in 2007 (later struck down by a Federal Appeals Court). This bill provided for electric generation service for fresh air and lights, restroom service and refreshments if passengers were delayed for more than three hours while being boarded on an aircraft prior to takeoff.

What exactly is recoverable from suits concerning airline travel? Courts have held that damages may include 'a wide variety of elements, including expenses for substitute or alternative transportation, meals, compensation for humiliation, outrage and inconvenience' (*Goranson v Trans World Airlines*, 121 Misc.2d 68, 467 N.Y.S.2d 774 (1983)). Common law, contractual and consequential damages are compensable. For instance, if alternative transportation is needed because of a failed service, and the transportation is more expensive than that originally contracted for, the difference is recoverable as a contractual damage. Also, if a delay was caused by breach of contract or negligence, and the damage was foreseeable, then consequential damages are recoverable. Further, damages for discomfort and inconvenience are also recoverable in the courts. One court has held that the inconvenience of being trapped for hours in an unfamiliar airport is a compensable element of damages for delays in airline travel (*Daniel v Virgin Atlantic Airways Limited*, 59 F.Supp.2d 986 (N.D. Ca. 1998)). However, there appear to be limits. Travel consumers cannot go so far as to recover for damages for loss of business opportunity if the damage was unforeseeable. See *Jamil v Kuwait Airways Corp.*, 773 F.Supp. 482 (D.D.C. 1991).

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In addition to airlines, tour operators and suppliers are feeling the effects of the economic downturn as well. Customers are signing up later than usual for trips. At the same time, the typical release dates for travel sellers from their contracts with suppliers are 50-60 days in advance of the date of departure. There is thus a gap of time between the time when release periods occur and when a trip may become fully booked, leaving travel sellers with a financial dilemma: go forward with the trip and risk not having full booking or honour the release dates and risk having had a fully booked trip. In order to mitigate such effects, suppliers have become more willing to negotiate release dates with travel sellers, which not only eases the burden on

the travel sellers but also fortifies the suppliers' chances to maintain their contracts for services.

## Tips for Consumer Protection

Travel sellers are in a more advantageous position than travel consumers. While travel sellers typically have a right to cancel embedded in their contracts, travel consumers rarely have such an option. How do consumers protect themselves? Here are some tips: Consumers should look to 'guaranteed tours,' which are guaranteed no matter what the enrolment. This will eliminate the risk of a cancelled tour and the fees that may go along with rescheduling. If consumers opt to not book with a guaranteed tour, then they are advised to delay the booking of airline tickets, which may avoid cancellation penalties or re-booking fees if the trip does get cancelled. Travel consumers should also look to 'tiered-pricing tours,' which base the price of the tour on the number of travellers enrolled and are less likely to be cancelled.

In addition to adjusting travel arrangements, travel consumers can become educated by

becoming familiar with the US Tour Operators Association (USTOA). The USTOA educates consumers on matters pertaining to tours and vacation packages and helps consumers recoup financial losses in the event of insolvency. Active members of the USTOA are required to carry \$1,000,000 of professional travel agent/tour operator liability insurance, with worldwide coverage. In addition, members must belong to the '\$1 Million Dollar Travelers Assistance Program,' which requires member travel sellers to post a \$1,000,000 bond or letter of credit. In the event of an operator bankruptcy, insolvency or failure to refund consumer deposits or payments within 120 days of cancellation of departures, consumers may look to the USTOA for reimbursement. Currently, there are 48 active members of the USTOA that directly serve travellers.

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## Conclusion

Travel consumers are prevalent and State regulation of the travel industry is scarce. With the demand for travel services, the financial instability of travel sellers and popularity of internet sales, the need for more regulation in the travel industry is gaining more attention. Further, current economic conditions have worsened the risk for travel consumers who are already in a more disadvantageous position than travel sellers when it comes to

limiting the risk associated with signing travel agreements. Until the travel industry becomes subject to more regulation, consumers are advised to become familiar with their rights and the practicality of obtaining reimbursement in the event that a travel seller fails to deliver services or faces insolvency and travel plans come crashing down.