

MISTAKES, AIRFARES, AND CONSUMERS: RESTORING THE DEPARTMENT OF TRANSPORTATION'S ROLE IN REGULATING UNFAIR TRADE PRACTICES

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“If you want to be a millionaire, start with a billion dollars and launch a new airline.”

-- Richard Branson, founder of Virgin Airlines¹

“If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.”

-- Smith v. Hughes²

INTRODUCTION

Price mistakes in contracting raise difficult legal questions.³ When someone buys something that it turns out is worth more than they paid for, questions of equity and law quickly surface. The prospect of striking it rich suddenly has captured the public imagination, with the growth of reality television shows specializing in “sudden windfall” stories. There is no shortage of examples in the media. Take, for example, the case of Zach Norris, who purchased a watch from a Goodwill thrift store for \$5.99, only to find out later it was worth \$35,000.⁴ Goodwill did not attempt to take back its purchase, but a car dealership in Virginia wasn't quite as charitable. In September 2012, a Chevrolet dealership in Chesapeake mistakenly sold a new vehicle to a customer for thousands of dollars less than it intended.⁵ When the customer refused to sign a new contract for the right price, the dealership asked police to arrest the customer, who then spent hours in jail.⁶ The charges were dropped, but the customer filed a \$2.2 million suit against the dealership alleging malicious prosecution, slander, defamation and abuse of process.⁷

What happens when computers automate the process of price contracting, and millions of the same or similar items are sold daily? The airline industry grapples with this question when its tickets are mispriced and consumers snatch them up in seek of a bargain. This Article addresses questions raised when airlines misprice their airfares.

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¹ Kitty Bean Yancey, *Peek Under the Wing at Airline Secrets*, USA TODAY, Oct. 13, 2006, at Life.

² Smith v. Hughes, 6 LR-QB 597, 607 (1871) (Blackburn, J.).

³ See generally Benjamin Groebner, *Oops! The Legal Consequences of and Solutions to Online Pricing Errors*, 1 Shidler J. L. Com. & Tech. 2 (2004) and Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CAL. L. REV. 1573 (2003).

⁴ Andrew Luecke, *Making \$35,000 Off a Thrift Store Watch*, ESQUIRE.COM, Jan. 26, 2015, <http://www.esquire.com/style/mens-accessories/a31314/35000-dollar-lecoultre-deep-sea-alarm-thrift-store-012615/> (last visited March 1, 2015).

⁵ Suzan Clarke, *Chevy Dealer Errs in Sale Price, Has Customer Danny Sawyer Arrested for Theft*, ABC NEWS, Oct. 4, 2012, <http://abcnews.go.com/blogs/headlines/2012/10/chevy-dealer-errs-in-sale-price-has-customer-danny-sawyer-arrested-for-theft/> (last visited March 1, 2015).

⁶ *Id.*

⁷ Scott Daugherty, *Dealership Apologizes for Error, Customer Arrest*, THE VIRGINIAN-PILOT, Sept. 27, 2012, available at <http://hamptonroads.com/2012/09/dealership-apologizes-error-customer-arrest-0>.

The airline industry remains an important force in the U.S. economy. In the wake of the Great Recession of 2008, the airline industry in the United States suffered through one of its most difficult periods, as business demand dried up and prices dropped.⁸ In 2009, the industry experienced a steep 16.1% decline in revenue.⁹ By 2014, the airline industry finally seemed to be on the mend as revenues rose 3.6% to \$143 billion.¹⁰ Consolidation in the industry reduced the number of major airlines to just four companies (American, Delta, United, and Southwest) holding nearly 70% of the market.¹¹ The combination of higher ticket prices (a result of decreased competition from mergers), increased efficiencies, and lower oil prices meant that the global airline sector returned handsome profits of \$19.9 billion to shareholders in 2014, and is poised to increase that figure to \$25 billion in 2015.¹²

These profits are generated by staggering numbers of passengers. In 2014, airlines serving the United States carried an all-time high of 848.1 million passengers' system-wide (domestic and international), a 2.5% increase from 2013 and 1.2% more than the previous record-high of 838.4 million in 2007.¹³ "In 1991, planes flew on average at 56 percent full, but now average over 85 percent full."¹⁴ Average fares have risen from \$307.31 in 2005 to \$390.61 in 2014.¹⁵

This Article traces the problem of mistake airfares and the federal government's response to airlines that cancel tickets for erroneous fares. Part I of the Article explores airline pricing generally, and argues that airline tickets are a unique form of commodity good, one where there is no consumer expectation of a reasonable price. The dynamic nature of airline yield management means that prices for the exact same seat on an airplane can range dramatically on a variety of circumstances and factors that are beyond the knowledge, control or comprehension of the ordinary consumer. The Article investigates several well-known examples of mistake airfare pricing, and the Department of Transportation's regulations on airfare pricing. In Part II, the Article analyzes the DOT's regulations in light of the common law of mistake in contracts, and concludes that those regulations are well-grounded in traditional contract law. Part III of the Article explores the DOT's newly evolving thinking on mistake fares, including the DOT's proposal to revise regulation on those fares. The Article argues that DOT should not move away from its pro-consumer stand that has served consumers well for nearly four years. Finally, in Part IV, the Article makes some common-sense suggestions for how DOT can approach the problem of mistake airfares in a way that strikes a proper balance between consumers and airlines.

I. The problem of mistake airline airfares

⁸ IBISWORLD, DOMESTIC AIRLINES: INDUSTRY AT A GLANCE (2014).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Zacks Equity Research, *Lower Oil Prices: A Boon for the Airline Industry*, WWW.ZACKS.COM (Mar. 23, 2015), <http://www.zacks.com/commentary/38950/airline-industry-stock-outlook---march-2015>.

¹³ Press Release, U.S. Dep't of Transp., Summary 2014 U.S.-Based Airline Traffic Data (Mar. 26, 2015) (on file with author) (*available at* http://www.rita.dot.gov/bts/press_releases/bts015_15).

¹⁴ Paul Hudson, *It's Time to Re-Regulate Airlines*, ELLIOT.ORG, May 15, 2015, <http://elliott.org/blog/its-time-to-re-regulate-airlines/>.

¹⁵ United States Department of Transportation, Office of the Assistant Secretary for Research and Technology, Bureau of Transportation Statistics, <http://www.transtats.bts.gov/> (last visited May 1, 2015).

A. Airline pricing generally

Every day, millions of air passengers purchase tickets from airlines entitling them to passage from their point of origin to their destination. Originally printed on paper, the industry moved to 100% e-ticketing in May 2008 (resulting in \$3 billion annual savings).¹⁶ In addition to information about the flights the passenger has purchased passage on, airline e-ticket systems typically store a passenger's name, address, date of birth, gender, frequent flyer information, seat assignment, and class of travel.¹⁷ When passengers arrive at the airport, the e-ticket is retrieved and used to issue a boarding pass to the passenger.¹⁸

The industry distinguishes a reservation from an e-ticket. Some airlines permit reservations to be made and held without payment,¹⁹ while others require reservations to be paid for immediately. When a customer makes payment, e-tickets (each e-ticket has a separate and unique number attached)²⁰ are typically issued shortly thereafter.

Since the airline industry is capacity constrained, the price paid for an e-ticket is highly variable. Unlike a business such as Google or Facebook, that makes money by selling advertising on their websites and therefore have a theoretically unlimited upper limit in creating revenue, an airline can only make as much revenue as it has seats to sell on airplanes flying between origin and destination. Airline ancillary pricing (such as checked bag fees) has created tremendous opportunities for additional revenue growth, but ultimately airline revenue is driven by seat capacity. Once an airplane door closes and the airliner leaves the gate, the airline can no longer generate revenue by selling seats on that plane. As Jim Compton, a senior vice president of pricing and revenue at (now merged with United) Continental Airlines said, "I have a really perishable product. It's gone when the door of the plane closes. An empty seat is lost revenue."²¹

This was not always the case. When the federal government regulated the airline industry, ticket prices for those seats remained fairly constant.²² In 1974, for example, it was illegal for an airline to charge less than \$1442 for a New York to Los Angeles flight.²³ Airline deregulation in 1978 gave pricing control to the airlines, and subsequently had profound effects on Americans. In 1965, 20 percent of Americans had ever flown in an airplane. By 2000, half of Americans took at least one roundtrip flight in that year. Airlines prices have fallen by about

¹⁶ International Air Transport Association, *Fact Sheet: Concluded StB Projects*, WWW.IATA.ORG, https://www.iata.org/pressroom/facts_figures/fact_sheets/Pages/stb-concluded.aspx (last visited Feb. 25, 2015).

¹⁷ Nadia Nygaard, *How Do Electronic Airline Tickets Work?*, WWW.USATODAY.COM, <http://traveltips.usatoday.com/electronic-airline-tickets-work-63549.html> (last visited Feb. 25, 2015).

¹⁸ *Id.*

¹⁹ American Airlines, for example, permits most tickets to be placed on a 24-hour hold before purchase and ticketing. When a customer chooses this option, a reservation is created but the e-ticket is not issued until the customer pays the fare quoted for the reservation. See American Airlines, *Hold Your Reservation on aa.com*, WWW.AA.COM, <https://www.aa.com/hold> (last visited Feb. 20, 2015).

²⁰ The e-ticket number begins with a 3 digit numerical code indicating which airline issued the ticket. See Airline E-Ticket Codes, <http://www.kovrik.com/sib/travel/airline-codes.txt> (last visited Feb. 20, 2015).

²¹ Charles Fishman, *Which Price is Right*, WWW.FASTCOMPANY.COM, Feb. 28, 2003, <http://www.fastcompany.com/46061/which-price-right>.

²² For an excellent exposition on national airline policy, see Timothy M. Ravich, *National Airline Policy*, 23 U. MIAMI BUS. L. REV. 1 (2014).

²³ Derek Thompson, *How Airline Ticket Prices Fell 50% in 30 Years (And Why Nobody Noticed)*, WWW.THEATLANTIC.COM, Feb. 28, 2013, <http://www.theatlantic.com/business/archive/2013/02/how-airline-ticket-prices-fell-50-in-30-years-and-why-nobody-noticed/273506/>.

50% since 1978. That pricing, however, has become much more dynamic, and is now driven by a philosophy known as yield management or revenue management. Put simply, airlines want to sell each seat for as much money as possible, without pricing it so high that the seat flies empty. If a seat can't sell, the airline may decide to make it available to its frequent fliers who redeem accumulated miles for those seats.

With revenue maximization as the goal, airlines may change fares many times a day in hopes of selling more seats at higher prices.²⁴ Competitive forces play a factor as well, as airlines change prices to capture customers from other airlines or launch new routes. Unlike many other consumer commodity items, therefore, airline customers very rarely pay the same price for the same good or service they have previously purchased, or the same price as another customer seated next to them has paid. A myriad of factors can affect the price a customer pays for a seat, ranging from the time of day or week they are flying, the route they are flying, their point of origin, their destination, competitive forces or sales promotions, or even the size of their frequent flyer accounts. As flights fill up, seats become scarcer and pricing accordingly rises.²⁵ Generally this means last-minute fares are more expensive than tickets purchased in advance, but in some cases airlines will cut prices at the last minute to fill a plane that has lots of empty seats left.²⁶ Since airline pricing is deregulated, airlines are free to offer a seat at any price, and consumers are free to accept or reject that offer. On any given day, there are more than 100 million fares offered for sale to consumers, with prices updated hourly.²⁷ Consider one modern example: in 2003, Continental Airlines flew 2000 flights a day, with *each flight* having between 10 and 20 filed prices.²⁸ The airline begins offering seats for sale 330 days in advance of a flight, and prices vary by day of flight.²⁹ "At any given moment, Continental may have nearly 7 million prices in the market."³⁰ Collectively, the airlines change 75,000 prices a day.³¹

The industry's revenue model has three clear impacts to consumers. First, there is often no relationship between the cost to the airline to transport the passenger and the price charged.³² A short flight between two captive major hub cities with little competition that costs the airline far less in labor and fuel may be priced much higher than a longer flight between cities where competition requires lower pricing.³³ A direct flight that similarly costs the airline less in labor and fuel may cost more than a flight with connections that requires more labor, fuel, and occupies a seat the airline may otherwise sell.³⁴ In virtually all business to consumer transactions, a consumer can expect to pay more for receiving more product or services. In the airline business, the relationship between price and miles flown simply doesn't exist.

²⁴ See Fishman, *supra* note 21 (observing that airlines participate in a fare clearinghouse, ATPCO, that allows fares to change every day).

²⁵ George Hobica, *Confessions of an Airline Revenue Manager*, www.airfarewatchdog.com, <http://www.airfarewatchdog.com/blog/17695985/confessions-of-an-airline-revenue-manager/> (last visited Feb. 20, 2015).

²⁶ *Id.*

²⁷ Airline Tariff Publishing Company, *Life Cycle of the Fare*, <http://www.atpco.net/life-cycle-fare> (last visited Apr. 1, 2015).

²⁸ Fishman, *supra* note 21.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Scott McCartney, *You Paid What for that Flight?*, WALL ST. J., Aug. 26, 2010, available at <http://www.wsj.com/articles/SB10001424052748704540904575451653489562606> (last visited May 15, 2015).

³³ *See id.*

³⁴ *See id.*

The second impact to consumers is that the product they purchase comes with more conditions than virtually any other consumer commodity. If a consumer purchased a concert ticket, for example, they could give away the ticket to a friend to attend the concert instead. Airlines don't permit name changes on tickets. When a customer purchases bagels at the end of the day when the food is about to be discarded they may expect a discount, but with airlines the price of the seat goes up much higher as departure arrives. When a customer purchases a can of soda from a vending machine they are welcome to throw away unused portions, but with airline tickets, a customer who intentionally discards the last portion of a ticket (a practice known as throw-away ticketing) is violating the terms of their contract with the airline and could face penalties.³⁵ When a customer purchases two cans of sodas, they are welcome to consume the product in any order they wish, but when an airline customer purchases two tickets and flies them in different order (a practice known as nesting), airlines consider that a violation of ticketing rules and subject to penalties.³⁶ When a customer purchases goods at retail, they almost always have a right to return those goods if they change their minds, while the vast majority of airline tickets are nonrefundable or come with steep change penalties. The airlines have a need to protect revenue from a perishable product, and therefore impose onerous terms and conditions that most other industries would never contemplate.

The third impact to consumers, and perhaps the most important for purposes of this discussion, is that it is very hard, or even impossible, to discern a reasonable or prevailing price for any given ticket.³⁷ It can be more expensive to fly between New York and Hartford than to fly between New York and Spain.³⁸ Consumers rarely check the fare basis for the ticket they purchase, which all come with their own set of rules and restrictions.³⁹ With most consumer goods and services, consumers approach a transaction with an expectation of what price they will be asked to pay. With airline pricing, however, ticket prices are so unpredictable and variable that there is very little expectation other than to be surprised.

B. Examples of Mistake Airfares

With millions of tickets sold every day for passage between thousands of destinations, airlines face a dauntingly large task of yield management. Most airlines hire revenue managers to oversee the task, aided by sophisticated computer programs that constantly monitor sales channels and loads to suggest changes.⁴⁰ Every so often, an airline makes a mistake in updating a fare, resulting in a fare offered for sale that is lower than the airline intended. These so-called mistake fares are then purchased by consumers through normal retail channels such as from the airline (i.e., through the airline's website, phone reservations, or in person at a ticket counter) or a travel agent (i.e., online travel agency Travelocity.com or Orbitz.com).

³⁵ Megan Willett, *Throwaway Ticketing, The Controversial Money-Saving Trick That Airlines Don't Want You to Know About*, BUSINESS INSIDER (May 3, 2015), <http://www.businessinsider.com/what-is-throwaway-ticketing-2015-4>.

³⁶ Seth Miller, *Nesting Tickets, Saving Money*, THE WANDERING ARAMEAN (Nov. 19, 2014), <http://blog.wandr.me/2014/11/nesting-tickets-saving-money>.

³⁷ See generally, McCartney, *supra* note 32.

³⁸ *Id.*

³⁹ See Carol Pucci, *A Confusing Alphabet Soup of Airfares*, THE SEATTLE TIMES, Nov. 24, 2012, available at <http://www.seattletimes.com/life/travel/a-confusing-alphabet-soup-of-airfares-travel-wise> (last visited May 15, 2015).

⁴⁰ Hobica, *supra* note 25.

The growth of internet-based bulletin boards where consumers can share experiences and trade information has made the presence of mistakenly filed airfares almost immediately available. This list of mistake airfares is by no means exhaustive, since many mistakes are not widely reported or discussed. Past examples include:

- In May 2004, Icelandair filed a \$0 fare for roundtrip economy class travel between New York and Iceland.⁴¹ With taxes and fees, tickets were sold for approximately \$60.⁴² The airline honored the fare.⁴³
- In April 2005, Air Pacific (now Fiji Airways) offered a promotion whereby a passenger purchasing a roundtrip economy class ticket from Los Angeles to Fiji would receive a free companion ticket.⁴⁴ Online travel agent Travelocity offered the “free” companion ticket for sale, which meant customers could purchase the \$0 ticket for approximately \$50 in taxes and fees.⁴⁵ Travelocity honored the fare.⁴⁶
- Also in April 2005, US Airways filed fares from Lebanon, New Hampshire to virtually everywhere in the United States for between \$2 and \$22.⁴⁷ Transcontinental flights priced at the same level, and travel on partner United Airlines was permitted.⁴⁸ The airline honored the fare.⁴⁹
- In May 2005, Spain-based Air Europa filed a fare between Boston and Madrid for \$185 roundtrip in economy class.⁵⁰ This is a route the airline itself did not fly, but the fare rules permitted travel on partner airline Continental Airlines.⁵¹ Although not bookable with the airline itself, the fare was bookable through any travel agent including online travel agencies.⁵² The airline honored the fare.⁵³
- In October 2005, now-defunct British airline bmi offered tickets between Chicago and Manchester for \$220 roundtrip in premium economy class.⁵⁴ The fare was filed as \$0, as the ticket fare class was for a mileage redemption ticket rather than a ticket for cash sale.⁵⁵ The airline honored the fare.⁵⁶

⁴¹ JFK-KEF (Keflavik, Iceland) \$61 at cheaptickets.com, [WWW.FLYERTALK.COM](http://www.flyertalk.com/forum/mileage-run-deals/322038-jfk-kef-keflavik-iceland-61-cheaptickets-com.html), <http://www.flyertalk.com/forum/mileage-run-deals/322038-jfk-kef-keflavik-iceland-61-cheaptickets-com.html> (last visited Feb. 20, 2015).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ LAX-NAN (Nadi, Fiji) - \$51 all in – Travelocity! (fare gone – discussion only), [WWW.FLYERTALK.COM](http://www.flyertalk.com/forum/mileage-run-discussion/418433-lax-nan-nadi-fiji-51-all-travelocity-fare-gone-discussion-only.html), <http://www.flyertalk.com/forum/mileage-run-discussion/418433-lax-nan-nadi-fiji-51-all-travelocity-fare-gone-discussion-only.html> (last visited Feb. 18, 2015).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Fare Gone! – US: LEB (Lebanon, NH) to just about anywhere USA Fares - \$2-\$22, [WWW.FLYERTALK.COM](http://www.flyertalk.com/forum/mileage-run-deals/429884-fare-gone-us-leb-lebanon-nh-just-about-anywhere-usa-fares-2-22-a.html), <http://www.flyertalk.com/forum/mileage-run-deals/429884-fare-gone-us-leb-lebanon-nh-just-about-anywhere-usa-fares-2-22-a.html> (last visited Feb. 18, 2015).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ (fare gone) Air Europa: BOS-MAD \$115, [WWW.FLYERTALK.COM](http://www.flyertalk.com/forum/mileage-run-deals/431604-fare-gone-air-europa-bos-mad-115-a.html), <http://www.flyertalk.com/forum/mileage-run-deals/431604-fare-gone-air-europa-bos-mad-115-a.html> (last visited Feb. 20, 2015).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ (Fare Gone) Cheap ORD/MAN Z Class tickets, [WWW.FLYERTALK.COM](http://www.flyertalk.com/forum/mileage-run-deals/482380-fare-gone-cheap-ord-man-z-class-tickets.html), <http://www.flyertalk.com/forum/mileage-run-deals/482380-fare-gone-cheap-ord-man-z-class-tickets.html> (last visited Feb. 22, 2015).

⁵⁵ *Id.*

⁵⁶ *Id.*

- In April 2006, Italy-based Alitalia mistakenly filed a business class fare between Toronto and Cyprus for \$33 instead of \$3300.⁵⁷ After initially canceling the tickets, the airline decided to honor the tickets and even permitted changes once, at which time the tickets were no longer changeable.⁵⁸ Hundreds of tickets were sold in a 12-hour window.⁵⁹
- In September 2007, Air France filed a fare as \$0 between New York and Rome for economy class travel.⁶⁰ With fuel surcharges, taxes, and fees, the tickets priced at around \$280 each, roundtrip.⁶¹ Air France honored the tickets.⁶²
- In late April 2012, as a result of a currency fluctuation, a one-way first-class ticket from Yangon to Los Angeles could be purchased for \$254, while a round-trip ticket was pricing at \$450.⁶³ The tickets were widely available on multiple online travel agencies, and since the transition happened just before a weekend, was available for at least three days before it was fixed.⁶⁴ Many tickets were sold on behalf of Korean Airlines, which had the most available routings on the fare.⁶⁵ Korean immediately cancelled the tickets and refunded customers' money when they discovered the mistake.⁶⁶ The airline, however, eventually honored all tickets issued under the fare.
- In September 2013, United Airlines filed \$5-10 fares for many destinations, resulting in free or nearly-free tickets being sold on its website.⁶⁷ The airline decided to honor the tickets.⁶⁸ Online social media and forums picked up the fare within 30 minutes, but the airline did not discover it for 50 minutes.⁶⁹ It then took 20 minutes to fix the problem, and the airline lost \$2.9 million in that time.⁷⁰
- In November 2013, a small Norwegian online travel agency sold tickets without fuel surcharges, resulting in flights on United Airlines such as New York to Milan for \$149.⁷¹ A transaction processor for multiple airlines, Amadeus, was the source of the computer

⁵⁷ [FARE GONE] Wickedly Low Biz Class Fare from YYZ to LCA (Cyprus) on AZ (Alitalia), WWW.FLYERTALK.COM, <http://www.flyertalk.com/forum/mileage-run-discussion/544622-fare-gone-wickedly-low-biz-class-fare-yyz-lca-cyprus-az-alitalia.html> (last visited Feb. 22, 2015).

⁵⁸ *Id.*

⁵⁹ National Post, *Toronto to Cyprus for \$39? That's More than Fare*, WWW.CANADA.COM, Apr. 8, 2006, <http://www.canada.com/nationalpost/news/story.html?id=2ca121c0-d17e-4fdb-9dac-e81042bdce86> (last visited Feb. 22, 2015).

⁶⁰ (Fare Gone) NYC-Rome ~ 285 AI on AF, WWW.FLYERTALK.COM, <http://www.flyertalk.com/forum/mileage-run-deals/735063-fare-gone-nyc-rome-285-ai-af.html> (last visited Feb. 21, 2015).

⁶¹ *Id.*

⁶² *Id.*

⁶³ Burma: RGN Mistake Fare, Nov. 2012, SFO777: THE FIRST CLASS TRAVEL BLOG, <http://sfo777.com/report/yangon-rgn-mistake-fare>

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Joshua Freed, *United Shuts Down Website Bookings After Ticket-Pricing Glitch*, HUFFINGTON POST (Sept. 12, 2013), http://www.huffingtonpost.com/2013/09/12/united-website-down_n_3915931.html.

⁶⁸ *United Airlines Honors Tickets Bought During Computer Glitch*, HUFFINGTON POST (Sept. 13, 2013), http://www.huffingtonpost.com/2013/09/13/united-airlines-cheap-tickets_n_3922275.html.

⁶⁹ Brian Sumers, *How United Airlines is Cracking Down on "Mistake Fares"*, WWW.BRIANSUMERS.COM (Apr. 8, 2015), <http://www.briansumers.com/home/2015/4/7/how-united-airlines-is-cracking-down-on-mistake-fares>.

⁷⁰ *Id.*

⁷¹ [FARE GONE] UA: EWR-Europe from \$370 return, [WWW.FLYERTALK.COM](http://www.flyertalk.com), <http://www.flyertalk.com/forum/mileage-run-discussion/1524370-fare-gone-ua-ewr-europe-370-return.html> (last visited May 1, 2015).

error.⁷² Thousands of consumers booked the tickets, which were ultimately honored by the airline.⁷³

- In December 2013 Delta Airlines loaded \$0 fares for many destinations, allowing round-trip cross-country flights to be sold for \$25.⁷⁴ The airline honored the tickets.⁷⁵
- In February 2014, Etihad Airways (based in the United Arab Emirates) filed a fare for first class travel between Colombo, Sri Lanka, and Dallas for \$1450, cheaper than their normal economy class fare for the route.⁷⁶ The airline honored the fare, but informed customers they would not receive other perks that came with first class travel such as chauffeur service or lounge access at the airport.
- In November 2014, Singapore Airlines mistakenly listed business class seats for sale at economy-class prices between Sydney and London.⁷⁷ Although the seats were not cheap (about \$3000), they were about half what the correct price should have been.⁷⁸ About 400 tickets were sold.⁷⁹ The airline initially demanded extra payment from customers, but ultimately backed down and honored the tickets.⁸⁰
- In March 2015, American Airlines published business class fares for travel between Washington and Beijing for \$450 roundtrip.⁸¹ The fare was quickly recognized as a mistake and widely publicized on social media and blogs.⁸² The airline quickly announced it would honor the deal for all ticketed reservations.⁸³

Not all mistake fares are honored. In December 2009, Swiss Airlines sold tickets from Toronto to several European cities for \$0 plus taxes and fees.⁸⁴ 78 tickets were sold before the airline corrected the mistake.⁸⁵ Swiss cancelled all the tickets, although relented on those sold through online travel agencies once the Canadian Transportation Agency stepped in and asked Swiss to resolve the matter.⁸⁶ In October 2013, Qatar Airways filed a business class fare for the

⁷² Grant Martin, *Mistake in Norwegian Booking Site Puts Tickets to Europe As Low As \$149*, WWW.FORBES.COM, <http://www.forbes.com/sites/grantmartin/2013/11/24/mistake-in-norwegian-booking-site-puts-tickets-to-europe-as-low-as-149/> (last visited May 1, 2015).

⁷³ *Id.*

⁷⁴ Jack Nicas, *Delta Sells Rock-Bottom Fares By Mistake*, WALL ST. J., Dec. 26, 2013, at B1.

⁷⁵ *Id.*

⁷⁶ Gary Leff, *Etihad Honoring Their First Class Mistake Fare... Grudgingly*, Feb. 12, 2014, <http://viewfromthewing.boardingarea.com/2014/02/12/etihad-honoring-first-class-mistake-fare-grudgingly/> (last visited May 27, 2015).

⁷⁷ Jonathan Pearlman, *SIA Will Honour Erroneous Sale of Business-class Tickets at Economy-class Fares in Australia*, Dec. 8, 2014, WWW.STRAITSTIMES.COM, <http://www.straitstimes.com/news/asia/australianew-zealand/story/sia-says-will-honour-erroneous-sale-business-class-tickets-econ> (last visited May 15, 2015).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ [PREM FARE GONE] AA DCA-PEK sub-\$450 a/i rt in J, [WWW.FLYERTALK.COM](http://www.flyertalk.com/forum/mileage-run-discussion/1664177-prem-fare-gone-aa-dca-pek-sub-450-i-rt-j.html), <http://www.flyertalk.com/forum/mileage-run-discussion/1664177-prem-fare-gone-aa-dca-pek-sub-450-i-rt-j.html> (last visited May 15, 2015).

⁸² See Ben Schlappig, *AMAZING DEAL: \$450 Business Class Tickets Between Washington and Beijing*, ONE MILE AT A TIME (Mar. 17, 2015), <http://onemileatatime.boardingarea.com/2015/03/17/amazing-deal-450-business-class-tickets-between-washington-and-beijing>.

⁸³ *Id.*

⁸⁴ Nicholas Krlev, *Should Airlines Honor Fare Errors?*, THE WASH. TIMES, Jan. 18, 2009, available at <http://www.washingtontimes.com/news/2009/jan/18/should-airlines-honor-fare-errors/print> (last visited May 15, 2015).

⁸⁵ *Id.*

⁸⁶ *Id.*

relatively short (132 miles) flight between Ho Chi Minh City in Vietnam and Phnom Penh in Cambodia for \$245.⁸⁷ The flight operates as a “tag” flight, allowing the airline to pick up customers in two relatively small markets before continuing to a larger destination.⁸⁸ The fare, however, allowed routing through Qatar’s hub in Doha, so that a customer could book Phnom Penh-Doha-Ho Chi Minh City for \$250 (more than 7000 miles of flying).⁸⁹ Three weeks after the fare was discovered and publicized, the airline announced it was not honoring tickets issued under the fare.⁹⁰ It blamed the mistake on “an error in our system, outside the control of Qatar Airways.”⁹¹ An industry observer categorized that explanation as a “flat out falsehood” since the error occurred because of the “way that Qatar filed the routing rules for the fare.”⁹²

C. Airfare Pricing Mistakes Not Similar to Other Pricing Mistakes

Of course, pricing mistakes take place in many commercial and retail transactions. For example, in 2009, Best Buy mistakenly advertised a 52-inch TV for \$9.99 on its website, instead of the intended price of \$1799.99 (apparently someone dropped of the first “17” from the price).⁹³ Best Buy refused to honor the advertised price.⁹⁴ In 2010, Sears mistakenly advertised snow blowers for 50% off on its website, allowed customers to purchase the snow blowers, and even sent customers confirmation emails telling them their snow blowers were ready to be picked up.⁹⁵ Several customers were able to pick up their snow blowers before Sears started canceling orders.⁹⁶ Some retailers have taken a different approach, and honor pricing mistakes as a gesture of goodwill. In 2010, for example, online shoe retailer Zappos.com mistakenly capped every item on its website at \$49.95.⁹⁷ The mistake was live for six hours, during which time Zappos lost \$1.6 million.⁹⁸ The company, however, decided to honor the orders.

Advertisements are not offers and do not create the power of acceptance in the public that sees the advertisement. In addition, most retailers specifically reserve the right to cancel orders resulting from pricing errors. Sears, for example, includes the following language on its website: Pricing errors may occur on the Sears Site from time to time, on items sold by Sears, or items sold by third party sellers on Sears Marketplace. Sears attempts to correct all pricing errors as soon as they are discovered, or as soon as Sears receives notice of an error. Sears reserves the right to cancel any orders containing

⁸⁷ Gary Leff, *Business Class Fare on Qatar Airways: 7300 Miles for \$250*, VIEW FROM THE WING, Sept. 7, 2013, <http://viewfromthewing.boardingarea.com/2013/09/07/business-class-fare-on-qatar-airways>.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Gary Leff, *Qatar Waits Weeks, Won’t Honor Mistake Fare, Fibs About its Cause*, VIEW FROM THE WING, Oct. 6, 2013, <http://viewfromthewing.boardingarea.com/2013/10/06/qatar-waits-weeks-wont-honor-mistake-fare-fibs-cause>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ Mae Anderson, *Best Buy’s \$9.99 TV: Oops*, WWW.MAINSTREET.COM, Aug. 13, 2009, available at <https://www.mainstreet.com/article/best-buy-s-999-tv-oops> (last visited Apr. 15, 2015).

⁹⁴ *Id.*

⁹⁵ Meg Marco, *Sears Epic Pricing Error Leaves Hundreds with Canceled Snow blower Orders*, CONSUMERIST (Jan. 5, 2010), <http://consumerist.com/2010/01/05/sears-epic-pricing-error-leaves-hundreds-with-canceled-snowblower-orders>.

⁹⁶ *Id.*

⁹⁷ Dan Nosowitz, *Zappos Loses \$1.6 Million in Six-Hour Pricing Screw Up*, WWW.FASTCOMPANY.COM (May 24, 2010), <http://www.fastcompany.com/1651302/zappos-loses-16-million-six-hour-pricing-screw>.

⁹⁸ *Id.*

pricing errors, with no further obligations to you, even after your receipt of an order confirmation or shipping notice from Sears. Any payments you make to Sears for orders that are cancelled due to pricing errors will be refunded.⁹⁹

Even without this disclaimer language in the website terms and conditions, however, Sears and other retailers are not liable for pricing mistakes in advertisements or their websites. It is well-settled law that advertisements are not contract offers.¹⁰⁰ In essence, both by law and contract, the contract to purchase and sell is not formed at the time the customer tenders payment, but rather, at the time the merchant ships the goods. Once the goods are shipped, though, retailers do not generally demand extra payment due to the discovery of a pricing mistake.

Applying these principles to the realm of airfare mistakes, it's easy to conclude that a customer's purchase of an offered price for an air ticket is not binding, but at the time an e-ticket is issued with e-ticket number, that the equivalent of merchant shipping goods has occurred, and cancellation or asking for more money is no longer appropriate. Additionally, pricing mistakes in retail advertisements typically relate to goods whose value is easily ascertainable, whether it's a television or snow blowers. The analogy to airline tickets falls apart because as explained above, the value of an airline ticket is not ascertainable by a reasonable person.

D. The DOT's response

After airline deregulation, the DOT maintained authority to prohibit unfair or deceptive practices.¹⁰¹ After a string of bad publicity surrounding passengers stranded on the tarmac during storms, the DOT moved in 2009 to begin creating passenger-friendly rules and regulations.¹⁰² A new regulation allowing fines of \$27,500 per passenger on flights stranded for more than three hours saw a dramatic decline in tarmac delays in 2010.¹⁰³ These regulations were followed by a second set of regulations in 2011. After many years of not regulating actively in the arena of mistake airfares, the DOT issued broad new regulations (known as Enhancing Airline Passenger Protections, or EAPP) in April 2011 that required disclosure of the total price of airfare in advertising, and requiring airlines to allow passengers 24 hours to seek a refund on purchased airfare.¹⁰⁴ Low-cost carrier Spirit Airlines quickly challenged the rules, arguing that the regulations infringed on the company's First Amendment rights and "undermine the pro-competitive mandates of the Deregulation Act."¹⁰⁵ Spirit lost the case before a three-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit, which ruled that DOT did not act arbitrarily and capriciously in adopting the regulations.¹⁰⁶ The court also held

⁹⁹ Sears, *Terms of Use*, WWW.SEARS.COM, http://www.sears.com/shc/s/nb_10153_12605_NB_CStermsofservice (last visited May 15, 2015).

¹⁰⁰ See 1 Samuel Williston, THE LAW OF CONTRACTS §27 at 32-33 (1920) ("The construction is rather favored that such an advertisement is a mere invitation to enter into a bargain rather than an offer.").

¹⁰¹ 49 U.S.C. § 41712 (2010).

¹⁰² Joe Sharkey, *Tough Rule Eliminates Most Tarmac Strandings*, N.Y. TIMES, May 4, 2011, available at <http://www.nytimes.com/2011/05/05/business/05TARMAC.html> (last visited May 5, 20105).

¹⁰³ *Id.*

¹⁰⁴ Joanne W. Young and Lyndsey M. Grunewald, *Supreme Court Review of DOT Actions: An Opportunity to Discipline Government Efforts to Re-Regulate the Industry*, 25 NO. 4 AIR & SPACE LAW. 1 (2013).

¹⁰⁵ *Id.* For more discussion on this case, see *D.C. Circuit Holds that Rule Prohibiting Airlines from Displaying Taxes 'Prominently' Does Not Violate the First Amendment*, 126 HARV. L. REV. 1422 (2013).

¹⁰⁶ *Spirit Airlines Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403 (D.C. Cir. 2012).

that the full-fare rule did not violate the First Amendment since it “does not prohibit airlines from saying anything.”¹⁰⁷ Additional rounds of regulations are proposed by DOT.¹⁰⁸

When DOT first announced the total-fare rule, most attention was paid to the litigation by low-cost carriers dissatisfied with having to disclose the complete airfare in advertising. Another portion of the regulations, however, had a dramatic effect on mistake fare pricing. That portion prohibited collecting additional money after a ticket was issued. The regulation, 14 C.F.R. § 399.88(a), took full effect in January 2012 and includes a prohibition against post-purchase price increases. The regulation states:

It is an unfair and deceptive practice within the meaning of 49 U.S.C. 41712 for any seller of scheduled air transportation within, to or from the United States, or of a tour (i.e., a combination of air transportation and ground or cruise accommodations), or tour component (e.g., a hotel stay) that includes scheduled air transportation within, to or from the United States, to increase the price of that air transportation, tour or tour component to a consumer, including but not limited to an increase in the price of the seat, an increase in the price for the carriage of passenger baggage, or an increase in an applicable fuel surcharge, after the air transportation has been purchased by the consumer, except in the case of an increase in a government-imposed tax or fee. A purchase is deemed to have occurred when the full amount agreed upon has been paid by the consumer.¹⁰⁹

The implementation of the total-fare rule coincided with a mistake fare case that was handled in a particularly poor manner by the airline involved. In 2011, Korean Airlines published a fare between the United States and Palau for \$450 to \$600. The fare was quickly discussed on websites, and more than 300 tickets were sold.¹¹⁰ Although the fare was correct, the ticket was designated “AD 75” which means it was a fare reserved for sale only to travel agents, and not the general public.¹¹¹ Unfortunately, the fare was distributed for sale widely, and consumers bought them. It’s likely that some knew the fare was a mistake, but also likely that many consumers did not know it was a mistake. Two months after the episode (in November 2011), Korean Airlines began cancelling the tickets.¹¹² The airline promised to reimburse any non-reimbursable expenses, and gave customers a \$200 voucher.¹¹³ It’s impossible to say if this episode of an airline behaving badly gave rise to additional clarification from DOT about the prohibition against post-purchase price increases, but it likely did. In October 2012, DOT issued a clarification on its website in a section called Frequently Asked Questions that specifically addressed its position on mistake airfares:

¹⁰⁷ *Id.* At 412.

¹⁰⁸ See Gerald F. Murphy, Lorraine B. Halloway, Catherine A. Pawluch, Steven J. Seiden, *International Transportation Law*, 47 INT’L LAW. 311 (2013) and Josh Romanow, Jennifer Trock, Justin Bintrim, and Peter Nelson, *Client Alert: Proposed U.S. Department of Transportation Passenger Protection Rules Offer Opportunity for Travel Industry Comments*, May 21, 2014, <http://www.pillsburylaw.com/publications/proposed-dot-passenger-protection-rules-open-comment-period>.

¹⁰⁹ 14 C.F.R. § 399.88(a).

¹¹⁰ Steve Richardson, *Air Fare or Error Fare: Mistake Fare or Sweet Deal?*, Nov. 20, 2011, <http://www.flyerspulse.com/2011/11/20/air-fare-or-error-fare-mistake-airfare-palau-korean-airlines-fare-priced-ad75-travel-agency-fare-department-of-transportation-dot-complaints-bait-and-switch-rangoon-currency-devaluation-news-help/>.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

Does the prohibition on post-purchase price increases in section 399.88(a) apply in the situation where a carrier mistakenly offers an airfare due to a computer problem or human error and a consumer purchases the ticket at that fare before the carrier is able to fix the mistake?

Section 399.88(a) states that it is an unfair and deceptive practice for any seller of scheduled air transportation within, to, or from the United States, or of a tour or tour component that includes scheduled air transportation within, to, or from the United States, to increase the price of that air transportation to a consumer after the air transportation has been purchased by the consumer, except in the case of a government-imposed tax or fee and only if the passenger is advised of a possible increase before purchasing a ticket. A purchase occurs when the full amount agreed upon has been paid by the consumer. Therefore, if a consumer purchases a fare and that consumer receives confirmation (such as a confirmation email and/or the purchase appears on their credit card statement or online account summary) of their purchase, then the seller of air transportation cannot increase the price of that air transportation to that consumer, even when the fare is a “mistake.”

A contract of carriage provision that reserves the right to cancel such ticketed purchases or reserves the right to raise the fare cannot legalize the practice described above. The Enforcement Office would consider any contract of carriage provision that attempts to relieve a carrier of the prohibition against post-purchase price increase to be an unfair and deceptive practice in violation of 49 U.S.C. § 41712.¹¹⁴

After staying quiet for many years, the DOT took a strongly pro-consumer stance and protected consumers who booked mistaken airfares. The publication of the FAQ in October 2012, especially, appeared to be dispositive. Airlines must honor mistake airfares, even if the mistake was genuine or unintended.

This resolve would see its biggest test almost immediately, when perhaps the biggest example of a mistake fare, that attracted the most attention on social media and blogs and eventually led to litigation and further regulatory action, took place in April 2012. The government of Myanmar, after decades of maintaining an artificially high official exchange rate for the currency, the Kyat, finally permitted the Kyat to devalue to market rates. Unfortunately for airlines, the new exchange rate was not updated in the global distribution system used by airlines to sell airfares. Overnight, tickets originating from Myanmar’s capital city Yangon became very cheap.¹¹⁵ The new exchange rates (\$1 to 800 Kyats) had not been updated from the official government rate, which was \$1 to 6.5 Kyats.¹¹⁶ The underlying fare for the tickets (one example was for sale at 110,000 Kyats) did not change, but when the exchange rate changed and the fare stayed the same, that same ticket went from \$18,000 to

¹¹⁴ United States Department of Transportation, 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)*, Aug. 19, 2011, available at http://airconsumer.dot.gov/rules/EAPP_2_FAQ_01-11-2012final.pdf (last visited May 20, 2015).

¹¹⁵ (Gone) RGN - SFO in F \$450 one way AI; other N. America cities included, WWW.FLYERTALK.COM, available at <http://www.flyertalk.com/forum/mileage-run-discussion/1341617-gone-rgn-sfo-f-450-one-way-ai-other-n-america-cities-included.html> (last visited May 15, 2015).

¹¹⁶ Mendor, Comment to (Gone) RGN - SFO in F \$450 one way AI; other N. America cities included, WWW.FLYERTALK.COM (May 1, 2012, 10:10 AM), <http://www.flyertalk.com/forum/18492513-post235.html>.

\$133.¹¹⁷ Korean Airlines, which issued many of the tickets, immediately began canceling the tickets just as it had with the Palau fare a few short months earlier.¹¹⁸

Within a few short months of § 399.88(a) coming into full effect, the DOT was presented with a test case of massive proportion.¹¹⁹ Reacting to years of bad publicity surrounding tarmac delays and deceptive advertising, the DOT had published consumer-friendly regulations on a wide array of airline operations including the sale of tickets. One of those regulations and the accompanying Frequently Asked Questions, § 399.88(a), prohibited airlines from cancelling tickets simply because they were the result of a mistake. Would the DOT step in to enforce tickets that had been canceled? Within 10 days of cancelling tickets, the answer became evident when Korean communicated with customers that it would honor all previously canceled tickets.¹²⁰

In the ensuing months, several further mistake fares continued to test the DOT's rules, and through interpretive guidance, DOT began to clarify what the rules meant in application. First, there was a clarification from DOT that the rules do in fact apply to tickets "issued under frequent flyer tickets, particularly when they also entail cash payments."¹²¹ That clarification came amidst a mistake on United Airlines' website that allowed any award ticket to, from, or through Hong Kong, Beijing, and Shanghai.¹²² Several days after the website glitch, United canceled the tickets,¹²³ resulting in consumer complaints to the DOT under § 399.88(a).¹²⁴

According to the airline, it would honor tickets for customers who had already begun travel, but would cancel all other tickets. The distinction, according to the airline, was that the actual price for the ticket in miles was never in error. The airline said: "Unlike other widely reported "mistake fares," the number of miles required for these awards – the correct purchase price – was clearly disclosed to customers throughout the MileagePlus award redemption process and is also available on our MileagePlus travel award chart."¹²⁵

The DOT seemed to agree with United on this case, even as it claimed § 399.88(a) reached tickets issued under frequent flier programs. In response to consumer complaints about canceled tickets, the DOT wrote:

¹¹⁷ KevinInRI, Comment to *(Gone) RGN - SFO in F \$450 one way AI; other N. America cities included*, WWW.FLYERTALK.COM (May 1, 2012, 3:47 PM), <http://www.flyertalk.com/forum/18494953-post451.html>.

¹¹⁸ Trip Report, *supra* note 63.

¹¹⁹ Seth Miller, *What is the Real Impact of 49 CFR 41712 § 399.88(a) [sic] for Travelers*, WANDERING ARAMEAN (May 12, 2012), <http://blog.wandr.me/2012/05/what-is-the-real-impact-of-49-u-s-c-41712-399-88a-for-travelers>.

¹²⁰ Trip Report, *supra* note 63.

¹²¹ Genevieve Shaw Brown, *4 Miles and \$43 to Hong Kong, Should United Honor?*, Jul. 18, 2012, ABC News, *available at*

http://abcnews.go.com/Travel/hong-kong-miles-43-united-honor-mistake/story?id=16801963#.UAhDyr_gJT5 (last visited Apr. 15, 2015).

¹²² Short hair Francis, Comment to *Eminem has his 8 Mile, I'll take my 4 Mile (United Int'l and Premium Service F)*, WWW.FLYERTALK.COM (Jul. 22, 2012, 11:14 AM), <http://www.flyertalk.com/forum/trip-reports/1369003-eminem-has-his-8-mile-i-ll-take-my-4-mile-united-int-l-premium-service-f.html>.

¹²³ Gary Leff, *United Won't Honor the 4 Mile Award Tickets to/through Hong Kong*, VIEW FROM THE WING (Jul. 16, 2012), <http://viewfromthewing.boardingarea.com/2012/07/16/united-wont-honor-the-4-mile-award-tickets-tothrough-hong-kong>.

¹²⁴ Scott McCartney, *DOT Investigates After United Says it Will Kill Award Tickets it Sold for 4 Miles*, WALL ST. J., Jul. 18, 2012, *available at* <http://blogs.wsj.com/middleseat/2012/07/18/dot-investigates-after-united-says-it-will-kill-award-tickets-it-sold-for-4-miles>.

¹²⁵ UA Insider, Company Representative – United Airlines, Comment to *UAs Official Response to HKG Ticketing/IT Error: Redeem @ Correct Amount or Redeposit*, WWW.FLYERTALK.COM (Jul. 16, 2012, 7:08 PM), <http://www.flyertalk.com/forum/18965497-post2.html>.

We have completed our review of United's conduct regarding its recent Frequent Flyer fare sale to Hong Kong from the United States on its website. Our review found that the actual price of the advertised fare was never clearly stated during the booking process, thereby creating ambiguous circumstances in which it could be reasonably interpreted that the actual price of the fare was significantly more than the amount consumers paid at the time they attempted to purchase the fare, e.g., \$40 plus 4 frequent flyer miles. Therefore, we are not able to establish that consumers, in fact, paid the full amount of the offered fare at the time of purchase. Accordingly, the evidence does not support a finding that United engaged in an unfair and deceptive practice in violation of the relevant statute. Please note that, regardless of the outcome of our investigation, consumers are free to pursue claims (e.g., a breach of contract claim) against the airline in an appropriate civil court for monetary damages and other remedies particular to their situation.¹²⁶

According to DOT, then, in order to invoke the protections of § 399.88(a), customers must actually pay a mistake fare in full. In the United Airlines 4 mile case, since customers could actually know and see the real price of the ticket throughout the process of purchasing the ticket, then customers had not paid full amount of the offered fare at the time of purchase. A Freedom of Information request to DOT appeared to confirm this reasoning.¹²⁷

In September 2012, barely five months after the DOT intervened and forced Korean Airlines to honor cancelled tickets originating in Yangon, the same mistake once again allowed customers to purchase cheap tickets from Yangon.¹²⁸ Remarkably, airlines appeared to not have learned from the first round of these tickets. For more than 6 days (from September 21 to September 26, 2012), customers could purchase first class tickets as long as they originated in Yangon and ended in a few select cities in Canada.¹²⁹ More than 1000 passengers did that, filling more than 30 percent of annual travel on certain routes for one airline's first class cabin.¹³⁰ Unlike the first round where many tickets were issued by Korean Airlines, this time most tickets were issued by Swiss Airlines.¹³¹ One week after tickets were issued, Swiss cancelled the tickets.¹³² The company's communication to consumers stated in part:

Subject: Cancellation of your ticket due to erroneous fare

Dear Sir/Madam,

We are writing in regards to the travel you recently booked with Swiss International Air Lines Ltd. from Yangon (RGN), Myanmar. Unfortunately, as you must have been aware of, the fare you purchased was incorrect and resulted from an inadvertent error that was out of our control. While SWISS honors its

¹²⁶ Seth Miller, *United Survives DOT Scrutiny on the 4 Mile Hong Kong "Sale,"* THE WANDERING ARAMEAN, Oct. 12, 2012, <http://blog.wandr.me/2012/10/united-survives-dot-scrutiny-on-the-4-mile-hong-kong-sale>.

¹²⁷ Freedom of Information Request regarding United Airlines 4 Mile Award Tickets to Hong Kong, *available at* <https://docs.google.com/file/d/0B1cqSPD8xsbuVIJkWG9ZQ2dDUDQ/edit> (last visited May 15, 2015).

¹²⁸ Gary Leff, *Mistake Fare – One Way First Class Originating in Myanmar is Back!*, VIEW FROM THE WING, Sept. 27, 2012, <http://viewfromthewing.boardingarea.com/2012/09/27/mistake-fare-one-way-first-class-originating-in-myanmar-is-back/>.

¹²⁹ Matthew Klint, *Swiss Int'l Air Lines Cancels RGN Tickets*, WWW.UPGRD.COM, Oct. 8, 2012, <http://upgrd.com/matthew/swiss-intl-air-lines-cancels-rgn-tickets.html> (last visited May 15, 2015).

¹³⁰ Evelyn D. Sahr and Drew M. Derco, *Airlines Need Protection Too*, THE AIR & SPACE LAWYER, Vol. 26, No. 1 (2013).

¹³¹ Klint, *supra* note 129.

¹³² *Id.*

commitment to the highest level of customer service and safety in air travel, it must also honor its obligations to its employees and shareholders.

We are not obligated to provide our services for compensation that is obviously erroneously published and commercially infeasible. We are aware that good travel bargains are quickly recognized and booked, however principles of fair bargaining dictate that a service provider does not give away its services for almost free or at a loss.

Because the fare you booked was not valid, we will unfortunately have to cancel your reservation and ticket. We are extremely sorry for this error and we are not increasing the price of your ticket; rather we will promptly issue you a full refund for the total price you paid for the ticket. The full amount will be automatically credited using your original form of payment. In the event that you would like to rebook your itinerary at the appropriate price, please contact your nearest SWISS service center or your travel agent.

SWISS deeply regrets the inconvenience caused by the publication of the erroneous fare to the passengers who may have thought they had booked and purchased a valid ticket for an erroneous cost. We apologize for this unfortunate situation and trust your future travel on SWISS is comfortable.¹³³

Some consumers argued this was not a mistake fare, since the ticket was sold for 130,000 Kyats, which was the correct price.¹³⁴ Swiss, however, maintained that the fare was “incorrect” and resulted from an “inadvertent error that was beyond our control.” The airline also deliberately stated “we are not increasing the price of your ticket,” perhaps in an attempt to evade § 399.88(a)’s prohibition on post-purchase price increases.¹³⁵

In response to consumer complaints, the DOT took a different approach than it did with Korean Airlines and the first round of Rangoon tickets. The agency took the position that since the tickets originated in Rangoon and ended in Canada, that it would not assert jurisdiction even if the ticket had a stopover in the United States. The agency informed consumers:

We are sorry to hear of your dissatisfaction. However, our jurisdiction is limited to air transportation within, to, or from the United States. Because it appears that your itinerary is for air transportation between two or more non-U.S. points, the regulations enforced by our office do not apply to your transportation. Please contact the carrier directly.¹³⁶

As 2012 drew to a close, then, DOT’s rules on mistake fares seemed clear-cut and easily understood. Through the Rangoon mistake fare and the United 4 mile award ticket cases, it was clear that DOT would hold any mistake ticket that touched the United States enforceable as long as the customer did not know the real price of the ticket and had made full payment.

II. Ordinary Contract Principles Support 14 C.F.R. § 399.88(a)

¹³³ Gary Leff, *Swiss Cancelling Myanmar First Class Mistake Fare Tickets*, VIEW FROM THE WING (Oct. 4, 2012), <http://viewfromthewing.boardingarea.com/2012/10/04/swiss-cancelling-myanmar-first-class-mistake-fare-tickets>.

¹³⁴ Klint, *supra* note 129.

¹³⁵ Swiss Airlines appeared determined to not honor the Rangoon tickets. Several customers filed complaints against Swiss in the Canadian Transportation Agency. The proceedings stretched on for more than two years, resulting in several early wins for consumers before the Agency finally settling the matter in favor of Swiss Airlines. See Seth Miller, *Mistake Fares Really are Mistakes in Canada*, THE WANDERING ARAMEAN (May 27, 2014), <http://blog.wandr.me/2014/05/mistake-fares-really-are-mistakes-in-canada>.

¹³⁶ *Id.*

A. Offer and Acceptance – Protecting Consumers’ Reasonable Expectations

First-year law students learn that contracts begin with a binding offer. “An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”¹³⁷ Critically, an offer is valid if the offeree understands that his assent is invited and will conclude the agreement. The offeror doesn’t always have to have the specific or subjective intent to be bound by the contract.¹³⁸ As Judge Learned Hand once wrote, a contract has “nothing to do with the personal, or individual, intent of the parties.”¹³⁹ If it were proved by “twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.”¹⁴⁰ In *Lucy v. Zehmer*, a party was held to a contract for the sale of land even though he thought he was only joking because a reasonable person would have believed that the offer to sell the land was genuine.¹⁴¹ Similarly, in *Leonard v. Pepsico*, a company was held to not be liable on an advertisement for the sale of a Harrier jet airplane for the equivalent of \$700,000 (far below market value) because the commercial was clearly a farce.¹⁴² In the context of an advertisement (such as an offer for airfare presented on a website), “the essential question in assessing the rule is whether a reasonable person understands that a merchant manifests the intention to create a binding relationship when it publishes an advertisement specific as to subject matter and price but containing no more details.”¹⁴³

Another important principle in contract law is consideration. Put simply, the law does not inquire into the adequacy of consideration, and a peppercorn may constitute adequate consideration.¹⁴⁴ As a general matter of policy, government and its instrumentalities does not interfere with freedom of contract by determining whether a price is fair or reasonable. Similarly, the courts or government agencies are poor places to determine whether a consumer may reasonably consider an offered fare a mistake.

The concept of “reasonable expectation” is important here. Reasonable expectations are derived from the “court’s perceptions of what a typical consumer believes or is entitled to believe based on normal usage in the marketplace.”¹⁴⁵ Given how difficult it is for consumers to grasp normal or reasonable airfare for any specific ticket, the objective theory of contracts would dictate that as long as a typical consumer is entitled to believe that a mistake fare is in fact offered for sale, and subsequently ticketed, that the contract should be honored as a binding agreement. The reasonable expectation is further reinforced by the airlines’ choice to use e-ticketing. If an airline contacted a customer after the customer paid for a ticket online but before the ticket was issued and informed the customer that the price was an error and would be

¹³⁷ Restatement (Second) of Contracts § 24 (1981).

¹³⁸ See generally, Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119 (2008).

¹³⁹ *Hotchkiss v. Nat’l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911).

¹⁴⁰ *Id.*

¹⁴¹ 84 S.E.2d 516 (Va. 1954).

¹⁴² 88 F.Supp. 2d 116 (S.D.N.Y. 1999), *aff’d*, 210 F.3d. 88 (2d. Cir. 2000).

¹⁴³ Jay M. Feinman and Stephen R. Brill, *Is an Advertisement an Offer? Why it is, and Why it Matters*, 58 HASTINGS L.J. 61, 77 (2006).

¹⁴⁴ See generally, Val D. Ricks, *In Defense of Mutuality of Obligation: Why “Both Should be Bound, or Neither,”* 78 NEB. L. REV. 491 (1999).

¹⁴⁵ *Id.*

corrected, a consumer might reasonably expect that there is in fact, no contract. When millions of tickets are sold through automatic e-ticketing, however, then a consumer might reasonably expect that if a mistake fare is ticketed, that it is valid for travel as a binding contract has been formed. Once a contract is formed parties have to go through with it and cannot unilaterally cancel the contract. The airlines themselves seem to understand this perfectly well, since they generally don't permit customers to cancel tickets because a consumer made a mistake in buying the tickets in the first place.

B. Implied Covenant of Good Faith

Some commentators have called customers who purchase mistake airfares “thieves.”¹⁴⁶ This criticism suggests that customers may be technically correct in asserting a contract interest, but equity somehow should intervene to prevent them from enjoying the contract. They may find some help in this argument in the Restatement, which states: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”¹⁴⁷ Starting with the seminal New York case of *Wood v. Lucy, Lady Duff-Gordon*,¹⁴⁸ the implied duty of good faith enjoys widespread acceptance in modern American law, “allowing a degree of flexibility in contract interpretation that was previously shunned.”¹⁴⁹

Airlines, however, have purposefully disclaimed the implied duty of good faith in their frequent flyer programs. That was precisely the position taken by Northwest Airlines (which has since merged with Delta Airlines) before the Supreme Court in *Ginsberg v. Northwest Inc.*¹⁵⁰ In that case, Northwest Airlines unilaterally terminated a relationship with a customer it felt was complaining too frequently, revoking his membership in the WorldPerks frequent flier membership program.¹⁵¹ The customer sued Northwest, claiming in part that Northwest had breached its implied duty of good faith.¹⁵² After initially losing at the Ninth Circuit Court of Appeals,¹⁵³ the airline argued successfully at the Supreme Court that the implied duty of good faith claim could not proceed because it was a state action preempted by the federal Airline Deregulation Act.¹⁵⁴

In his majority opinion, Justice Alito invited airlines to consider contracting out of the implied duty of good faith:

A State's implied covenant rules will escape pre-emption only if the law of the relevant State permits an airline to contract around those rules in its frequent flyer program agreement, and if an airline's agreement is governed by the law of such a State, the airline can specify that the agreement does not incorporate the covenant. While the

¹⁴⁶ Christopher Elliott, *Attack of the Airfare Thieves*, WWW.ELLIOTT.ORG, Feb. 4, 2013, <http://elliott.org/what/attack-of-the-airfare-thieves/>.

¹⁴⁷ Restatement (Second) of Contracts § 208 (1981).

¹⁴⁸ 118 N.E. 214 (N.Y. 1917).

¹⁴⁹ Seth William Goren, *Looking for Law in all the Wrong Places: Problems in Applying the Implied Covenant of Good Faith Performance*, 37 U.S.F. L. REV. 257 (2003).

¹⁵⁰ 572 U.S. ____ (2014).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Roy Goldberg and Megan Grant, *Ginsberg v. Northwest: An Opportunity to Bring the Ninth Circuit into the Fold on ADA Preemption*, 26 No. 2 AIR & SPACE LAW. 1 (2013).

¹⁵⁴ *Ginsberg*, *supra* note 146. For an excellent examination on frequent flyer programs and consumers' expectations out of those programs, see Ann Morales Olazábal, Howard Marmostein, and Dan Sarel, *Frequent Flyer Programs: Empirically Assessing Consumers' Reasonable Expectations*, 51 AM. BUS. L.J. 175 (2014).

inclusion of such a provision may impose transaction costs and presumably would not enhance the attractiveness of the program, an airline can decide whether the benefits of such a provision are worth the potential costs.¹⁵⁵

In April 2015, American Airlines accepted Justice Alito's invitation. It updated its terms and conditions for the American AAdvantage program to include this language: "To the full extent allowed by law, these Terms and Conditions disclaim any duty of good faith as well as any implied contractual terms or obligations."¹⁵⁶ Apparently, American Airlines decided that the benefits of such a provision are worth the potential costs.

If an airline disclaims any duty of good faith with respect to customers in its frequent flier program, it appears obvious that customers similarly do not owe airlines a duty of good faith. This is a critical point for DOT to consider as it examines whether customers exhibit bad faith in intentionally booking mistake airfares. Admittedly, this analysis is limited at this stage to customers in frequent flyer programs, looking to take advantage of benefits that apply to frequent flyers such as upgrades and free or discounted tickets. However, it does not take much imagination to predict that airlines will also disclaim the duty of good faith in the general conditions of carriage as well. When they do, any argument that customers also owe airlines a duty of good faith fly out of the window.

C. Why Mistake Contract Law Does Not Apply

Several commentators have observed that §399.88(a) is inconsistent with well-established contract law on mistake in contract. Young and Grunewald, for example, labeled the requirement that airlines disclose the total price of an air ticket "pernicious."¹⁵⁷ Yet, a close review of the requirements of §399.88(a) reveals no inconsistency with existing law of mistake in contracts, particularly post-ticketing.

It is well-established that when both parties are genuinely mistaken as to the value of an item they are buying and selling, that the contract is not voidable simply because the item turns out to be more valuable than either party realized. In the seminal *Wood v. Boynton*, for example, a woman sold a stone she believed was a topaz to a jeweler for \$1 in 1885.¹⁵⁸ The jeweler testified credibly that he had never seen an uncut diamond, and therefore did not know what the stone was worth.¹⁵⁹ Later, the jeweler discovered the true nature of the stone and sold it to Tiffany for \$850.¹⁶⁰ She lost a suit to recover the stone.¹⁶¹

Modern contract law on mistakes is summarized in the Restatement (2d) on Contracts, where §153 states:

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is

¹⁵⁵ Ginsberg, *supra* note 146.

¹⁵⁶ American Airlines, *AAdvantage Program Terms and Conditions*, [WWW.AA.COM](http://www.aa.com), <https://www.aa.com/i18n/AAdvantage/termsConditions.jsp> (last visited May 30, 2015).

¹⁵⁷ Joanne W. Young and Lyndsey M. Grunewald, *Supreme Court Review of DOT Actions: An Opportunity to Discipline Government Efforts to Re-Regulate the Industry*, 25 No. 4 AIR & SPACE LAW. 1 (2013).

¹⁵⁸ *Wood v. Boynton*, 25 N.W. 42 (Wis. 1885).

¹⁵⁹ *Id.*

¹⁶⁰ *Contracts Limerick of the Week: Wood v. Boynton*, Oct. 1, 2012, CONTRACTSPROFS BLOG, http://lawprofessors.typepad.com/contractsprof_blog/2012/10/contracts-limerick-of-the-week-wood-v-boynton.html.

¹⁶¹ *Id.*

adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and

- (a) the effect of the mistake is such that enforcement of contract would be unconscionable, or
- (b) the other party had reason to know of the mistake or his fault caused the mistake.¹⁶²

Applying this rule to airline mistake fares, one grounds for an airline to void a mistake fare if enforcement would be unconscionability, although in the context of pricing that doctrine is typically used to protect consumers from excessive pricing.¹⁶³ Courts generally hold a contract to be unconscionable when there is an “absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.”¹⁶⁴ The meaningfulness of choice can be negated by “a gross inequality of bargaining power.”¹⁶⁵ The manner of entering a contract is relevant as well. If important terms are “hidden in a maze of fine print and minimized by deceptive sales practices” or if a party with little bargaining power with no real choice signs a “commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”¹⁶⁶ Applying these doctrines to a scenario where a consumer purchases a ticket from an airline at a quoted price, which then charges the customer and issues an e-ticket, it’s difficult to argue that the airline should be excused from performance because the contract is unconscionable.

A second argument airlines could make is that the customer had reason to know of the mistake. Here, the argument is much stronger since many mistake fares are in fact well-publicized and blogged about as mistakes. That said, the problem with this argument is that it remains exceedingly difficult, from an evidentiary perspective, to prove that a specific customer had reason to know that a fare was a mistake. As discussed in Section I.A., *infra*, airline ticket pricing has nearly no relationship to the cost to the airline to transport the passenger. Ticket pricing is driven by complicated price algorithms designed to sell each seat for as much money as possible, and seats on any given airplane on any given flight will range from non-revenue generating seats to seats that generate thousands of dollars. Unlike a lost masterpiece painting or an uncut diamond or a hidden oil field in farmland or a barren cow, each of which have actual market values that can be readily determined, there simply is no way to determine the market value for a particular seat on a particular plane. A seat that is sold at a mistake fare is worth more to the airline than that same seat which leaves the gate empty. If we accept that there is no way for a reasonable customer to have a reasonable expectation of what price a particular ticket should command, then there is no meaningful way for an airline to demonstrate that a specific customer “had reason to know” of the mistake. This doctrine can only apply when a reasonable person can determine the reasonable price for a good or service, an impossibility in airline ticket pricing.

In any case, airlines can only avail themselves of the benefits of § 153 of the Restatement if they can demonstrate that they “do not bear the risk of mistake under the rule stated in § 154.” Section 154 of the Restatement states:

¹⁶² Restatement (Second) of Contracts, § 153 (1981).

¹⁶³ See Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS.L.REV. 1819 (1994).

¹⁶⁴ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

A party bears the risk of a mistake when

- (a) The risk is allocated to him by agreement of the parties; or
- (b) He is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
- (c) The risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.¹⁶⁷

In airline mistake fares, the fares typically arise because of a typing error, fare code error, or currency exchange error. Regardless of how the error arises, the customer is presented with an offer for a ticket that is cheaper than what the seller intended. These circumstances could reasonably be categorized as falling into section (b) above, where the seller has only limited knowledge with respect to the facts to which the mistake relates. Take, for example, the case of Swiss Airlines and the second round of mistake fares originating in Yangon. There, five months had passed since the first round of mistakes had risen with respect to the devaluation of the local Kyat currency. And yet, Swiss continued to sell tickets priced under a pre-devaluation exchange rate five months later. Under section (b) above, the airline could be held to bear the risk of mistake since it has treated its limited knowledge of the facts as sufficient to continue contracting.

A party also bears the risk of mistake when the “risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.” Courts hold that in “considering whether to allocate the risk of mistake to the party who made the mistake, the question is whether ‘under the totality of the circumstances, it would be more equitable or reasonable to do so.’”¹⁶⁸ Relevant factors include “who drafted the agreement, the relative sophistication of the parties, any communications the parties had concerning the proposed agreement, and the effect of the error on the parties.”¹⁶⁹ Since airlines draft the conditions of carriage, and are generally considered to be more sophisticated than consumers, it would be appropriate for courts to hold airlines responsible for bearing the risk of mistakes in mistake airfares.

Applying these principles found in the Restatement to § 399.889(a), it is clear that the DOT regulations governing mistake fares are entirely consistent with the Restatement. Before ticketing, airlines might be able to argue that mistake fares are merely invitations to offer. Post-ticketing, however, tickets issued are binding contracts for carriage. Starting from the position that contracts should be enforced as written, forcing airlines to honor mistake airfares does not present any unconscionability questions given the nature of the parties and the contract they are entering into. The nature of airline ticket pricing and the value of an airline seat makes it impossible to rely on the obvious mistake doctrine for a specific customer. Finally, the risk of mistake should be allocated to airlines given the totality of circumstances surrounding the sale of an e-ticket.

III. DOT Prepares to Revise § 399.88(a)

A. The Tide Turns

¹⁶⁷ Restatement (Second) of Contracts § 154 (1981).

¹⁶⁸ *In re Duong*, 451 B.R. 800 (Bankr. N.D. Ohio 2011).

¹⁶⁹ *Id.*

After a very strong pro-consumer response in 2012, the pendulum began to swing the other way three years later.¹⁷⁰ Perhaps as the result of the mistake fare cases in 2012-2014, including Swiss Airlines' successful defense of its actions in canceling over 1000 tickets from Yangon to Canada, DOT began considering revisions to the mistake fare rule in 2014. On May 23, 2014, the Department published a Notice of Proposed Rulemaking (NPRM) that sought comments on a number of new regulatory proposals.¹⁷¹ The NPRM indicated DOT's increasing belief that customers were engaging in "bad faith" when purchasing mistake fares:

"The Enforcement Office has become concerned that increasingly mistaken fares are getting posted on frequent-flyer community blogs and travel-deal sites, and individuals are purchasing these tickets in bad faith and not on the mistaken belief that a good deal is now available. We solicit comments on how best to address the problem of individual bad actors while ensuring that airlines and other sellers of air transportation are required to honor mistaken fares that were reasonably relied upon by customers."¹⁷²

The NPRM also indicated DOT was considering defining "air transportation within, to, or from the United States" to mean "any transportation that begins or ends in the United States or involves a connection or stopover in the United States that is 24 hours or longer."¹⁷³ This definition would bring § 399.88(a) in line with the DOT's position on the Swiss Airlines Rangoon case (where tickets originated in Myanmar and ended in Canada), and would likely address criticism of the regulation's extraterritorial reach. The comment period for the proposed changes closed September 29, 2014, and DOT continues to review the comments.¹⁷⁴

A few months after the NPRM, DOT was faced with another case where it believed it saw bad faith in customers. In February 2015, a third-party software vendor loaded incorrect exchange rates on the British Pound and Danish Kroner to United Airline's website.¹⁷⁵ Customers who set the Danish Kroner as their local currency, and used Denmark as the billing address in their payment credit card, were able to price tickets originating in the United Kingdom at extremely low prices, such as \$51 for Newcastle to Newark in first class, or \$193 for London to Honolulu first class.¹⁷⁶ Once it discovered the mistake, United began voiding tickets, even if they had been issued and ticketed.¹⁷⁷ United insisted that the fares were properly filed, and that the errors resulted from currency exchange rates filed by the third-party vendor, implying it was beyond their control.¹⁷⁸ The mistake was quickly publicized on popular blogs and websites, with detailed instructions on how consumers could purchase the tickets.¹⁷⁹

¹⁷⁰ See Seth Miller, *Mistake Fares are Once Again, Mistakes*, WANDERING ARAMEAN (May 10, 2015), <http://blog.wandr.me/2015/05/mistake-fares-are-once-again-mistakes>.

¹⁷¹ See Notice of Proposed Rulemaking, Docket DOT-OST-2014-0056, available at <http://www.dot.gov/sites/dot.gov/files/docs/Passenger%20Protections%20NPRM%20April%2016%202014.docx>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Comments can be viewed through the government's regulation feedback portal at <http://www.regulations.gov/#!documentDetail;D=DOT-OST-2014-0056-0001>.

¹⁷⁵ Ben Mutzabaugh, *United to Void Absurdly Cheap 1st-class Mistake Fares*, USA Today.com, Feb. 12, 2015, available at <http://www.usatoday.com/story/todayinthesky/2015/02/11/mistake-fares-united-1st-class-to-europe-sold-for-just-68/23234223/>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See e.g., [PREM FARE GONE] UA: NCL-EWR 600 DKK (mistaken fare) DOT ruled; see wiki for link, WWW.FLYERTALK.COM, <http://www.flyertalk.com/forum/mileage-run-discussion/1654036-prem-fare-gone-ua-ncl-ewr-600-dkk-mistaken-fare-dot-ruled-see-wiki-link.html> (last visited Apr. 1, 2015).

The DOT responded quickly when consumers began filing complaints under § 399.88(a). Two weeks after the complaints began, the DOT posted a notice to its website indicating that “thousands” of consumers had complained about United’s cancellation of the tickets, and that it was not going to require United to honor the tickets.¹⁸⁰ In justifying its decision, DOT wrote:

“The mistaken fares appeared on a website that was not marketed to consumers in the United States. In order to purchase a ticket, individuals had to go to United’s Denmark website which had fares listed in Danish Krone throughout the purchasing process. In addition, only people who identified “Denmark” as their location/country where billing statements were received when entering billing information at the completion of the purchase process were able to complete their purchase at the mistaken fare levels. Consistent with the Office’s treatment of fare advertisements and disclosure of baggage fees, it does not intend to enforce the rule in question (the post-purchase price increase prohibition) when the fare offer is not marketed to consumers in the United States. Additionally, the Office is concerned that to obtain the fare, some purchasers had to manipulate the search process on the website in order to force the conversion error to Danish Krone by misrepresenting their billing address country as Denmark when, in fact, Denmark was not their billing address country. This evidence of bad faith by the large majority of purchasers contributed to the Enforcement Office’s decision.”¹⁸¹

In response to Freedom of Information Act (FOIA) requests, DOT suggests that its thinking was heavily influenced by the widespread attention the fare received on social media websites and blogs.¹⁸² The released documents include many pages of printouts from these sites explaining how consumers can book the tickets.¹⁸³ Unfortunately, the released documents only hint at DOT’s thinking, given that many pages of internal DOT communications were redacted before they were released.

B. The Other Shoe Drops

In May 2015, the DOT decided to suspend its rule on mistake airfares. In a notice posted on its website, the agency stated:

The Assistant General Counsel has decided not to enforce section 399.88 with respect to mistaken fares while the Department completes the aforementioned rulemaking process. As a matter of prosecutorial discretion, the Enforcement Office will not enforce the requirement of section 399.88 with regard to mistaken fares occurring on or after the date of this notice so long as the airline or seller of air transportation: (1) demonstrates that the fare was a mistaken fare; and (2) reimburses all consumers who purchased a mistaken fare ticket for any reasonable, actual, and verifiable out-of-pocket expenses that were made in reliance upon the ticket purchase, in addition to refunding the purchase price of the ticket. These expenses include, but are not limited to, non-refundable hotel reservations, destination tour packages or activities, cancellation fees for non-refundable connecting air travel and visa or other international travel fees. The airline may ask the

¹⁸⁰ Office of Aviation Enforcement and Proceedings Determination Regarding United Airlines Mistaken Fare, https://cms.dot.gov/sites/dot.gov/files/docs/Mistaken_Fare_AEP_Statement_on_United_Airlines.pdf.

¹⁸¹ *Id.*

¹⁸² Letter from Kathy Ray, FOIA Officer (on file with author), available at <http://issuu.com/free-quentflyer/docs/dotfoiauniteddanish/1?e=17177371/12926312>.

¹⁸³ *See id.*

*consumer requesting out-of-pocket expenses to provide evidence (i.e. receipts or proof of cancellations) of actual costs incurred by the consumer. In essence, the airline or seller of air transportation is required to make the consumer “whole” by restoring the consumer to the position he or she was in prior to the purchase of the mistaken fare.*¹⁸⁴

In its notice, DOT noted that the suspension of enforcement on mistaken fares is “temporary and will remain in effect only until the Department issues a final rule that specifically addresses mistake fares.”¹⁸⁵

DOT seems to be heavily influenced by the distinction between a customer who acts in bad faith versus a customer who acts in the mistaken belief that a good deal has become available.¹⁸⁶ It is unclear; however, how a customer knows it’s a mistake (presumably bad faith in DOT’s view) versus it’s just a good deal (no bad faith)? Airlines generally want good deals posted on social media websites. Now-defunct Independence Air even launched a mistake fare intentionally in 2005.¹⁸⁷ Can DOT really distinguish between one and the other? “The mere discussion of a fare in frequent flyer forums is insufficient to demonstrate that a fare was known to be a mistake.”¹⁸⁸ Unless the person making this mistake itself claims ownership, how can DOT determine whether or not a genuine mistake has taken place? Can airlines distinguish mistakes that were made intentionally, recklessly, or negligently, and should it matter? Can anyone label a fare a mistake even if it’s not? Presumably, DOT will address these questions when it issues a final rule. Meanwhile, it may be useful for DOT to review the concept of bad faith in customer actions.

C. There are bad faith consumers – purchasing fare offered for sale is not one.

DOT is not alone in suggesting that customers who intentionally take advantage of well-publicized mistake airfares are engaging in bad faith. Several observers have commented that customers who intentionally book mistake airfares are engaging in morally dubious behavior, or even stealing.¹⁸⁹ Sahr and Derco characterize these customers as “aggressive” and “unscrupulous” who “troll” the internet looking to take advantage of mistake fares.¹⁹⁰ Christopher Elliott, a travel industry expert, believes that at some point, a fare is so low that it has to be obvious to the customer that a mistake has taken place.¹⁹¹ He cites the example of one of his readers of who purchased a \$9,470 first class ticket from Burma for \$13.¹⁹² Unfortunately, his example is disingenuous since that \$13 fare is just the base fare.¹⁹³ When taxes and

¹⁸⁴ Department of Transportation Enforcement Policy Regarding Mistaken Fares, May 8, 2015, *available at* https://cms.dot.gov/sites/dot.gov/files/docs/Mistaken_Fare_Policy_Statement_05082015.pdf

¹⁸⁵ *Id.*

¹⁸⁶ *See* Notice of Proposed Rulemaking, *supra* note 167.

¹⁸⁷ Keith Alexander, *Independence Air’s Accidental Free Fares*, WASH. POST, Oct. 13, 2005, *available at* <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/12/AR2005101202028.html>.

¹⁸⁸ Gary Leff, *The DOT Wants to Clamp Down on Forums and Blogs Spreading Mistake Fares and Having Them Honored* (June 3, 2014), VIEW FROM THE WING, <http://viewfromthewing.boardingarea.com/2014/06/03/us-department-transportation-wants-let-airlines-hook-honoring-mistake-fares-consumers-learned-blogs-forums>.

¹⁸⁹ Christopher Elliott, *supra* note 140.

¹⁹⁰ Sahr, *supra* note 130.

¹⁹¹ *See* Christopher Elliott, *supra* note 146.

¹⁹² *Id.*

¹⁹³ *Id.*

surcharges were included, his reader actually paid \$586 for the ticket.¹⁹⁴ Given the complexities of airline pricing (see Section I.A, *infra*), if the proposition that there is no reasonable expectation for airfare pricing, then there can be no argument that a customer has stolen from an airline by purchasing a mistake fare.

There are, of course, customers who engage in bad faith in dealing with airlines. In 1981, for example, cash-strapped American Airlines sold the lifetime unlimited AAirpass for \$250,000, with the possibility to add a companion for an extra \$150,000.¹⁹⁵ The program entitled holders to fly unlimited number of flights in First Class for their lifetime.¹⁹⁶ Savvy customers soon realized the value of what they had, and began engaging in practices such as selling their companion seats or miles earned from their flying (in some cases customers earned more than 40 million miles).¹⁹⁷ The airline responded by cancelling several customers' AAirpass memberships for fraud.¹⁹⁸ In another case, a customer booked a fully refundable first class ticket, used the ticket to gain access to the airline's first class lounge to eat, then canceled the ticket for a full refund, rebooked a ticket for the next day, and did it again.¹⁹⁹ He did this for nearly a year before he was caught by the airline.²⁰⁰ Then there was the case of the American Airlines customer who repeatedly made fictitious reservations to block premium seats for the sole purpose of obtaining mileage upgrades.²⁰¹ Another example came in 2010, when an airfare website revealed that it was possible to avoid paying fuel surcharges (saving hundreds of dollars in international airfares) by reserving complicated itineraries that customers may not have any intention to fly, a practice known as "fuel dumping."²⁰² In another case, a United Airlines customer discovered a way to manipulate United's website to sell tickets between San Francisco and Honolulu for \$80.²⁰³ Finally, there are customers who routinely engage in practices specifically prohibited by airlines such as selling their miles or upgrades for cash.²⁰⁴

These practices to make personal profit or otherwise exploit airline programs appear to square within the meaning of "bad faith." On the other hand, it's hard to see how purchasing a fare offered for sale through an airline's website, an act that happens millions of times daily, is "bad faith" simply because the consumer heard about the fare through a website. DOT first

¹⁹⁴ Christopher Elliott, *Is It Ever OK to Steal from an Airline?*, WWW.ELLIOTT.ORG, Jan. 23 2013, <http://elliott.org/what/is-it-ever-ok-to-steal-from-an-airline/>.

¹⁹⁵ Ken Bensinger, *The Frequent Flyers Who Flew Too Much*, L.A. Times, May 5, 2012, available at <http://articles.latimes.com/2012/may/05/business/la-fi-0506-golden-ticket-20120506>.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Man Uses One First-Class Ticket to Get Free Airline Lounge Meals for a Year*, FOX NEWS, Jan. 28, 2014, available at <http://www.foxnews.com/travel/2014/01/28/man-uses-one-first-class-ticket-to-get-free-airline-lounge-meals-for-year>.

²⁰⁰ *Id.*

²⁰¹ Gary Leff, *Bet You Didn't Know This Trick, and How it Could Cost You Your Miles*, VIEW FROM THE WING (July 23, 2014), <http://viewfromthewing.boardingarea.com/2014/07/23/bet-didnt-know-trick-cost-miles/>.

²⁰² Gary Leff, *Answering Reader Questions: The Mystery Surrounding Fuel Dump*, VIEW FROM THE WING (Jan. 29, 2013), <http://viewfromthewing.boardingarea.com/2013/01/29/answering-reader-questions-the-mystery-surrounding-fuel-dumps>.

²⁰³ Brian Cohen, *United Airlines Shuts Down Accounts of FlyerTalk Members Who Manipulated Internet Web Site*, WWW.FLYERTALK.COM (Nov. 6, 2013), <http://www.flyertalk.com/the-gate/blog/25586-united-airlines-shuts-down-accounts-of-flyertalk-members-who-manipulated-internet-web-site.html>.

²⁰⁴ See Account audit / fraud issues - Busted selling miles / SWU / VIP, etc (consolidated), WWW.FLYERTALK.COM, <http://www.flyertalk.com/forum/american-airlines-aadvantage-combined-airline-program/689350-account-audit-fraud-issues-busted-selling-miles-swu-vip-etc-consolidated.html> (last visited May 30, 2015).

surfaced the “bad faith” issue when it responded to United’s cancelation of tickets issued in Denmark. The agency stated it was concerned that customers had to change their billing address to Denmark in order to force the website to display fares in Danish Krone.²⁰⁵ In reality, however, customers could see the fares even if they were in the United States with the US set as their country.²⁰⁶

Although it’s hard to argue customers acted in truly bad faith in that case, the facts are that United’s fare mistake was beyond its control.²⁰⁷ That may be a stronger basis upon which to release United from liability for honoring that fare. These reforms are discussed below.

IV. Suggested Reforms and Conclusion

As this Article has demonstrated, a rule that relies on the “obviousness” of a mistake fare is probably unenforceable and overly simple. The problem of mistake airfares is ripe for just and fair reform. Without regulation, airlines would be free to unilaterally cancel tickets at any time, including when travelers are in the middle of their journeys, simply by calling the ticket a mistake. This stance is unsupportable under the law of contracts, which requires contract sanctity to be upheld whenever possible. The DOT is statutorily charged with preventing unfair and deceptive trade practices, and should use that regulatory power to level the playing field between two parties of inherently unequal bargaining power.

On the other hand, DOT’s initial muscular pro-consumer stand in § 399.88(a) and the accompanying Frequently Asked Questions, requiring all airlines to honor mistake fares in all circumstances, may leave airlines without any protection for mistakes beyond their ability to control or influence. The rise of social media means these fares can be distributed with rapid speed (the United Airlines Danish Krone mistake fare alone generated over 1000 consumer complaints and an astounding 15,000 consumer opinions),²⁰⁸ further underlining the need for real reform is clearly needed. Industry observer Gary Leff suggests airlines should have to certify under oath that a real mistake has happened, the fare must be at least 80% discounted from the lowest paid fare in the last 30 days, airlines must cancel within 24 hours of ticketing, and must communicate with customers.²⁰⁹ In addition to these sound suggestions, DOT could limit airlines to only honoring one reservation per customer, to prevent customers from repeatedly exploiting a mistake airfare.

Airlines can also take steps to mitigate their damages from mistake airfares. Airlines can use better technology, such as United’s team response. In April 2015, United Airlines announced it was creating a Digital Operations Center to “ensure the airline loses a lot less money when it makes silly mistakes, like selling free or deeply discounted fares filed in

²⁰⁵ Department of Transportation, *supra* note 176.

²⁰⁶ *Dot Rules in Favor of United on the “Krone Krime” Fares*, Feb. 24, 2015, available at <http://pizzainmotion.boardingarea.com/2015/02/24/dot-rules-in-favor-of-united-on-the-krone-krime-fares/> (last visited May 15, 2015).

²⁰⁷ Mutzabaugh, *supra* note 171.

²⁰⁸ Ben Schlappig, *How Many DOT Complaints Were Filed Over One Mistake Fare*, ONE MILE AT A TIME (Apr. 30, 2015), <http://onemileatatime.boardingarea.com/2015/04/30/how-many-dot-complaints-were-filed-over-one-mistake-fare>.

²⁰⁹ Gary Leff, *A Modest Proposal for How Airlines Should be Required to Handle Mistake Fares*, VIEW FROM THE WING (Apr. 30, 2015), <http://viewfromthewing.boardingarea.com/2015/04/30/a-modest-proposal-for-how-airlines-should-be-required-to-handle-mistake-fares>.

error.”²¹⁰ At the facility, staff will use specialized software and hardware to detect and prevent mistakes like error fares.²¹¹ Airlines can also delay ticketing, so that they only issue tickets after a fare verification process ensures that the right fare has been quoted to the customer. Since many customers book multiple mistake fares so that they can accumulate miles and accrue elite status, airlines can discourage this behavior by not awarding award mileage bonuses on mistake fares, as American Airlines announced in May 2015.²¹²

As DOT contemplates its next steps towards a final rule on mistake airfares, it is important for DOT to keep in mind the policy reasons it promulgated § 399.88(a) in the first place. The airlines, through the adoption of complicated revenue management strategies, have created enough confusion among customers for airline airfare prices that customers rarely have an expectation for a reasonable value for a given route. The industry’s adoption of e-ticketing means that airlines have robbed themselves of any opportunity to correct for mistake fares before binding contracts (tickets) are issued to customers. Requiring airlines to honor mistake fares is wholly consistent with existing contract law, especially in light of airlines’ positions that they do not owe customers a duty of good faith in dealing with contracts. For these reasons, DOT should consider a final rule that fulfills its role in preventing deceptive and unfair trade practices.

²¹⁰ Sumers *supra* note 69.

²¹¹ *Id.*

²¹² Gary Leff, *American AAdvantage Will No Longer Award Miles on Mistake Fares*, VIEW FROM THE WING (May 28, 2015), <http://viewfromthewing.boardingarea.com/2015/05/28/american-aadvantage-will-no-longer-award-miles-on-mistake-fares>.