

# IADC

# Newsletter

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## *Aviation & Space Law Committee*

### In This Issue

October's newsletter for the Aviation Committee is written by Michael J. Holland a partner in the law firm of Condon & Forsyth, LLP, New York, New York.

### **Warsaw Convention Pre-Empts State and Federal Law Claims for Violation of Discrimination Statutes**

*By Michael J. Holland*

The Supreme Court's landmark decision in *Tseng v. El Al Israel Airlines*, 525 U.S. 155 (1999) left open the issue of whether claims based on violation of federal discrimination statutes are precluded by a finding that plaintiff did not meet the pre-requisites for recovery under the Warsaw Convention for incidents which occur on international flights. In a far reaching opinion, the United States District Court for the District of New Jersey held in *Waters v. The Port Authority of New York and New Jersey*, \_\_\_ F.Supp. 2d \_\_\_, 2001 WL 912663 (D. New Jersey, August 14, 2001) that claims for discrimination under the Air Carrier Access Act and the Federal Aviation Act, as well as claims for non-monetary relief, i.e., declaratory and injunctive relief, are barred when plaintiff cannot meet the criteria for proving an accident under Article 17 of the Warsaw Convention.

### The IADC

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In *Waters*, the wheelchair-bound plaintiff alleged that Alitalia and its ground handling agents at Kennedy Airport failed to seat him in a bulk head seat on his trip from JFK to Rome and that on a return flight they failed to transfer him from his airline seat to a wheelchair upon his arrival at JFK.

Plaintiff claimed that when he checked in for his JFK to Rome flight aboard Alitalia on December 22, 1997, he requested a bulkhead seat and assistance in boarding the aircraft. Plaintiff, who was travelling with three other family members, then boarded the aircraft. However, when he reached what he claimed was his assigned seat, he discovered that while his three travel companions were given bulkhead seats, he was not. He refused to take the

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assigned seat which was given to him and remained in the aisle approximately 25 minutes while he debated his seat assignment with ground agents. During that time, other passengers were permitted to board the flight and plaintiff alleged that during the course of their boarding, he was bumped and struck by other passengers and their carry-on baggage. Eventually, plaintiff sat in the bulkhead seat for the flight.

Upon his arrival home from Rome aboard Alitalia flight 610 on January 3, 1998, he contended that the two gate agents assigned to assist in transferring him from his airline seat to a wheelchair did not know how to properly transfer him. Two of his travel companions transferred him and plaintiff exited uneventfully.

*Waters* filed suit, alleging that as a result of these incidents, he sustained mental and emotional anguish, distress, indignity, embarrassment and humiliation. He also claimed damages for being smacked in the head with carry on bags while waiting in the aisle for his seat location to be clarified. Plaintiff claimed that as a result of this incident, he lost sleep, was constipated for 12 days and suffered an exacerbation of his multiple sclerosis. No medical testimony was proffered to support the claim that there was any exacerbation of the multiple sclerosis and plaintiff testified at his deposition that he had never even discussed with his physician whether his experience aboard the Alitalia flights was in anyway connected to his claimed loss of upper body strength.

Alitalia and its ground handling agents moved for summary judgment dismissing all of the claims. The court began its analysis by concluding that, under *Tseng*, all state law claims were pre-empted by the Warsaw Convention. Moreover, the pre-emption of the state law claims extended to defendants other than Alitalia because all of those companies were acting as agents of Alitalia in the providing of the air transportation services.

While the court found that it was less clear as to whether the Convention pre-empted Federal causes of action for discrimination under the Federal Aviation Act and the Air Carrier Access Act, the court ultimately concluded that, in the interests of uniformity, all of those claims for damages must be dismissed where plaintiff did not meet the criteria for establishing liability under the Warsaw Convention, a treaty of the United States.

The court started its analysis by citing the now familiar standard for recovery under *Tseng*, i.e., that a passenger may recover under the Warsaw Convention when the passenger establishes that (1) an accident has occurred; (2) that the passenger suffers death, wounding or other bodily injuries; and (3) that the accident occurred either on board the aircraft or in the course of embarking or disembarking from the aircraft. *Tseng*, 525 U.S. 155.

Since the transportation was international, the provisions of the Convention exclusively governed the rights of all of the parties to an action for damages and pre-empted all other causes of action. The *Waters* court concluded that the Convention was intended to pre-empt all causes of action, whether based on state or federal law, even where those causes of action were created by federal statutes barring discrimination. Moreover, regardless of whether money damages were sought or whether the relief sought was declarative or injunctive, the Warsaw Convention still governed the claims. If the criteria for proof of an "accident" under Article 17 of the Warsaw Convention were not met, the action must be dismissed.

The two cases which have cited *Tseng* in connection with Federal discrimination claims, *Brandt v. American Airlines*, 2000 WL 288393 (ND Ca. 2000) and *Turturro v. Continental Airlines*, 128 F.Supp. 2d 170 (S.D.N.Y. 2001) focused on the Convention's goals of providing a comprehensive liability scheme to ensure greater predictability to countries which are signatories to

the Warsaw Convention and of generally restricting the type of actions for damages which may be brought in order to ensure uniformity. Accordingly, the *Waters*' Court agreed that to allow the plaintiff to pursue a cause of action that falls within the scope of the Convention under the guise of a Federal discrimination statute would undercut the statutory goals of the Warsaw Convention.

Applying the Warsaw Convention to the *Waters* claims, the court, without reaching the issue as to whether a bodily injury had been sustained by the plaintiff, found that *Waters* failed to establish an "accident" under Article 17 of the Warsaw Convention. The refusal of the airline to seat plaintiff in what he claimed was his assigned seat did not constitute an accident. The fact that other passengers may have bumped plaintiff with their baggage while he remained in the aisle discussing his proper seat location did not constitute an accident. The court concluded that the plaintiff's fate was in his own hands and that his refusal to sit in his assigned seat eliminated any possible causal connection between his seating assignment and his alleged injuries. The injuries that Mr. Waters claimed to have sustained resulted solely from his own internal reaction to not being assigned in a bulk head seat and his refusal to take his assigned seat despite the airline's request that he do so. Moreover, with respect to the claimed failure to

"meet and assist" on the return flight to New York, plaintiff conceded that he was removed from the aircraft by his travelling companions. There was no viable claim that an "accident" occurred because of the inability of the crew to transfer plaintiff from his seat on the aircraft to the transfer wheelchair.

In conclusion, finding that the plaintiff had not sustained an "accident" within the meaning of Article 17 of the Warsaw Convention, the court dismissed all claims, whether brought under Federal or state law, and regardless of whether declaratory, injunctive or money damage relief was sought.

The *Waters* case will be an extremely significant decision in the field of aviation law. The Air Carrier Access Act was amended within the last several years to apply to foreign air carriers as well as domestic carriers. Carriers will frequently be faced with claims for discrimination by various passengers claiming disabilities. Where these alleged acts of discrimination do not rise to the level of an "accident" under the Warsaw Convention, the passengers who make these claims with respect to an incident which occurs on an international flight will face the likely dismissal of their lawsuits under *Tseng* and its subsequent interpretation by the District Court of New Jersey in *Waters v. The Port Authority*.

