



Airlines Need Protections Too

By Evelyn D. Sahr and Drew M. Derco



Airlines unfortunately have a lamentable public image. From poor food, rude flight attendants, and delayed flights, to increased fees, lost baggage, and cramped space, it seems that everyone loves to hate the airlines. In our increasingly interconnected world, these negative perceptions are propa-

gated via the Internet, news, and social media.¹ To protect consumers and the public, and presumably to ensure a better travel experience, governmental regulators have promulgated a series of new consumer rights regulations aimed at preventing misleading advertising, pricing, and other alleged unfair or deceptive conduct by airlines.²

Notwithstanding the above, there is one issue for which, contrary to the current regulatory model, airlines deserve some protection of their own: aggressive consumers who take advantage of implausibly low fares that are clearly published in error. While the airline industry's use of the Internet and social media has helped to streamline operations and promote interactions on a global scale, airlines' reliance on these media outlets subjects them to increased risk. Genuine pricing mistakes, although rare, do happen. And, with the existence of blogs and other forms of social media, airlines are at the mercy of unscrupulous passengers who troll these media looking to take advantage of erroneous fares, which are sometimes referred to as "mistake fares."

The sale of erroneously priced goods and services affects virtually all industries. It has been addressed at length by governmental entities and the U.S. judicial system. In most cases, the relationship between a business and its customer is governed by general contract law principles and the terms of the parties' agreement. When it comes to mistake fares, however, airlines do not enjoy similar protections. Moreover, the U.S. Department of Transportation (DOT) has imposed strict liability on airlines for any and all unfortunate pricing events, which raises the question: in light of wide-ranging rules for protecting airline consumers, who protects the airline?

This article recounts recent cases of airline mistake fares and their consequences, then describes DOT's policy establishing strict airline liability for such fares. Next, the article contrasts DOT's policy with the rules and legal principles that apply to other industries, which generally permit merchants to rescind a contract formed on the basis of a pricing mistake. The article concludes that

DOT should reconsider its strict liability policy, recognizing that neither the industry nor the broader community of air travel consumers benefits from requiring airlines to honor tickets sold at implausibly low fares that were the result of inadvertent error.

Recent Airline Mistake Fares

The most recent instance of mistake fares occurred in September 2012 and impacted numerous airlines. In that case, an erroneous one-way first-class fare from Yangon, Myanmar (RGN) (aka Rangoon), to Montreal, Canada (YUL), was inadvertently made available for sale to the general public. Online ticket agents sold the first-class fare for as little as \$125 (excluding taxes and fees) when the correct fare in most cases exceeded \$10,000 (again, excluding taxes and fees). Thus, many tickets were sold for less than 1 percent of their correct value. A popular online blog, BoardingArea™, learned of the erroneous fare and published a posting entitled "Mistake Fare—One Way First Class Originating in Myanmar is Back!"³ Once the fare's existence was publicized, the affected airlines, many of whom learned about the mistakes from passengers, reacted quickly to remove the fare, in most cases less than 24 hours after the blog posting. Despite the airlines' best efforts, however, in excess of 1,000 passengers purchased incorrectly priced tickets before the fare was removed.

The mistake fare at issue in this case was not an airline fare, but rather was priced and distributed by third parties, outside the control of the affected carriers. The impact on the industry, however, was dire. For at least one airline, the mistake fare tickets sold would have filled its first-class cabin for approximately 30 percent of annual travel on certain routes. Honoring such fares would have resulted in millions of dollars in lost revenue. For some smaller carriers, such losses could be unsustainable.

Although the price of each ticket was clearly erroneous (in many cases less than 1 percent of the correct fare), the majority of airlines affected by this incident chose to honor the mistake fares. While customer service was a factor in those decisions, the airlines were also motivated by fear of DOT reprisal if the tickets were canceled or consumers were forced to pay the correct price. While DOT initiated informal investigations of the carriers that sold mistake fares, it ultimately declined to assert jurisdiction because the mistake fares involved itineraries between non-U.S. points and therefore, according to DOT, were outside

the scope of "foreign air transportation."⁴ Had the itineraries involved a U.S. point of origin or destination, or a stopover in the United States of more than 24 hours, it is likely that DOT would have asserted jurisdiction and possibly viewed any airline cancellations or price corrections as "unfair or deceptive practices."⁵

Another well-publicized mistake fare occurred in 2009, when British Airways sold tickets from the United States to India for \$40 (excluding taxes and fees). The fare, which DOT described as "erroneous,"⁶ was almost 20 times lower than the lowest U.S.-India fare being offered by British Airways prior to the mistake. In the two hours during which the mistake fare was available online, more than 1,200 bookings were made. As a result of the error, British Airways canceled the bookings of all passengers who purchased the fare and offered each passenger a \$300 voucher. DOT's Aviation Enforcement Office immediately initiated an investigation into the matter. While DOT supported the carrier's decision to offer vouchers,⁷ after consulting with the Aviation Enforcement Office, British Airways also agreed to reimburse passengers for expenses resulting from having relied on the erroneous \$40 fare⁸ and to provide notice of its offer to all consumers on its website.⁹

In July 2012, meanwhile, United Airlines mistakenly offered flights from New York to Hong Kong in exchange for four frequent flyer miles (plus taxes and fees).¹⁰ United immediately canceled the tickets and offered a full refund. Customers were also allowed to keep their reservation by paying the correct number of air miles (65,000) if they chose to do so. While no enforcement action has been taken to date, it has been reported that DOT has investigated this matter.¹¹

These are just a few recent examples of mistake fares. In all of these cases, the fare was not published intentionally by airlines with the purpose of misleading passengers. Rather, the fare was published unintentionally, discovered by an unscrupulous consumer, and posted on the Internet, thereby enabling scores of other consumers to take advantage of an inadvertent and clearly erroneous fare.

DOT's Position on Airline Mistake Fares

DOT's most recent round of "passenger protections" regulations, which took partial effect in August 2011 and full effect in January 2012, includes a prohibition against "post-purchase price increases,"¹² which are broadly defined as an increase in the price of the seat, carriage of passenger baggage, or fuel surcharge after the consumer has purchased the air transportation. Purchases are deemed to have occurred when the full amount has been paid by the consumer,¹³ and DOT

has determined that post-purchase price increases that occur in connection with the sale of air transportation to, from, or within the United States are unfair or deceptive practices in violation of 49 U.S.C. § 41712, thereby subjecting carriers to civil penalties of up to \$27,500 per incident.¹⁴

DOT specifically addressed fare errors in a series of "Frequently Asked Questions" (FAQs)¹⁵ that it published on the DOT's Aviation Consumer Protection Division's website.¹⁶ This document serves as a guide for the industry and, while it was not promulgated through the formal rulemaking process and thus is not binding, it is used by DOT to provide additional information on DOT's enforcement policy on certain subjects.¹⁷ In these FAQs, DOT answered the question of whether its regulation prohibiting post-purchase price increases (14 C.F.R. § 399.88) applies when a consumer purchases an airfare that was mistakenly offered due to a computer problem or human error. DOT advised that carriers may not increase or correct the fare amount after the consumer has purchased a ticket and received a purchase confirmation from the carrier (e.g., confirmation e-mail) even when the fare purchased was the product of inadvertent error. DOT did not provide for any exceptions to this "strict liability" policy based on specific circumstances, such as the scale of the error, the number of tickets sold, or whether the consumer knew or reasonably should have known that the fare amount was erroneous. Moreover, DOT stated that it would view any action by the carrier to correct a mistake fare by charging the passenger a higher amount as constituting an unfair or deceptive practice, subjecting the carrier to potential civil penalties of up to \$27,500 per incident.¹⁸

Equally significant, DOT advised that airlines may not include provisions in their passenger contracts of carriage that would allow the airline to cancel or correct mistake fare tickets. Specifically, FAQ XI(8) states: "A contract of carriage provision that reserves the right to cancel [mistake fare tickets] or . . . to raise the fare cannot legalize the practice [of raising a fare to the correct price after purchase]." DOT further informed the industry that any contract of carriage provision that allows such actions would be an unfair or deceptive practice in violation of 49 U.S.C. § 41712.¹⁹

Pursuant to 14 C.F.R. § 399.88 and in accordance with the information published in its FAQs, DOT has taken a strict liability approach to mistake fares. Thus, carriers must either honor mistake fares (potentially to their extreme financial detriment)²⁰ or face imposition by DOT of a potentially substantial civil penalty (often following a lengthy and costly investigation).²¹ As explained below, DOT's policy on mistake fares places airlines in a uniquely disadvantaged position relative to other industries, including other modes of transportation. When an inadvertent pricing error occurs, businesses in other industries may protect themselves pursuant to the contract they have in place with consumers, as well as

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general principles of contract law, by canceling the contract or correcting the pricing error.

Other Industries May Correct Pricing Errors

The doctrine of mistake is a central tenet of contract law.²² While courts traditionally were hesitant to let parties unilaterally rescind contracts based on mistake, many jurisdictions have taken an increasingly permissive stance on allowing rescission of a contract based on a mistake by one party.²³ Now, where a unilateral mistake is made as to a basic assumption of the contract and that mistake has a material effect on the agreed exchange of performances, the contract is voidable by the party that made the mistake if the effect of the mistake makes enforcement of the contract unconscionable or the other party had reason to know of the mistake.²⁴

Modern courts, following this liberalized trend in the mistake doctrine, have allowed unilateral rescission when contracts are based on pricing mistakes. In *Donovan v. RRL Corp.*, the Supreme Court of California, well known for enforcing consumer protection laws, found that rescission was warranted when the advertised price of an automobile was approximately 32 percent of the price the seller intended due to a typographical error committed by a local newspaper.²⁵ In that case, the newspaper's employees confused the advertised prices of a 1994 Jaguar XJ6 and a 1995 Jaguar XJ6 Vanden Plas.²⁶ When the plaintiff attempted to purchase the 1995 Jaguar for the price of the 1994 model, the dealer refused the sale, citing mistake.²⁷ In reviewing the case, the court found that the advertisement for sale of the vehicle at a specific price was an offer that was accepted when the consumer tendered the purchase price.²⁸ The court, however, also held that common-law contract principles generally permit rescission when the seller makes a mistake regarding a basic assumption of the contract (e.g., price), the mistake has a material (and often adverse) effect on the seller, and enforcement would be unconscionable.²⁹

Similarly, in *O'Keefe v. Lee Callan Imports, Inc.*, the Appellate Court of Illinois, First District, held that "in the absence of special circumstances, a newspaper advertisement which contains an erroneous purchase price through no fault of the defendant advertiser and which contains no other terms, is not an offer which can be accepted as to form a contract."³⁰ The court stated that "such an advertisement amounts only to an invitation to make an offer and, in that situation, there was no meeting of the minds nor the required mutual assent to the two parties to a precise proposition."³¹

As the U.S. Federal Trade Commission (FTC) has noted, there is no federal statute requiring merchants (in other industries) to honor erroneous pricing unless it is misleading or deceptive. In 2010, an FTC spokesman stated, "Honest mistakes do happen, and a transaction can be undone."³² In addition, most state

laws allow a merchant to correct an inadvertent pricing error.³³ Thus, absent any federal or state law prohibiting them from doing so, other industries are able to protect themselves by contract from the consequences of pricing errors. For instance, in 2006, Holland America Line, a vacation cruise line located in Seattle, sold cabins aboard the *Noordam* for \$849. These tickets normally cost \$1,399 and, according to news reports, were "accidentally" sold for the lower, incorrect price.³⁴ Holland America, relying on its "cruise contract"³⁵ and general principles of contract law, required passengers who booked the erroneous fares to pay the difference in order to join the cruise. Passengers who did not pay the difference were to be denied boarding.

The Holland America Line is not the only cruise line that protects itself from erroneous fares by the terms of its standard contract with passengers. Several others, including Carnival Cruise Lines, have similar protections in their ticket contract.³⁶ Carnival's "Ticket Contract" states: "In the event that a cruise fare listed, quoted or advertised through any website, Carnival sales person, travel agent or any other source is booked but is incorrect due to an electronic error, typographical error, human error or any other error causing the fare to be listed, quoted or advertised for an amount not intended by Carnival, Carnival reserves the right to correct the erroneous fare by requesting the Guest to pay the correct fare intended, or by canceling the cruise in exchange for a full refund, but in no event shall Carnival be obligated to honor any such booking resulting from the error or otherwise be liable in such circumstances."³⁷

Amtrak enjoys similar protections. Its "Terms of Transportation" provide: "Amtrak will exercise reasonable efforts to ensure that all fares it publishes are accurate and available for sale, but Amtrak reserves the right to correct any erroneously published fare that Amtrak did not intend to offer for sale. In the event that an erroneous fare is inadvertently published for sale and a ticket is issued at the erroneous fare before it has been corrected, Amtrak reserves the right to cancel the ticket purchase and refund all amounts paid by the purchaser or, at the purchaser's option, to reissue the ticket for the correct fare."³⁸

The transportation sector is not the only industry affected by pricing errors. In 2010, an online pricing error resulted in the sale by Ticketmaster of an undisclosed number of Kenny Chesney concert tickets for \$25, which was approximately 25 percent of the correct price. Ticketmaster canceled all of the erroneously priced tickets and notified consumers of the mistake almost two weeks after the tickets' sale. In its correspondence with each affected consumer, Ticketmaster apologized for the mistake and allowed consumers to choose between a full refund or re-purchase at the correct price of \$99.50.³⁹

Ticketmaster's cancellation was permissible under the terms of its purchase policy, which states: "If the amount you pay for a ticket is incorrect regardless of

whether because of an error in a price posted on this Site or otherwise communicated to you, or you are able to order a ticket before its scheduled on-sale or presale date or you are able to order a ticket that was not supposed to have been released for sale, then we will have the right to cancel that ticket (or the order for that ticket) and refund to you the amount that you paid. This will apply regardless of whether because of human error or a transactional malfunction of this website or other Ticketmaster operated system.”⁴⁰

Conclusion

These erroneous fare contract provisions, coupled with general principles of contract law, protect members of the cruise, ticketing, and rail transportation industries against the sale of erroneously priced tickets. By virtue of these protections, members of these industries are effectively shielded from unscrupulous consumers who become aware of the mistake and attempt to take unfair advantage of the company by disseminating the error on blogs and the Internet. Airlines, by contrast, are prohibited from enjoying the same protections due to DOT’s strict interpretation of its own consumer protection rules and stated enforcement policy with respect to erroneous fares. This not only puts the airline industry at a competitive disadvantage, but makes airlines a target for predatory consumer tactics. As in the most recent erroneous fare case involving Myanmar, a single mistake fare can be discovered, disseminated on blogs, and purchased by thousands of consumers in a matter of hours.

Mistake fares occur and will continue to do so. Airlines (particularly smaller airlines) do not have the capability to prevent all such errors, many of which are caused by third parties without the airline’s knowledge. Under the current regulatory scheme, however, airlines are put in a position where a choice must be made to honor the tickets and suffer significant revenue loss or cancel the tickets and risk DOT enforcement action along with public criticism.

While DOT’s consumer protection rules were drafted for a laudable purpose, DOT must consider the effect of its rules on the industry as a whole. A single instance of a mistake fare being listed for sale online for even a few hours could impose an extraordinary financial burden on an airline—particularly when unscrupulous bloggers highlight the error and consumers (who otherwise may have no interest in traveling on the itinerary being offered) seek to take advantage of it—if DOT continues to impose strict liability for such an inadvertent error. The financial cost of such an error could be devastating, particularly for smaller airlines. The correction of mistake fares is not simply a post-purchase price increase and should be subject to a different regulatory standard. While DOT’s FAQs were not promulgated through the rulemaking procedures mandated by the Administrative Procedure Act, they reflect DOT’s

enforcement policy with respect to this issue and thus have a significant impact on airlines’ decisions. Accordingly, DOT should reconsider the impact of applying its “unfair or deceptive” standard to airlines’ mistake fares on a strict-liability basis.

To protect themselves from the risk of lost revenues associated with a mistake fare, airlines should be permitted to add protections to their contract of carriage allowing for the cancellation (at no charge to the consumer) or correction of mistake fares. If DOT fails to amend its current enforcement policy, airlines at some point may have to raise ticket prices to hedge against future losses from pricing errors. Allowing the few unscrupulous consumers who troll websites to profit from unintentional pricing errors will, in the end, only serve to raise the price of air travel to the detriment of the broader class of consumers DOT seeks to protect.

Endnotes

1. Philip LeBeau, *New Study Shows Fliers More Fed Up Than Ever Before*, CNBC.COM (Apr. 8, 2013), <http://www.cnbc.com/id/100622381>.
2. Enhancing Airline Passenger Protections, Final Rule #1, 74 Fed. Reg. 68,983 (Dec. 30, 2009); Enhancing Airline Passenger Protections, Final Rule #2, 76 Fed. Reg. 23,110 (Apr. 25, 2011); Regulation (EC) No 261/2004 of the European Parliament (Feb. 11, 2004).
3. *Mistake Fare—One Way First Class Originating in Myanmar is Back!*, BOARDING AREA (Sept. 27, 2012), <http://boardingarea.com/blogs/viewfromthewing/2012/09/27/mistake-fare-one-way-first-class-originating-in-myanmar-is-back/>.
4. Foreign air transportation is defined as “the transportation of passengers or property by aircraft as a common carrier for compensation, or the transportation of mail by aircraft, between a place in the United States and a place outside the United States when any part of the transportation is by aircraft.” 49 U.S.C. § 40102(a)(23).
5. 49 U.S.C. § 41712.
6. Press Release, U.S. Dep’t of Transp., Department Ensures British Airways Offers Reimbursements Following Erroneous Fare Offer, DOT 183-09 (Nov. 30, 2009).
7. *Id.* DOT Secretary LaHood stated, “We are pleased to see that British Airways has accepted responsibility for the fares it published” and “[t]his agreement with British Airways will compensate passengers for losses they suffered as a result of the carrier’s mistaken fare offer.” *Id.*
8. Such expenses could include fees for canceling flights or hotel reservations, rental cars, or costs incurred in rebooking flights due to fare increases on previously held flights that were canceled in order to book the \$40 fare.
9. *Id.*
10. Josh Noel, *Cashing in on Mistake Fares*, CHI. TRIB. (July 31, 2012), http://articles.chicagotribune.com/2012-07-31/travel/sc-trav-0731-travel-mechanic-20120731_1_special-fare-frequent-flier-miles-airlines.
11. *Id.* See also Scott McCartney, *DOT Investigates*

After United Says It Will Kill Award Tickets It Sold for 4 Miles, WALL ST. J. (July 18, 2012), <http://blogs.wsj.com/middleseat/2012/07/18/dot-investigates-after-united-says-it-will-kill-award-tickets-it-sold-for-4-miles/>.

12. 14 C.F.R. § 399.88(a).

13. *Id.*

14. *Id.* See also 49 U.S.C. §§ 41712, 46301 (DOT may impose civil penalties of up to \$27,500 per violation).

15. Office of Aviation Enforcement and Proceedings, *Answers to Frequently Asked Questions Concerning the Enforcement of the Second Final Rule on Enhancing Airline Passenger Protections (EAPP #2)*, U.S. DEP'T OF TRANSP. (Oct. 23, 2012), http://www.dot.gov/sites/dot.dev/files/docs/EAPP_2_FAQ.pdf [hereinafter DOT FAQs].

16. *Id.*

17. By implementing these policies in enforcement actions against airlines, DOT has in effect begun regulating by guidance.

18. *Id.*

19. DOT FAQs, *supra* note 15, at XI(8). In other words, DOT could take enforcement action solely on the basis that an airline included such a provision in its contract of carriage, even if the carrier had never invoked the provision as a basis for canceling or correcting a mistake fare after a consumer had purchased it.

20. Airlines are generally not permitted to recoup lost revenues from third-party vendors, such as the Airline Tariff Publishing Company (ATPCO), which is responsible in most cases for distributing fare data for sale by online ticket agents. See *Alitalia Linee Aeree Italiane v. Airline Tariff Publ. Co.*, 580 F. Supp. 2d 285 (S.D.N.Y. 2008). 21. DOT has broad investigative powers and may, on its own motion, unilaterally investigate whether a carrier is engaged in unfair and deceptive practices. See *Allied Air Freight, Inc. v. Pan Am. World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968).

22. Restatement Second of Law, Contracts defines "mistake" as "an erroneous belief. A party's erroneous belief is therefore said to be a 'mistake' of that party. . . . The erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined here. An erroneous belief as to the contents or effect of a writing that expresses the agreement is, however, a mistake" RESTATEMENT 2D OF CONTRACTS § 151 (1981).

23. *Id.* § 153. See also *Supreme Court of California Explicitly Accepts Restatement (Second) of Contracts Provisions as State Law*, 115 HARV. L. REV. 724 (Dec. 2001).

24. RESTATEMENT 2D OF CONTRACTS § 151. The comment following this section recognizes "a growing willingness to allow avoidance where the consequences of the mistake are so grave that enforcement of the contract would be unconscionable."

25. 26 Cal. 4th 261 (2001). The court also discussed price terms relative to the mistake doctrine: "A significant error in the price term of a contract constitutes a mistake regarding a basic assumption upon which the contract is made, and

such a mistake ordinarily has a material effect adverse to the mistaken party. See also *Elsinore, Union etc. Sch. Dist. v. Katstroff*, 54 Cal. 2d 380, 389 (1960).

26. *Donovan*, 26 Cal. 4th at 267.

27. *Id.* at 268.

28. *Id.* at 277.

29. *Id.* at 294.

30. 128 Ill. App. 2d 410 (1970).

31. *Id.* at 413.

32. Scott McCartney, *When Airline Fares Are Too Good to Be True*, WALL ST. J. (Mar. 25, 2010), <http://online.wsj.com/article/SB10001424052748704266504575141644282587882.html> (quoting FTC Spokesman Mitch Katz).

33. *Id.* ("Most state laws accommodate mistakes in a merchant's favor. In New York, for example, if the purchaser 'either knew or should have known such a mistake was being made,' the seller can cancel a contract.")

34. Gene Sloan, *Cruise Line's Pricing Gaffe Soaks Passengers*, USA TODAY (Nov. 17, 2006), http://usatoday30.usatoday.com/travel/destinations/2006-11-16-cruise-pricing_x.htm.

35. The contract states: "Additions to Fare, Government Fees & Taxes and Surcharges: (a) The fare that you paid was determined far in advance of Initial Departure on the basis of then-existing projections of fuel and other costs. In the event of an increase in fuel or other costs above amounts projected, we have the right to increase the fare at any time up to Initial Departure and to require payment of the additional fare prior to Initial Departure. We have the right to refuse to transport you unless the additional fare is paid. Within seven (7) days after you are notified of the additional fare (but no later than Initial Departure), you may elect to surrender this contract to us for cancellation, whereupon you will receive the Refund Amount. Cancellation fees do not apply to this type of refund." See *Holland America Lines Cruise Contract*, HOLLAND AM. LINES (Feb. 19, 2013), http://www.hollandamerica.com/legalAndPrivacy/Main.action?tabName=Cruise+Contract&WT.ac=footer_Contract.

36. See, e.g., *Royal Caribbean Cruise/Cruisetour Ticket Contract*, ROYAL CARIBBEAN CRUISE LINES, http://www.royalcaribbean.com/content/en_US/pdf/CTC_Not_For_BR.pdf; *Celebrity Cruises "Important Price Terms"*, CELEBRITY CRUISES, http://www.celebritycruises.com/footer/priceTerm.do?pagename=footer_pages_price_terms&cS=Footer&ICID=Cel_11Q4_web_hp_ftr_price.

37. *Carnival Cruise Lines Ticket Contract, Section 7(a)*, CARNIVAL CRUISE LINES, http://www.carnival.com/about-carnival/legal-notice/ticket-contract.aspx?icid=CC_Footer_84.

38. *Terms of Transportation*, AMTRAK, <http://www.amtrak.com/servlet/ContentServer?c=Page&pagename=am%2FLayout&cid=1241337896134>.

39. See Alfred Branch Jr., *Ticketmaster Claims "Pricing Error" in Listing of \$25 Kenny Chesney Tickets*, WWW.TICKETNEWS.COM (Nov. 22, 2010), <http://www.ticketnews.com/news/Ticketmaster-claims-pricing-error-in-listing-of-twenty-five-dollar-Kenny-Chesney-tickets111022852>.

40. See *Purchase Policy*, TICKETMASTER, http://www.ticketmaster.com/h/purchase.html?tm_link=help_nav_5_purchase.