Standard of Care When Airlines Remove or Refuse to Board Passengers

Steven R. Pounian and Justin T. Green
New York Law Journal
Jul 30, 2012

A split has developed among the circuit courts regarding a federal statute that provides airlines discretion to refuse to allow passengers to board and to remove passengers from airplanes. The statute amended the Federal Aviation Act in 1961 after a spate of airline hijackings, and provides that "any air carrier is authorized to refuse transportation to a passenger when, in the opinion of the air carrier, such transportation would or might be inimical to safety of flight." The central dispute is whether, in amending the act, Congress immunized airlines from liability unless they act in an "arbitrary and capricious" manner or if airlines remain liable to passengers under traditional common law tort rules, which look to whether conduct is "reasonable" under the circumstances. Congress did not address the standard of care that airlines owe to passengers before refusing to transport them, leaving the question to the courts.

Circuit Court Rulings

The U.S. Court of Appeals for the Second Circuit addressed the airlines' obligations in the 1975 decision Williams v. TWA, where an airline refused boarding to a man who raised a string of red flags: He faced a kidnapping charge, had booked his ticket under an assumed name, and was described in an FBI bulletin as a "schizophrenic" who "possessed a large quantity of firearms," "threatened violence" and should be "considered armed and extremely dangerous." The man sued the airline alleging discrimination, false imprisonment and breach of contract.

The Second Circuit saw the "central issue" as whether it was "reasonable under the circumstances" for the airline to refuse transportation. Williams held that the test was whether under "the facts and circumstances of the case as known to the airline at the time it formed its opinion and made its decision [was] rational and reasonable and not capricious or arbitrary." The court concluded that the airline had not committed any "negligent or unlawful act or omission or any malfeasance."

The facts justifying the airline's refusal to board in Williams were stark, and nothing in the opinion indicates that the court was attempting to parse a distinction between "reasonableness" and "arbitrary and capricious" as the proper standard. Later decisions of the First and Ninth circuits, however, both cited Williams as the main support for their conflicting views.

In Cerqueira v. American Airlines, the U.S. Court of Appeals for the First Circuit "followed" Williams and applied an "arbitrary and capricious" standard, which it held was different from a reasonableness standard. The Cerqueira court also "followed" the U.S. Court of Appeals for the Ninth Circuit decision in Cordero v. CIA Mexicana De Aviacion, which it believed had likewise adopted an "arbitrary and capricious" standard. As a result, Cerqueira reversed a jury verdict that a passenger had faced discrimination from airline personnel and was improperly denied boarding.

Cerqueira cited favorably to the New York Court of Appeals decision in Adamsons v. American Airlines where, as in Cerqueira, the court adopted the arbitrary and capricious standard that it believed Williams had established. Adamsons described the standard as "under the facts and circumstances known by the carrier at the time the decision was made, whether the decision is arbitrary, capricious or irrational, constituting an abuse of discretion vested by law in the carrier." The Cerqueira court held that the focus of the inquiry is only on the captain's actions and omissions and that he or she is entitled to rely on information received from other crew members without making a reasonable inquiry the question is what the captain "actually knew,"
The Ninth Circuit, however, has since rejected the arbitrary and capricious standard and has itself "followed" Williams and its prior ruling in Cordero to hold that a standard of "reasonableness under the circumstances" should be applied.

In Eid v. Alaska Airlines, the Ninth Circuit not only rejected the First Circuit's "arbitrary and capricious" standard, but found that Williams and Cordero both adopted a reasonableness standard. The Eid court held that "reasonable" is a well-established and easily-understood standard, one that American courts are accustomed to applying in a wide variety of situations involving the behavior of individuals. 'Arbitrary and capricious,' by contrast, is a standard normally applied to actions of government agencies or judicial officers: it is seldom used to judge the conduct of individuals in the real world. Eid arose out of an international flight and, therefore, the liability of the airline was governed by the Tokyo Convention, which among other things provides an airline captain with the authority to restrain passengers if he or she has "reasonable grounds" to believe the passenger has or is about to commit an act which may jeopardize the safety of the aircraft or good order or discipline, to disembark a passenger if there are "reasonable grounds" to believe the passenger has or is about to commit an offense against penal law, an act that may jeopardize the safety of the aircraft, etc., or which jeopardizes good order or discipline, and to turn the passenger over to law enforcement authorities if there are "reasonable grounds" to believe passenger has committed an act, which in a captain's opinion, is a serious offense according to the penal law. The airline and crew and even other passengers who become involved are entitled to immunity for actions taken in accordance with the convention.

The Eid analysis focused not only on what the standard should be under the Tokyo Convention, but also what the standard was under the Federal Aviation Act with the parties and amici taking different views on the standard, even as they cited to the exact same authority to support their divergent arguments. The court seemed to tacitly acknowledge the vagueness of the Williams court's language in defining the reasonableness standard, noting that "arbitrary and capricious" may be used to describe the reasonableness standard (after all if an action is unreasonable, it also can be described as arbitrary and capricious), and held that "[r]easonableness is a well-established and easily-understood standard, one that American courts are accustomed to applying in a wide variety of situations involving the behavior of individuals. 'Arbitrary and capricious,' by contrast, is a standard normally applied to actions of government agencies or judicial officers: it is seldom used to judge the conduct of individuals in the real world." Indeed, "arbitrary and capricious," as used in Williams, seems to merely describe an airline's decisions that are not reasonable and, while coming to the opposite conclusions, both the First and Ninth circuits recognized that arbitrary and capricious could describe a reasonableness standard.

**Issues to Consider**

The chief argument against a reasonableness standard is that the Federal Aviation Act affords the airline discretion to act on its opinion in the interests of safety and that absent an arbitrary and capricious standard, airlines and their flight crews would be unfairly second-guessed by juries applying the perfect vision of hindsight. Fearing potential liability, airlines and their crews might hesitate to take actions to preserve safety and good order on airplanes. This argument, however, does not properly respect the safeguards already incorporated into the common law reasonableness test. That standard is not applied in a vacuum, but incorporates and adjusts to the unique risks faced by airlines. An airline attempting to thwart a potential hijacker is judged as a reasonable carrier under the circumstances. Those circumstances can include the time available to make a decision, the threat level, the available information, the special conditions of an in-flight emergency and a myriad of other potential factors. The reasonableness standard is not unfair if applied correctly, and it is hardly likely that an airline or a flight crew would be influenced if the standard of care were reasonableness under the circumstances, rather than an arbitrary and capricious standard.

By contrast, the "arbitrary and capricious" standard does not define a rule of conduct but provides a basis for an airline to argue for almost blanket immunity whether or not its actions deserve such special treatment. While the Federal Aviation Act clarified that airlines have discretion to refuse boarding to potentially dangerous passengers (something already part of the common law), it did not adopt a new legal standard or suggest that airlines were empowered to act in an unreasonable manner.
Moreover, there is no suggestion that airlines face a deluge of lawsuits for refusing to board passengers. There have been relatively few suits of this nature, likely because these incidents are relatively infrequent and proving liability is challenging regardless of the standard of care (and recoverable damages are frequently modest).

While the question of reasonableness is usually decided by a jury and not on summary judgment, that is no reason to abandon the traditional rule. In appropriate cases courts can act to dismiss cases where there is insufficient proof to establish negligence as a matter of law.

The reasonableness standard works to balance the very important duty of the airlines to preserve safety and good order against the basic rights of passengers. The post 9/11 world has changed the equation of airline security, leaving passengers increasingly subject to the control of airline personnel. The reasonableness standard can adapt to this change while providing some measure of protection to the rare passenger who actually faces discrimination or unfair treatment.

Steven R. Pounian and Justin T. Green are partners at Kreindler & Kreindler.

Endnotes:

1. 49 U.S.C. 44902(b).
2. 509 F.2d 942 (2d Cir. 1975).
3. Id. at 945 n.1 (capitalization in original).
4. 509 F.2d at 946.
5. Id. at 948.
6. Id. at 949.
7. 520 F.3d 1 (1st Cir. 2008).
8. 681 F.2d 669 (9th Cir. 1982).
10. Id. at 49.
11. 520 F.3d 1, 14-15 (1st Cir. 2008).
12. 621 F.3d 858 (9th Cir. 2010).
13. Id. at 868.
15. See Federal Aviation Act 1111e (Public Law 87-197, 87th Cong. 1st Sess., approved Sept. 5, 1961, 75 Stat. 466) codified, as amended, at 29 U.S.C. 44902(b). The amendments were not substantive. See 49 App. 1511(a)
16. Eid, 621 F.3d at 868.
17. Id.; Cerqueira, 520 F.3d at 14 n.17.