

## **Walking The Tightrope: Waiver of Airline Defenses Under Montreal Convention Can Prove Costly, Despite Recoveries in “Bump” Cases**

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Involuntary denial of boarding a flight, also known as getting “bumped,” has been a common practice by airlines for years. It occurs in situations where there are more passengers scheduled to fly on an airplane than available seats. When a flight is full and overbooked, airlines use their own criteria to choose which passenger(s) will be removed or “bumped” from the flight.



In a recent case of “bumping,” in *Lockhart v. Coastal Air Transport*, the Supreme Court of the Virgin Islands affirmed the award of damages to a passenger who was wrongfully denied boarding an international flight from Domenica to St. Croix, initially due to an erroneous ticketing issue that was determined to be the fault of the airline. *Lockhart* at 1. On appeal, the primary question the Court addressed was the issue of whether a passenger who was involuntarily denied boarding (“bumped”) is entitled to compensation when the plane has a capacity of only nine seats. Importantly, although this case was within the purview of the Montreal Convention (“Convention”), as it involved international carriage, the Court noted that the airline had waived its right to assert defenses under the Convention because the airline did not raise those defenses in its responsive pleadings.<sup>1</sup> *Lockhart* at fn. 2. Instead, the airline relied upon Section 250 of the Code of Federal Regulations as authority to support its position that the passenger was not entitled to recovery for compensatory damages, such as the cost of the ticket and subsequent expenses including overnight accommodations.

Specifically, the airline argued that the passenger’s recovery was precluded under 14 C.F.R. §250.6, which permits an airline to deny a passenger from boarding an oversold flight in the event the aircraft has 60 or less seats and is unable to accommodate additional passengers due to weight/balance restrictions related to operation and safety. *Lockhart* at 2. In affirming the trial court’s award for the passenger, the Court endorsed the position that private legal action is

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<sup>1</sup> It is unknown whether waiving defenses under the Montreal Convention was done intentionally or not.



permissible if airlines refuse recompense or passengers do not agree to an airline's proposed compensation in "bumping" situations. *Id.* at 3. The Court determined that §250.6 was inapplicable because the airline presented no evidence that the passenger was denied boarding due to weight or balance restrictions. The Court also found that §250 did not apply in the first place because it is limited to a category of aircrafts that have a designed passenger capacity of 30 or more passenger seats, and the aircraft at issue was limited to only nine seats. *Lockhart* at 2. As a result, this case was governed by local law rather than the Code of Federal Regulations. *Id.* at 3.

As seen in *Lockhart*, multiple controlling authorities have the potential to govern these types of claims, including the Code of Federal Regulations, the Montreal Convention, local law, and potentially other sources. While individual facts and circumstances in each case will ultimately determine whether liability exists and the extent of available damages, the Montreal Convention can serve to provide levels of limitation on recovery and may provide grounds for complete dismissal in certain situations. Although the passenger's recovery in *Lockhart* was ultimately upheld, the airline was fortunate that the scope of this particular claim was limited to nominal compensatory damages. In many situations, waiving defenses provided under the Montreal Convention is a risky proposition as the Convention provides a number of limitations on recovery and safeguards for air carriers, including caps on delay damages per Article 19, preclusion of recovery for delays under Article 17, in addition to the prohibition of emotional and punitive damages. Carriers flying internationally rely on these limitations on recovery, and risk losing these protections when waiving the defense of the Montreal Convention.

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