The U.S. Department of Transportation’s (DOT’s) primary source of statutory authority to regulate airline consumer practices derives from section 411 of the Federal Aviation Act (codified at 49 U.S.C. § 41712), which prohibits air carriers and ticket agents from engaging in “unfair or deceptive practices” and “unfair methods of competition.” DOT frequently cites section 41712, particularly its prohibition of “deceptive practices,” as primary (and often exclusive) statutory authority for a wide range of regulations and enforcement actions.1 Although DOT has enjoyed this authority since Congress deregulated the domestic airline industry in the late 1970s and early 1980s, DOT has never conducted a rulemaking to interpret the term “unfair or deceptive practices.” That will change: DOT has initiated a rulemaking to “define the phrase ‘unfair or deceptive practices.’”2

DOT and the courts have recognized that section 41712 is “modeled” on the Federal Trade Commission’s (FTC’s) substantively identical authority under section 5 of the Federal Trade Commission Act.3 Neither section 41712 nor section 5 defines the terms “unfair” and “deceptive.” Unlike DOT, however, the FTC has published detailed formal interpretations of “unfairness” and “deception,” including multipart tests that require objective evidence (not merely the subjective judgment of a regulator) to support a finding of a violation. DOT now has proposed to codify those FTC definitions of “unfairness” and “deception” in DOT’s regulations.4

The FTC defines “deception” by relying on a “reasonable consumer” standard. The FTC does not regulate to protect the uninformed consumer, but, rather, assumes that consumers have a minimal obligation to seek out available information before making a purchase decision and should not expect the government to protect them if they fail to do so and are unhappy with their purchase. If, however, a vendor (whether by representation or omission) actually and materially misleads (or engages in conduct that is likely to mislead) consumers who have taken reasonable steps to inform themselves, the FTC may deem such conduct to be a “deceptive practice.” The FTC’s rationale is that such deceptive conduct distorts the information available to the reasonable consumer, and it therefore may be appropriate for the government to intervene in the marketplace to prohibit the conduct when the deception is material and reasonable consumers were actually deceived.

DOT’s proposed definition of “deception” follows the FTC’s lead by relying on a “reasonable consumer” standard. DOT’s proposal, however, does not explain how to interpret the standard. This article addresses that issue. It begins by explaining how the FTC, in applying its test for “deception,” determines what constitutes “reasonable” consumer behavior. Next, the article examines how DOT has at times strayed from a “reasonable consumer” point of reference toward a more expansive approach to regulation and enforcement. Finally, the article concludes that DOT should adopt the FTC’s test for “deception” (as DOT has proposed) and, in doing so, rely solely on a “reasonable consumer” standard.

Why DOT Should Interpret “Deceptive Practices” Using a “Reasonable Consumer” Standard

By David Heffernan and Brian Doll

continued on page 8
It's hard to believe that we are already nearly four months into 2020! As always, our incredible Air & Space Lawyer team have an incredible issue lined up for you, one that spans our many industry sectors within the Forum.

As you experienced at our Washington Update Conference, the Forum is starting to implement some of the changes we've been discussing over the last several months. Under the leadership of Chair-Elect Marc Warren, we have formed working committees to dive into implementation of two of our top priorities from the strategic plan—governance and content.

Our governance team lead will be Jack Rossi, and our content team lead will be Brian Friedman. Our governance team will work with the Strategic Planning Committee and look at how we can best structure our governance to bring the Forum in line with best practices while ensuring that each member of our leadership team has a distinct profile. Our content team will review everything from conference format to our content offerings, such as the A&SL, to look at ways to continue delivering top-quality content while at the same time increasing engagement with the whole of our membership, from law students to our senior lawyers. We are excited to begin delving deeper into the implementation of our strategic goals.

For those who were in attendance in Washington, you hopefully enjoyed a slightly different format for our Update Conference, including shorter “snapshots” in different subject areas. We hope you enjoyed the change of pace and welcome your feedback on how we are doing.

In addition to our strategic plan, the Governing Committee, committee chairs, and liaisons are hard at work on other initiatives. Earlier this year, I had the pleasure of speaking to each of our committee chairs and liaisons about their goals for the next year, which range from increasing membership and engagement with young lawyers to ensuring that all of our offerings are providing opportunities for us to learn from each other and actively engage in all the Forum has to offer.

As one example, Abby Bried, our Diversity & Inclusion Liaison, and I have been working closely on diversity initiatives we hope to roll out this year, from including D&I CLE sessions at our annual conferences to D&I networking events throughout the year.

We welcome your continued input and engagement. As always, please do not hesitate to reach out to me at jennifer.trock@bakermckenzie.com if you have any questions. I look forward to hearing from you.

Jennifer Trock
Chair, Forum on Air and Space Law
Welcome to the first issue of The Air & Space Lawyer for 2020! I am excited about the articles and interviews you will find in this issue and planned for future issues. I am also pleased to introduce two new members of our editorial board.

In this issue, our first feature article, from former A&SL editor-in-chief David Heffernan and GWU law student Brian Doll, provides an in-depth look at how the Federal Trade Commission has defined its authority to prevent “deceptive” consumer practices, and it considers how the US Department of Transportation should incorporate this well-developed precedent when it initiates a rule-making to define its parallel authority to prevent “unfair and deceptive practices” as set out in 49 U.S.C. 41712. The absence of a clear standard by DOT and the expansive application of its authority, in contrast to the FTC’s approach, has been the source of considerable disagreement and debate between industry and DOT. The authors propose one possible solution.

Our second feature article covers the interesting history of the transition of Ontario International Airport, originally owned and operated by the City of Ontario, California, into a component of Los Angeles World Airports (LAWA), and its subsequent contested devolution back to an independent airport owned and operated by the Ontario International Airport Authority. Roy Goldberg provides a fascinating account of Ontario’s efforts to wrest control of the airport from Los Angeles after the 2008 recession, and he spotlights the legal issue at the heart of the dispute between the two cities: did Los Angeles exercise its “best efforts” to retain and promote air service at Ontario?

Rounding out the issue is a timely interview with former NTSB Chairman Chris Hart. Chris comments on the impact his unique skill set as a lawyer, an engineer, and a pilot has had on his career, some of the challenges and achievements he has experienced, and life after “retirement” (hint: he is not sitting still). Chris exemplifies the best of public service and dedication to improving safety in aviation and all transportation modes.

In addition to this issue’s substantive content, I am pleased to introduce two new assistant editors. Angela Foster-Rice and Aparna Joshi bring extensive experience in the aviation environmental and labor and employment fields, respectively, to the editorial board. You will find short biographies within.

Finally, as always, I encourage you to reach out to any editorial board member if you are interested in contributing an article to The Air & Space Lawyer. Our goal is to provide high-level substantive articles on the varied legal and regulatory issues that you encounter as air and space law practitioners. We look to all of you to share your insights and experience, and drive collegial debate on the issues of the day.

David A. Berg
Editor-in-Chief

David Berg (airberg600@gmail.com) was general counsel of Airlines for America for 15 years before retiring in 2018. He was Chair of the Forum on Air and Space Law from 2003 to 2005. He resides in Las Vegas, Nevada.
California Comeback: Ontario International Airport Is Again Independent and Thriving

By Roy Goldberg

On November 1, 2016, Ontario International Airport (ONT), which is located about 55 miles east of Los Angeles International Airport and two miles east of Ontario, California, commenced its new life as an airport no longer owned and operated by the City of Los Angeles. This transaction was years in the making, following a potentially fatal death spiral in passenger levels, intense state court litigation, years of stop-and-start negotiations between Ontario and Los Angeles, lobbying of municipal and state government officials, Federal Aviation Administration (FAA) approvals, and Congressional authorization. The transformation has been amazing. It has included new transcontinental and transpacific air service and dramatic year-over-year increases in annual passenger levels and cargo shipments. This retrospective offers a look back at the unique legal and regulatory hurdles to returning ownership of ONT to the City of Ontario and how ONT went from worst to first in air service development and improved passenger and cargo airline service.

Ontario International Airport

Ontario initially developed, owned, and operated ONT. In 1929, the City of Ontario purchased 30 acres, now in the southwest corner of the airport, for $12,000 and established the Ontario Municipal Airport. The airport was built by one of the first flying clubs in Southern California, the Friends of Ontario Airport. In 1941, the city bought 470 acres around the airport and approved construction of new runways, which were completed by 1942 with funds from the Works Progress Administration. In 1942, an Army Air Corps plane made the first landing at the new airport. By 1943, the airport was an Army Air Corps operating base. In 1946, Ontario Municipal Airport was renamed “Ontario International Airport” because of the transpacific cargo flights originating there. A Pacific Overseas Airlines flight from Shanghai arrived at ONT in 1946, which inaugurated regular round-trip air passenger service between the United States and Asia. In 1949, Western Airlines began scheduled flights, followed six years later by Bonanza Air Lines.

Federal funding shortfalls for airports due to the “guns and butter” economic demands of the United States during the 1960s (generated in large part by the Vietnam War and social welfare programs) prompted Ontario in 1967 to enter into a Joint Powers Agreement (JPA) with Los Angeles, which moved ONT into the Los Angeles airport network (eventually administered by Los Angeles World Airports (LAWA)) consisting of Los Angeles International Airport (LAX), Van Nuys Airport, and ultimately (but temporarily) Palmdale Airport. Ontario retained ownership of ONT during this period. At that time, ONT was primarily a reliever airport for LAX.

In 1968, ONT saw its first scheduled jet flights. In 1969, Continental Airlines started nonstop services to Denver and Chicago, Air California operated flights to San Jose, Pacific Southwest Airlines started San Francisco flights, and Western flew nonstop to Sacramento and Salt Lake City. In 1970, United commenced a nonstop flight to Chicago and American started flights to Dallas and Chicago.

Finally, in 1985, the cities entered into an acquisition agreement under which Ontario transferred ownership of ONT to Los Angeles. However, a key provision of the 1967 JPA between Ontario and Los Angeles survived the acquisition agreement. Specifically, this provision imposed an obligation on Los Angeles to use its “best efforts” to retain and promote air service at ONT. For several years after 1985, Los Angeles supported air service development at ONT, which culminated in the construction and opening in 1998 of two new passenger terminals (T2 and T4). ONT enjoyed a progression of good years with the high point being 7.2 million passengers flying in and out of the airport in the years 2005 through 2007. In 2006, ONT became “LA/Ontario International Airport.” The “LA” portion was added to remind fliers of Los Angeles and to avoid confusion with the Canadian province of Ontario.

ONT’s “Death Spiral”

Unfortunately, starting in 2008, the bottom quickly fell out for ONT, resulting in a substantial drop in passenger traffic—it was down to 3.9 million passengers per year by 2012. LAWAs failure to promote ONT and operate it efficiently caused a negative economic impact to Ontario and surrounding communities of at least $540
millions in 2012 alone, and an estimated loss of over 10,000 jobs. Ontario feared that ONT faced an existential threat from this death spiral and took action. That same year, Ontario and San Bernardino County, in which Ontario is located, entered into a joint powers agreement to form the Ontario International Airport Authority (OIAA), a new administrative body to provide overall direction for the management, operations, development, and marketing of ONT for the benefit of the Southern California economy and the residents of the airport’s four-county catchment area.

LAWA’s leadership at the time tried to blame the national economic recession for the passenger traffic fall-off at ONT. This was of cold comfort to Ontario and the surrounding community, which faced the debilitating loss of both transcontinental and regional air service. In Ontario’s view, the truth behind the downturn at ONT could not be attributed solely to the national economy. At the same time that ONT was suffering unprecedented declines in air service and passenger levels, other airports (such as LAX) continued to thrive. LAW A was undertaking a massive renovation of the Tom Bradley International Terminal (TBIT) and needed to focus all of its finances and energies on that project to make sure that air service at LAX continued to grow to pay for the TBIT renovations and other modernization projects at LAX.

LAWA also favored LAX over ONT when it came to assignment of U.S. Customs officials needed for handling arriving international flights. Ontario further maintained that LAW A had not been attentive to the management of ONT by pointing to the cost per enplaned passenger (CPE) of approximately $15.36 for 2010, which was among the highest in the country. The high CPE was the result of the high operational cost of ONT, which Ontario asserted was due to LAW A’s mismanagement and resulted in the decline of airline service at ONT.

Ontario officials hailed from among those dedicated to public service (firefighters, police officers, teachers, etc.) in contrast to the Los Angeles Board of Airport Commissioners (BOAC), which was comprised largely of Hollywood agents and partners at major law firms. The Ontario leadership came to the difficult but obvious and necessary conclusion that, to save ONT, the airport needed to be moved out of the LAW A network. Preliminary negotiations between Ontario and Los Angeles went nowhere. In 2013, LAW A offered to return the airport to local control for a purchase price of $474 million, which was rejected. Ontario officials claimed that that price tag was at least $181 million too high. They contended that the facility had a negative value as a result of the severe passenger decline. Ontario also cited a study done for Los Angeles that put the airport’s value at only $140 million.

With negotiations at an impasse, Ontario filed an administrative claim against Los Angeles under the California Tort Claims Act (which is a mandatory predicate to bringing a lawsuit against a city in California), alleging, among other things, that Los Angeles was in breach of its obligation to use “best efforts” to retain and promote air service at the airport.

**Ontario Files State Court Complaint**

After Los Angeles summarily denied the administrative claim, Ontario filed suit against Los Angeles in neutral Riverside County Superior Court (a venue with neither LAX nor ONT). The complaint asserted claims for (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, (3) breach of fiduciary duty, (4) rescission of the 1967 JPA and 1985 acquisition agreement, and (5) reformation of the JPA and acquisition agreement. In addition to monetary damages, the action sought a transfer of ownership and the termination of the 1967 JPA in which the Los Angeles airport department became the operator of ONT on the condition that it improve the facility.

Ontario asserted that Los Angeles assumed ownership in 1985 at virtually no cost and that instead of exercising its best efforts to attract airlines and new service, Los Angeles squandered the asset by slashing Ontario’s advertising and marketing budgets and failing to act fast enough to reduce the airport’s high costs for carriers, a disincentive for providing service. The complaint also asserted, among other things, that ONT’s survival was in jeopardy because Los Angeles for too long caused ONT’s costs to skyrocket compared with other secondary airports in Southern California and nationwide, focused on developing LAX’s capacity as an international airport, and refused to market ONT as a convenient alternative to LAX. Ontario stated that it had “no practical alternative but to pursue its judicial remedies to stop the hemorrhaging at ONT by restoring local control over its operations and thereby leveling the playing field so that ONT can better serve the Southern California region and once again be an engine for economic growth in the Inland Empire.”

**The “Best Efforts” Clause**

Years of litigation between Ontario and Los Angeles ensued, with extensive document discovery and depositions of LAW A and Ontario principals, including LAW A’s then-executive director. The litigation also involved a battle of the experts on what “best efforts” for air service development requires and whether or not Los Angeles had failed to exercise best efforts in its treatment of ONT.
A model for Ontario’s litigation strategy was the decision of the U.S. Court of Appeals for the Second Circuit in Bloor v. Falstaff Brewing Corporation.3 There, the court affirmed a finding that a beer brewing company breached its contractual obligation to use best efforts to sell the beer of a company it had purchased. The court held that the brewery was not entitled to emphasize profits for its other businesses without fair consideration of effects on beer sales under the plaintiff company’s brand name. The evidence sustained the finding that, even taking into account the defendant’s right to give reasonable consideration to its own interests in selling beer under its own label, the brewer breached its duty to use best efforts to sell the other brewery’s brand of beer.

In applying the law and precedent for enforcing best efforts clauses to air service development, Ontario’s retained experts focused on the nature and requirements of appropriate air service development for an airport and its community. Air service development refers to the organized activities that an airport and/or its affiliated communities undertake with the ultimate goal of retaining existing air service or improving air access and capacity in order to develop the economy of a community or region.4 Air service development is “important for many communities, given the financial and risk realities of the commercial airline industry.”5 Good “air service—an array of flights appealing to travelers—doesn’t just happen. In fact, market and industry forces . . . tend to discourage airlines from expanding air service. However, by taking an active, professional approach to air service development . . . smaller airports and communities can often provide the information and conditions to encourage airlines to retain or expand air service to that community.”6 Commercial air service is valuable as an economic driver in the community. Adequate air service is a prerequisite for attracting investment and generating employment. Air service is directly related to the amount of economic activity in an area, and additional flights contribute to a community’s economic well-being.7 Competition for air service increases during difficult economic times.8

The airport is the natural central stakeholder in any air service development effort. The airport is in the best position to understand passenger traffic, service levels, air fares, and industry costs, and can educate other community stakeholders on the benefits of the new services and demonstrate that their commitment is a sound investment. The airport manager or air service development officer thus becomes crucial for organizing the local effort and coordinating other stakeholders.9

The experts retained by Ontario (with more than 100 years of air service development experience between them) opined and testified in depositions that Los Angeles fundamentally failed in its obligation to use best efforts to maintain and pursue air service development for Ontario and were prepared to testify to this at the state court trial. And the facts bore this out completely. LAWA was too focused on building up LAX to devote the needed time, resources, energies, or finances to help ensure that ONT weathered the economic storm of the late 2000s; it failed to take advantage of all possible opportunities to use time-tested air service development tools and devices to pursue and maintain robust air service at ONT.

The Case Settles and the Airport is Transferred
In the Ontario litigation, after years of discovery and with an August 17, 2015, trial date approaching, an impasse in settlement negotiations received an important shot in the arm with the election of Los Angeles Mayor Eric Garcetti, and on August 6, 2015, a settlement was reached. Also significant, Riverside County Superior Court Judge Gloria Connor Trask denied a motion in July by Los Angeles to block an expert’s testimony that would estimate Ontario suffered between $1.7 billion and nearly $4 billion in economic harm because of the airport’s reduced air service.10

As part of the eve-of-trial settlement, the OIAA agreed to repay Los Angeles millions of dollars in funds expended on ONT in exchange for the airport being transferred to the OIAA. LAWA also received promises of job protection for the airport’s 182 employees. In order to effect the settlement, OIAA needed to meet a number of regulatory requirements and obtain a change to federal law governing passenger facility charges (PFCs). Thereafter followed more than a year of deal negotiations, lobbying of Congress for language needed to allow the use of ONT PFCs to finance the payments owed to Los Angeles, and working with FAA to issue to OIAA the requisite certificate under 14 C.F.R. Part 139 to operate the airport. In January 2016, Rep. Ken Calvert introduced HR 4369, proposing to use passenger fees at ONT for 10 years to help pay for the two terminals, a condition of the 2015 deal but at that time not permissible. In July 2016, President Obama signed the bill, which was wrapped into the FAA Reauthorization Act. It was notable because federal law otherwise prohibits the transfer of PFCs between airports.11

The litigation involved a battle of the experts about “best efforts” for air service development and whether Los Angeles failed to exercise best efforts.

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Ontario and the OIAA also galvanized both local and statewide support for the deal. The return of ONT to Ontario was endorsed by more than 130 cities, county governments in California, state and local elected officials, regional planning agencies, and aviation-related citizens groups in Los Angeles, Riverside, and San Bernardino counties. Thirty-eight mayors and two county supervisors from the Inland Empire sent a letter to Mayor Garcetti, thanking him for supporting the transfer of the airport back to Ontario.

The deal eventually came together, and on November 1, 2016, the transfer became official after final approval and issuance by the FAA of an airport operating certificate. The total value of the deal was approximately $250 million. This included Ontario’s agreement to pay $50 million from its reserves, assume the airport’s $60 million debt, make payments of $50 million over five years, and a $70 million payment in the final five years.12

The airport’s operating name reverted to Ontario International Airport since the City of Los Angeles no longer oversaw operations of the airport. Mayor Garcetti—who has made regional collaboration a top priority for his administration—also celebrated the milestone as a significant step forward for air travel, improving air quality, and connectivity across the region.

Ontario Reverses the “Death Spiral”
Fast forward three years to 2018, and this story has a true Hollywood ending: the new airport operators have reversed the death spiral, as demonstrated by several successes. The airport’s continuing traffic decline reversed in early 2017, when the airport experienced faster growth than LAX for the first time since 2007. Initiating aggressive new air service development practices, including lowering landing fees and providing new amenities to passengers inside the current terminals, the airport has successfully attracted new airlines and service. As a result, China Airlines, Frontier, Delta, United, Southwest, and JetBlue decided to either begin, resume, or expand service to the airport. In December 2019, ONT announced that it was the fastest growing U.S. airport for the second consecutive year.13

On September 30, 2017, it was announced that China Airlines would begin nonstop flights from Ontario to Taipei, which started in Spring 2018.14 In addition, new transcontinental service was introduced from ONT to JFK on JetBlue, and more recently, Frontier announced new nonstop service from ONT to Newark, Miami, and Las Vegas and international service to El Salvador and Guatemala.15 China Airlines also decided to shift some capacity from LAX to ONT. The airport authority launched a marketing campaign in support of the carrier’s new service—something that LAWA never would have done because of its inherent conflict of interest.

Like all good stories, this one has a moral, which is that local communities need not accept the poor hand that fate has delivered. Rather, communities who rely on good air service to support their local economies can take control of the air service development process and help ensure that air service development efforts are truly the “best efforts” of the airport management team.

Endnotes
2. Id. ¶ 8.
3. 601 F.2d 609 (2d Cir. 1979).
5. Id. at 18.
6. Id. at 20.
7. Id. at 22–23.
8. Id. at 23.
9. Id. at 28.
11. Id.
Why DOT Should Interpret “Deceptive Practices” Using a “Reasonable Consumer” Standard  
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The FTC’s Deception Test Focuses on the “Reasonable Consumer”  
The FTC has developed separate policy statements as to what constitutes “unfairness” and “deception” under section 5 of the FTC Act. These policy statements guide the FTC in its investigations and enforcement determinations. Under these policy statements, the FTC developed separate three-part tests for finding a practice to be either “unfair” or “deceptive.” The three elements of the FTC’s test for deception are:

1. There must be a representation, omission, or practice that actually misleads or is likely to mislead consumers;
2. The relevant test is whether a reasonable consumer (i.e., “a consumer acting reasonably in the circumstances”) would be misled; and
3. The representation, omission, or practice must be material (e.g., it must be likely to affect a reasonable consumer’s purchasing decision).

The FTC’s “deception” test is exacting: in order for the FTC to find a “deceptive practice” violation of section 5, it must determine that a “reasonable consumer” was (or would be) materially and actually misled. The historical context of this test is important. For decades the FTC applied a very different standard, focusing on protecting consumers who were “the ignorant, the unthinking, and the credulous.” From the 1930s until the 1970s, in determining whether an advertisement was deceptive, the FTC and the courts viewed the public as a “vast multitude . . . who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions.”

The U.S. Supreme Court noted that “[t]he fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced.” Thus, the FTC found deceptive an advertisement using the word “permanent” to refer to a hair-coloring product that would not actually recolor the user’s hair permanently. In a case that exemplified the FTC’s concern to protect the ignorant even if they represented only a minority of all consumers, the advertiser produced survey data showing that 91 percent of people who viewed its advertisement were not deceived. The FTC, however, sanctioned the advertiser on the basis that it had deceived nine percent of consumers, thereby violating the prohibition against deceptive practices under the “ignorant consumer” standard. The FTC continued to apply a similar approach during the 1960s and the early 1970s.

By the 1960s, however, the FTC and courts began to question the ignorant consumer standard. In May 1963, the Second Circuit reversed an FTC decision finding fault with a Sterling Drug advertisement that cited a study of its Bayer aspirin product compared with four other pain relievers. The FTC found that the advertisement could mislead “our hypothetical, sub-intelligent, less-than-careful reader . . . .” The Second Circuit, however, disagreed, finding that Sterling Drug had used facts from the study and that it was not deceptive to highlight that the U.S. government had funded the study. In another 1963 case after Sterling Drug, the FTC concluded that “a representation does not become ‘false and deceptive’ merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed.”

By the late 1970s, the ignorant consumer standard was the target of increasing criticism: as one scholar argued, “[a] small segment of the population can always be identified who will misinterpret the clearest communication. Thus, a demand that the law protect all—even the trusting and the unthinking—is indeed an extreme position.”

In 1978, the FTC faced a backlash after it issued the so-called “kid-vid” proposed rule that sought to impose severe restrictions on television advertising targeted at children, including a total ban on such advertising in some circumstances. The rationale for this proposed rule (which was not adopted) was that children are the ultimate ignorant consumers, too easily susceptible to deception based on advertising specifically targeted at them. Following a public outcry, Congress intervened to halt the rulemaking. Congress ultimately allowed the FTC’s funding to lapse, which shut down the FTC briefly before its funding was restored. A Washington Post editorial condemned the FTC as the “national nanny.” This proved to be a significant turning point for the FTC, which culminated in the FTC’s issuance of separate Policy Statements on Deception and Unfairness, which remain in effect today. The Policy Statement on Deception specifically rejected the “ignorant consumer” standard in favor of the “reasonable consumer” standard that the FTC continues to apply today.

DOT Has Regulated Deception Expansively, Not Merely to Protect the “Reasonable Consumer”  
DOT has stated in enforcement orders that it finds the FTC’s standard for deception focusing on protecting the “reasonable consumer” to be “instructive,” noting...
that “[a] practice is deceptive if it misleads or is likely to mislead a consumer acting reasonably under the circumstances with respect to a material issue (one that is likely to affect the consumer’s decision with regard to a product or service).” DOT, however, has not specifically adopted or applied the FTC’s three-part test for “deception.” Instead of explaining the specific criteria or standards it uses to identify deceptive practices, DOT has merely invoked section 41712’s broad prohibition against deceptive practices as authority to promulgate a number of regulations and take enforcement action against carriers for a wide range of conduct.

DOT has specifically cited section 41712 as authority for adopting and enforcing regulations prohibiting “deceptive practices” relating to codeshare disclosures, lengthy tarmac delays, full-fare advertising, post-purchase price increases, over-sales and denied boarding compensation, and the 24-hour reservation-hold rule. The cases cited in footnotes 29–35 in this Article are relatively recent, but the DOT, like its predecessor, the Civil Aeronautics Board, has relied for decades on section 41712 as exclusive statutory authority for a wide range of enforcement actions without further refining its approach to applying that authority.

DOT’s historical failure to formally adopt the FTC’s three-part deception test has caused it to apply less rigorous, and apparently subjective, standards for finding deceptive practices. While DOT has not addressed the point directly, numerous DOT actions to prohibit deceptive practices appear to have relied on an “ignorant consumer” standard, rather than a “reasonable consumer” standard. Below are just two examples.

**The Southwest “Free” Advertising Case**

In May 2012, DOT published “guidance” that prohibits airlines from advertising “free” air travel if the purchaser is required to pay any applicable taxes or fees. In 2017, Southwest Airlines offered a Companion Pass promotion under its Rapid Rewards frequent flyer program whereby California Rapid Rewards members could benefit from a “Fly One. Get One Free” deal. Southwest used an asterisk to disclose on the same page (in the body of the advertisement and not merely in a footnote) that the promotion did not include government taxes and fees. DOT deemed this to be an “unfair or deceptive practice” under section 41712.

DOT stated that Southwest’s advertisement was “misleading” because it advertised a “fare” as “free” even though passengers were responsible to pay applicable taxes and fees (which, for the majority of passengers, was $5.60 each way). In view of DOT’s threat to levy “substantial” enforcement penalties, Southwest decided to terminate the Companion Pass promotion despite tens of thousands of consumers having already taken advantage of it. There was no evidence that Southwest’s offer had misled or confused any consumers, and neither Southwest nor DOT received any consumer complaints about the offer.

The Southwest Airlines Companion Pass “free” ticket offer, with its prominent disclosure of the requirement that consumers pay the taxes and fees associated with their zero-fare ticket, likely would have passed muster under the FTC’s policy because there was no objective evidence of any consumer deception or harm. The net effect of DOT’s action was to deprive many additional consumers the benefit of Southwest’s offer.

**The Lufthansa Website Malfunction Case**

In 2015, DOT assessed a $30,000 civil penalty against Lufthansa for engaging in “unfair and deceptive practices” arising from a technical malfunction on the airline’s website that temporarily disabled the booking function for certain advertised fares. DOT presented no evidence of intent to deceive on the part of Lufthansa. In fact, DOT did not dispute Lufthansa’s position that the malfunction was inadvertent. In terms of consumer harm, only a single consumer complained to DOT about the malfunction. Lufthansa responded that if the consumer had called its toll-free booking phone number, the airline would have sold her the fare. At no point during the malfunction were seats unavailable for purchase at the listed fares, and Lufthansa took immediate corrective action to fix the problem with its online booking function. This included proactively contacting the affected passenger and honoring the quoted fare.

It seems inconceivable that DOT’s case against Lufthansa could satisfy the FTC’s “deception” test. Under that test, DOT would have to show that reasonable consumers were (or were likely to be) “misled” as result of a material misrepresentation or omission by Lufthansa. The only potential “misrepresentation or omission” was the fact that the Lufthansa website offered a fare that, for technical reasons, was temporarily unavailable for purchase via that website. DOT, however, never provided any evidence that more than one consumer was affected by the temporary malfunction. In addition, the one consumer who complained was able to purchase the fare; thus, the malfunction was not “material.” The FTC defines a reasonable consumer as one who takes reasonable steps to inform herself about a purchase. In the circumstances presented in the Lufthansa case, a reasonable consumer who wishes to purchase a fare that is advertised on an airline’s website but is unable to
complete the purchase online due to a technical issue with the website surely would call the toll-free phone number prominently displayed on the airline's website and inquire as to the fare's availability and how to book it (which would result in her purchase of the fare by phone or other means). A temporary website malfunction of an airline's website may be suboptimal from a customer-service perspective, but it should hardly be treated as an “unfair or deceptive practice,” particularly absent evidence that any consumer was actually harmed.

Thus, DOT's approach has deviated from the FTC's focus on the reasonable consumer test, and in ways that have led to a more market-interventionist regulatory approach. This result conflicts with DOT's congressional mandate to “place[ ] maximum reliance on competitive market forces.” Reliance on a reasonable consumer standard would acknowledge this mandate and more appropriately allow market forces to operate while reserving the government's authority to intervene in limited circumstances when diligent consumers are actually and materially deceived.

Conclusion

DOT has claimed that it models its interpretation of its statutory “unfair or deceptive practices” authority on the FTC's interpretation of the same phrase. But as shown, that has not, in fact, always been the case. DOT's pending rulemaking provides it an opportunity to codify such an interpretation into a regulation. In doing so, DOT should follow the FTC and adopt a test for determining “deception” that relies on the “reasonable consumer” standard. The FTC, after an extensive prior history of regulation to protect the “ignorant consumer,” has long used a “reasonable consumer” test, which strikes an appropriate balance between allowing market forces to operate while enabling the FTC to intervene if a merchant engages in conduct that would materially mislead a consumer who acts “reasonably in the circumstances.” This “reasonable consumer” standard makes clear that the government will not intervene in any or all circumstances to protect consumers from buyer's remorse or ill-informed purchasing decisions. If, however, an airline or ticket agent materially and actually misleads consumers by representation or omission, thereby frustrating a reasonable consumer's ability to obtain the accurate information necessary to make an informed purchasing decision, the reasonable consumer standard would allow DOT to take appropriate enforcement action for violating section 41712.

Endnotes

1. See infra notes 30–36 and accompanying text.
4. NPRM at 11882–9.
7. Id.
11. Id.
12. Firestone Tire, 81 F.T.C. 398, 415 (1972) (evidence of potential deception of 15 percent of individuals who viewed an advertisement was sufficient to deem the advertisement to be a deceptive practice); Benrus Watch Co., 64 F.T.C. 1018, 1032 (1964) (finding deception based on evidence that 14 percent of consumers who viewed an advertisement were deceived).
14. Id. at 675.
15. Id. The court pointed out that the FTC's reliance on an ignorant person standard was selective. Id. at 676–77 (“Unlike the standard of the average reader which the Commission avidly endorses throughout these proceedings, it here would have us believe that he is linguistically and syntactically sensitive to the difference between the phrases ‘as gentle as’ and ‘no more upsetting than.' We do not find that the Commission has reason to believe that this will be the case, and we therefore reject its contentions.”).
18. 43 Fed. Reg. 17,967, 17,969 (notice of proposed rulemaking on children's advertising, Apr. 27, 1978) (the proposed rule would have banned “all televised advertising for any product which is directed to, or seen by, audiences composed of a significant proportion of children who are too young to understand the selling purpose of or otherwise


25. See FTC Policy Statement on Deception, supra note 5, at 2 (“The act or practice must be considered from the perspective of the reasonable consumer”). As described above in text, the reasonable consumer standard is part of the FTC’s three-part test for deception.


35. See, e.g., Delta Air Lines, Inc. Enforcement Proceeding, C.A.B. Order 79-9-140 (Sept. 24, 1979) (Docket No. 33512) (finding that Delta violated the predecessor provision to § 41712 by advertising Dallas/Ft. Worth–London service without disclosing a required connection and aircraft change at Atlanta involving a 90-minute layover); Trans World Airlines, Inc. Discount Fare Advertising Enforcement Proceeding, C.A.B. Consent Order 80-6-29 (June 5, 1980) (Docket No. 37009) (finding that TWA violated the predecessor provision to § 41712 by advertising fares “with no restrictions” while...
imposing a limit on the number of seats available at those fares); Hotwire, Inc., DOT Consent Order 2002-10-7 (Oct. 4, 2002) (Docket No. DOT-OST-2002-12273) (finding that Hotwire violated § 41712 by “failing to describe fully the markets used in its comparison advertisements.”).


38. The FTC allows merchants to advertise “free” goods or services, subject to “clear and conspicuous” disclosure of all applicable terms and conditions. 16 C.F.R. § 251.1(c) (“When making ‘Free’ or similar offers all the terms, conditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.”). This requires more than “a footnote . . . to which reference is made by an asterisk or other symbol placed next to the offer.” Id. The FTC continues, “[a]ll of the terms, conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service.” Id.


40. 49 U.S.C. § 40101(a)(6); see ABC Aerolineas, S.A. de C.V., d/b/a Interjet v. U.S. Dep’t of Transp., 747 F. App’x 865, 867 (D.C. Cir. 2018) (noting that DOT’s limited statutory authority requires “maximum reliance on competitive market forces”).

Meet the New Editor

Angela Foster-Rice, Senior Vice President, Business Development-Transportation & Travel Sector, Everland
Angela Foster-Rice is an environmental attorney and sustainability leader with 20-plus years of experience. In 2019, Angela joined the company Everland with a mission to prevent deforestation as an important climate mitigation measure. At Everland, Angela leads business development for the transportation and travel sector, helping elevate the sustainability leadership of her clients by supporting projects that protect forests, wildlife, and that improve the livelihoods of those who live near those forests.

Prior to Everland, Angela spent 15 years at United Airlines, the last four as managing director, Global Environmental Affairs and Sustainability, leading a team responsible for United’s environmental regulatory compliance, environmental policy, sustainability measures, and alternative fuels strategy. Under her leadership, United became the first U.S. airline to integrate low-carbon biofuels into everyday operations. She participated in the International Civil Aviation Organization’s effort to develop the first global regulation of aviation carbon emissions—the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). She also has held several leadership roles within both IATA and A4A, including as vice chair of IATA’s Environment Committee and chair of A4A’s International Noise and Emissions Committee. During Angela’s tenure, United was recognized as an environmental leader for its climate change work in sustainable aviation fuels and its industry engagement for aviation climate policy.

Outside of work, Angela is active in various organizations focused on environmental law and policy, and clean/climate tech, and in mentoring future leaders in corporate sustainability. She received a degree in Environmental Studies from Rice University (Houston, Texas) and a law degree from Northwestern University (Chicago, Illinois).
Christopher A. Hart, attorney, engineer, and pilot, was appointed to the NTSB in 2009; he served as acting chair starting in 2014 and then as chair from 2015 to 2017. He also spent much of his career working for the FAA and National Highway Safety Transportation Administration. He was chosen to serve as the chairman of the FAA’s Joint Authorities Technical Review (JATR) team that made recommendations about improving the FAA’s process that approved the now-grounded Boeing 737 MAX.

A&SL: You’ve worn a lot of different hats in your career that have all been rooted in safety. And you’re a lawyer, an engineer, and a pilot. Can you tell us about those different positions that you have held in your career and how that background prepared you for those roles?

CH: My mother once told me that the first thing she ever saw me draw was an airplane; I am an aviation addict, and much of what I have done is centered around aviation. Most of the positions I have held have enabled me to take advantage of my combination of engineering, legal, and piloting backgrounds. For example, when I was at the FAA, I developed a program called GAIN, Global Aviation Information Network, which was created to enable the worldwide aviation community to collect, analyze, and share aviation safety information to use it proactively to prevent accidents. The program began with reporting from pilots, so my piloting background enhanced my understanding of the concerns that pilots might have about reporting about potential safety issues, and being a pilot enhanced my credibility with the pilot population when I encouraged them to report potential issues. Many of the reports were about design issues, so my engineering background enhanced my substantive understanding of the merits of the concerns that were being reported. Removing many of the obstacles that discouraged pilots from reporting about potential safety issues involved legislation and regulations, so my legal background was helpful for that.

Similarly, many of the issues that I encountered at the NTSB involved both engineering and legal challenges, and being a pilot helped me better understand those issues.

Some people thought that going to law school after engineering school was a mistake, but the combination has been very powerful and enormously useful in most of my career.

A&SL: You were a member of the National Transportation Safety Board in the early 1990s and then again from 2014 to 2017, including as the chairman of the Board. What was it like to go back to the Board for another term and as chairman?

CH: Being an NTSB Member was thoroughly gratifying because I could see so many transportation safety improvements from what we did. It was also thoroughly enjoyable to work on subjects that were up close and personal, since I drive and fly and ride trains like we all do every day. Returning to the NTSB after being away for 16 years was even more gratifying because I returned as vice chairman and later became chairman.

As chairman, I informed the staff that because the transportation industries were very innovative, the NTSB would also have to be innovative to avoid getting “left behind.” I used the example of Kodak, which filed for bankruptcy because it was still making film while people were increasingly taking pictures with electrons. Recognizing that being innovative often requires out-of-the-box thinking, which may involve making mistakes, I emphasized to the staff that when I learned of a mistake, I would assume positive intent and regard such mistakes as an indication of efforts to be innovative, rather than as a basis for punishment. I received many compliments from the staff for having that attitude about how the agency should operate in order to continue playing a significant and leading role in improving transportation safety.

Imagine my surprise and excitement when, to honor my service as NTSB chairman, current NTSB Chairman Robert Sumwalt named an NTSB conference room after me. Thank you so much, Chairman Sumwalt!

When all is said and done, what’s not to like about having the staff do all of the hard work while I, as chairman, got the credit?

A&SL: What has been the biggest safety challenge that you have seen in aviation?

CH: I see two major safety challenges in aviation, one of which has already manifested itself and the other of which is just over the horizon.
The challenge that has already manifested itself is that as aircraft systems become more complex and interconnected, the potential failure modes become less predictable. When the failure modes were more predictable, it was easier to decide what to train in the simulator to help ensure that if pilots encountered problems in operation, they would have already seen the problems in the simulator and would be more likely to respond appropriately. The increasing complexity of systems has resulted in an increasing number of accidents in which pilots encountered problems in operation that they had never seen before, even in training, and they responded inappropriately. The two tragic 737 MAX crashes are just the latest in a series of accidents over the last decade or so in which pilots responded inappropriately to problems that they had never seen before, and I anticipate that this problem will become worse as aircraft systems continue to become increasingly complex.

The challenge that is just over the horizon is that the more capable and reliable automation becomes, the more the pilots become mere monitors. Not only has aviation experience demonstrated that humans are not good monitors of very reliable systems, but I am concerned about the fundamental disconnect that will result when highly trained, skilled, and competent pilots are expected to be mere monitors. At worst, this may undercut professionalism. I loosely describe professionalism as maintaining focus on the operational tasks at hand and performing them effectively, efficiently, and safely, and with a personal commitment to doing a job well—even when nobody is looking, as they say—as opposed to coming to work simply for a paycheck. In my view, professionalism is the foundation of a safe aviation transportation system.

A&SL: What do you feel was your greatest safety accomplishment so far in your career?

CH: My greatest safety accomplishment was developing programs at the FAA that helped the aviation industry systemically pursue the process of collecting, analyzing, and sharing safety data to use it proactively to prevent accidents. Perhaps the most important foundational part of that effort was that I spearheaded the legislation that protected voluntarily supplied safety data from public disclosure. This legislation, which was enacted as part of the FAA’s 1996 reauthorization package, formed the foundation for 49 C.F.R. Part 193, which opened the pipeline of safety information from the industry about daily operational issues by protecting voluntarily supplied safety (and security) data from public disclosure. That, in turn, is why ASIAS, the Aviation Safety Information and Analysis System, now contains flight recorder data from millions of flights and is a rich source of data that is being used extensively and proactively to further improve aviation safety.

A&SL: What are you doing now?

CH: I am thoroughly enjoying my “retirement” by engaging in activities in which I can apply my NTSB and FAA risk management background and experience to improving safety in various domains.

For example, the FAA asked me to lead its Joint Authorities Technical Review, in which aircraft certification technical experts from nine aviation regulatory authorities around the world, plus NASA, conducted what was essentially a peer review of the FAA’s process for approving the flight control systems of the 737 MAX. The objective of this peer review was to examine the robustness of the process and make recommendations as needed to enhance that robustness. The JATR made its recommendations to the FAA in October, whereupon the FAA made the recommendations public.

I was also asked to chair the Washington Metrorail Safety Commission, which was created last year to oversee the safety of the Washington, D.C., area subway system. For most mass transit properties in the United States, the first-level safety oversight is provided by the state, typically through the state’s department of transportation or public utilities commission. That regulatory model has been a challenge in Washington because its subway is the only mass transit system in the country that services three jurisdictions: Maryland, Virginia, and D.C. The WMSC, which is led by six commissioners, two from each jurisdiction, is an effort to respond to this tri-jurisdictional challenge and improve the safety of the subway system.

I am also engaged as a consultant with a public utility to improve its public safety as well as its workforce safety. I firmly believe that the airline industry collaboration success story, CAST (Commercial Aviation Safety Team), is transferable to many industries that are involved in potentially hazardous endeavors, including other transportation modes, nuclear power, petroleum exploration and refining, chemical manufacturing, and health care, to name a few. The airline fatal accident rate, after declining significantly for decades, began to “flatten” onto a plateau in the early 1990s. CAST was created to get the decline started again. Despite the prediction of many safety experts that the rate could not be improved much, CAST reduced the fatal accident rate from the plateau by more than 80 percent in less than 10 years. I am
eager for opportunities to transfer that amazing safety improvement story to other industries.

In addition to that, I thoroughly enjoy public speaking, and I am often invited to give presentations about various legal issues, such as the adverse impacts of overzealous criminalization of accidents upon safety improvement efforts and the use of “just culture” concepts to help improve safety. I also speak about a variety of other issues, such as the power of CAST-type collaboration and “System Think” to improve the safety of complex systems of connected and coupled subsystems, improving safety through the development of high reliability organizations (HROs), automation issues in general, automation issues as reflected in the 737 MAX, automation issues on the ground as applied in autonomous vehicles (where the AV makers are making many of the same automation mistakes that aviation made decades ago), and issues related to urban air mobility (pilotless aerial taxis).

In short, when I left the NTSB, I promised that I was not going to stay at home watching Ellen, and I am happy to say that I have been fulfilling that promise.

A&SL: It’s hard to imagine that you have a lot of free time, so I’m sure the time you do find is precious. What do you like to do when you’re not working?

CH: I enjoy watching old movies and TV shows, and I enjoy mentally challenging games, such as Sudoku and Spider Solitaire. Someday I would like to take up angel flying, taking people on medical missions at no cost to them, but as they say about flying, you shouldn’t do it at all unless you do it enough to stay proficient, so I’m not sure that will be happening any time soon.

A&SL: What was the last book you read and where was the last place you visited on vacation?

CH: I just finished a book about how the use of cargo containers was revolutionary to the transportation of goods, so much so that it enabled a variety of new industries to grow because of the significant reduction in the cost of transporting goods. Now I’m reading a book about medical issues associated with inbreeding of isolated populations, in this case disproportionate hereditary deafness among the residents of Martha’s Vineyard in the 1700s and 1800s.

My most recent vacation was to Sweden, thanks to Volvo, who pays two airfares to Sweden plus hotel to enable people to go to Sweden to buy their Volvo at the factory. While you’re there, you can drive your new car around Sweden and elsewhere to do the tourist bit; then when you return the car to the factory, they ship it to the States. My wife and I took this trip during our daughter’s spring break so that she could go with us, since none of us had ever been to Sweden before. What a marvelous place!

Meet the New Editor

Aparna Joshi, Partner, O’Melveny & Myers

Aparna B. Joshi represents employers in a wide variety of labor and employment matters. She has substantial experience advising aviation industry clients, representing airlines in federal court litigation under the Railway Labor Act, as well as in labor arbitrations, mediations, collective bargaining negotiations and proceedings before the National Mediation Board and the National Labor Relations Board. She also has significant experience representing clients in employment class action litigation and in international labor matters.

Aparna additionally represents employers in a wide range of employment discrimination matters, including those related to Title VII, the Americans with Disabilities Act, the Family and Medical Leave Act, wrongful discharge, and the Age Discrimination in Employment Act. She further routinely advises clients on employee terminations and other employment matters. Aparna actively works to improve diversity in the legal profession as a member of the Firm’s Diversity Working Group and as a past Fellow of the Leadership Council on Legal Diversity (LCLD), a growing organization of more than 200 corporate chief legal officers and law firm managing partners dedicated to creating a truly diverse legal profession.
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Save the Dates

Drone Law Conference
June 4, 2020 | Washington, DC

Space Law Symposium
June 4, 2020 | Washington, DC

Air & Space Law Annual Conference
September 10–11, 2020 | Montréal, Québec, Canada

Interested in writing an article for The Air & Space Lawyer? Contact Kathy Yodice (kathy.yodice@yodice.com) or David Berg (airberg600@gmail.com).