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DVT MULTIDISTRICT LITIGATION

In multidistrict litigation pending in the Northern District of California,¹ plaintiffs sued aircraft manufacturers and domestic and international air carriers seeking damages for deep-vein thrombosis (DVT) injuries sustained during or after air transportation. Chief Judge Walker, the presiding district court judge, issued several significant decisions this year, including granting summary judgment to The Boeing Company on product liability and defective seat design claims, dismissing cases against various airline defendants arising from U.S. domestic flights and, this month, addressing the scope of discovery in the Warsaw cases.

Summary Judgment Granted To Boeing On Product Liability And Negligence Claims In *In Re: Deep Vein Thrombosis Litigation*, 356 F. Supp. 2d 1055 (N.D. Cal. 2005)

Plaintiffs sued Boeing in 17 of the cases where plaintiffs developed DVT on either a domestic or international flight operated with a Boeing aircraft. Plaintiffs alleged that the seats and seating configuration on the aircraft were dangerous and defective, creating a risk of developing DVT through prolonged and cramped seating.²

In 12 of the 17 cases, Boeing admitted it manufactured the aircraft, but did not design, manufacture or install the seats, which instead were

ordered directly by the airlines from a seat manufacturer. Plaintiffs nonetheless pursued product liability claims against Boeing, arguing that issues of fact remained on whether Boeing was involved in the seat design or in refurbishing or replacing seats after installation.

In the remaining five cases, Boeing manufactured the aircraft and also installed the allegedly defective seating. Boeing explained that when the airlines selected and purchased the seats from the seat manufacturing company, it simply fastened the seats to the aircraft in accordance with an FAA-approved configuration chosen by the carrier. Thus, Boeing argued, it could not be held liable for the alleged defective condition or design of the seats – only for negligent installation, a theory of liability not asserted by plaintiffs.

To establish its lack of involvement with the seat manufacturing and configuration, Boeing offered the declaration of its Senior Manager of Interiors Group and also the discovery responses of the co-defendant airlines, which expressly identified the seat manufacturers that designed and installed the seats on the aircraft after the sale by Boeing.

Plaintiffs argued that under Rule 56(f) of the Federal Rules of Civil Procedure, if granted the opportunity to conduct further discovery, they could produce evidence sufficient to raise a genuine issue of material fact to oppose the motion. Plaintiffs

further argued that the “objections and qualifying language” in the airlines’ discovery responses undermined the reliability of the responses. The district court disagreed, finding that plaintiffs were merely speculating and that their Rule 56(f) application failed to state with specificity the facts that plaintiffs hoped to elicit by either propounding additional interrogatories on the airline defendants or pursuing discovery from the seat manufacturers identified in the responses. Indeed, the district court found plaintiffs’ assessment of the airlines’ discovery responses disingenuous since plaintiffs sued additional defendants based on the same responses. The court declined to “countenance such crayfishing by counsel who are dangerously close to sanctionable conduct by such tactics.”

The district court further rejected plaintiffs’ request for additional discovery on whether Boeing “replaced or refurbished” the seats in question after installation. Again, plaintiffs’ Rule 56(f) application failed to assert with specificity the facts that plaintiffs reasonably expected to obtain regarding “replacement” or “refurbishment”. Because plaintiffs “produced only speculation and bald conclusions” to support their claims, the court held as a matter of law that Boeing did not design, manufacture, install, replace or refurbish any of the allegedly defective seating at issue in the 12 cases.

The court then decided whether Boeing, as an aircraft manufacturer, could be held liable for a defective product with which it had no contact. Plaintiffs argued that since a manufacturer of a product is responsible for defects in the *completed product*, Boeing is liable for plaintiffs’ DVT because the completed product is the aircraft (even though the airlines had purchased and installed the seats after purchase).

The court held otherwise, determining that “the completed product is the aircraft as delivered by Boeing to its customer, here sans seating.” The court considered its decision in accord with the Restatement (Second) of Torts § 402A, which imposes liability on product manufacturers who sell any product in a “defective condition.” While plaintiffs claimed that the seat design and seat configuration were defective, neither of these

conditions existed when Boeing sold the aircraft to the carriers.

The court further held that plaintiffs’ reliance on *Vandermark v. Ford Motor Co.*³ was misplaced. In *Vandermark*, Ford delivered a car to an authorized dealer who was empowered to sell the car after the dealer made final inspections, connections and adjustments necessary to make the car ready for use. The car was sold with a defective master assembly, which subsequently caused an accident. The California Supreme Court rejected Ford’s argument that the defect could have arisen *after* Ford delivered the car to the dealer since the authorized dealer was an agent of Ford with power to inspect, correct and adjust the cars prior to selling them. Boeing, however, *sold* the aircraft to the airlines, which were free to add their own seats and were not acting as agents of Boeing.

The court also admonished plaintiffs’ counsel on taking contradictory positions as they previously had represented to the Judicial Panel that they were interested only in pursuing the *manufacturers or installers* of the seats on the aircraft, which, in these cases, was not Boeing.⁴ The court then addressed plaintiffs’ remaining theories of liability against Boeing, *i.e.* that Boeing (1) defectively designed the seat tracking system on the aircraft; (2) breached its duty to warn the airlines of DVT; (3) breached its duty to warn passengers of DVT; and (4) breached its duty, as a market participant, to exert pressure on the airlines and seat manufacturers.

Defective Seat Tracking Theory

Although Boeing delivered the aircraft to the carrier defendants without seats, the aircraft is delivered with a seat tracking system (STS), which is a system of tracks that are secured to the aircraft cabin floor and upon which the later-installed seats are bolted. The STS accommodates a wide range of seating configurations, permitting airlines to configure the seats in a manner that is compliant with FAA certification. It was undisputed that the seating configurations on each aircraft in the 12 cases were certified by the FAA.

Plaintiffs asserted that the STS was defectively designed because it permits unsafe configurations and contains a design defect because it does not *prohibit* airlines from installing seats too closely together. Plaintiffs, however, did not quantify what distance between seats should be considered unsafe. The court readily dismissed this duty to prohibit theory since, as a threshold matter, Boeing “has no legal authority to require the airlines to configure the seats in a manner that maximizes passenger safety; that authority is vested in the FAA.” Secondly, to impose a “duty to prohibit” could lead to “untenable results, as a manufacturer would be liable for any purchaser’s later use or misuse of the manufacturer’s product.”

Finally, plaintiffs failed to cite to any case law in support of their theory. In fact, the court found that recent case law has declined to impose an affirmative duty on manufacturers to investigate and sanction purchasers that misuse their products. The case law, which involved handgun manufacturers,⁵ “cuts against” plaintiffs’ “duty to prohibit” theory. As concluded by the district court, “(m)anufacturers are not their purchasers’ keeper” and tort law does not require manufacturers to “look over the purchaser’s shoulder” at all times to ensure safe use of the product.

Marketing Enterprise Theory

Because Boeing is a participant in the overall production and marketing enterprise of commercial aircraft, plaintiffs argued that it is in a unique position to advise airlines about the issues of seat design and configuration and also exert pressure on carriers and seat manufacturers to design safer seats and seating configurations. Once again, plaintiffs offered no case law to support their novel theory, which the court found would produce “extraordinary results” and make a company liable for defective products manufactured by others simply because it is a market participant.

Alleged Duty to Warn Airlines

The court also rejected plaintiffs’ contention that Boeing had a duty to advise airlines of (1) the risk of DVT from unsafe seat design and seating configuration; (2) seat manufacturers that were

building safer seats; (3) safer alternative seat designs; and (4) preventative measures that could be taken by passengers to reduce such risks. Plaintiffs attributed Boeing’s knowledge on these issues to its membership in the International Air Transportation Association (IATA), and an IATA press release relating to risks of DVT.⁶

Even assuming that Boeing had such knowledge, the court concluded that Boeing had *no duty to warn* the airlines of potentially defective products that exist in the world and specify products that Boeing may believe are more safe. The court could find no case law holding that a manufacturer, after selling a completed product to a purchaser, remains under a duty to warn of potentially defective additional pieces of equipment that a purchaser may or may not use to complement the product. The court analogized the situation to a bike rack subsequently installed on an automobile, whereby it would be illogical to require an auto manufacturer to warn the customer of potentially defective bike rack brands or suggest safer brands.

Moreover, the court recognized the inherent inconsistency in plaintiffs’ argument that Boeing had a duty to warn the apparently uninformed, unsophisticated carriers of the risks of DVT, when these same carriers, according to plaintiffs, had actual knowledge of the air travel risks of DVT.

Alleged Duty to Warn Passengers

The court also held that Boeing had no duty to warn *passengers* of the risks of DVT and considered plaintiffs’ theory to be “convoluted.” To hold that a manufacturer is under a duty to warn an unknown third party that a purchaser may or may not have supplemented that manufacturer’s completed product with an allegedly defective piece of equipment “stretches a manufacturer’s tort liability too far.”

Lastly, in the five cases where Boeing actually installed the allegedly defective aircraft seats, the court rejected plaintiffs’ claims that the airlines’ interrogatory responses were unreliable evidence regarding Boeing’s involvement with the seats. Although Boeing could be liable as an installer under some state’s tort laws on a theory of

negligent installation, the relevant case law and statutes from New Jersey, Virginia, Illinois and Georgia (plaintiffs' states of residence) all supported Boeing's defense that it could not be liable for *product defects* solely based on its installation. Similarly, in the United Kingdom, only the producer of the product, not an installer, may be held liable under the Consumer Protection Act.

Moreover, several plaintiffs in the multidistrict litigation already had acknowledged that Boeing, as seat installer, could not be held liable for products liability or negligence unless it could be shown that Boeing designed or configured the seats.⁷ Thus, the court granted Boeing summary judgment in these five cases.

Airline Defendants' Joint Motion To Dismiss Cases Involving Domestic Transportation Granted In *In Re: Deep Vein Thrombosis Litig.*, 2005 WL 591241 (N.D. Cal. Mar. 11, 2005)

Chief Judge Walker also granted the airline defendants' joint motion to dismiss DVT cases involving mid- or trans-continental, *i.e.*, U.S. domestic transportation.⁸ Because these cases did not arise from international transportation, they were not governed by the Warsaw or Montreal Conventions. Plaintiffs premised their claims on state tort law, alleging that (1) the seating configurations on defendants' aircraft were dangerous and defective so as to create a risk of developing DVT through prolonged and cramped seating; (2) the seats were defectively designed so as to create the same risk; and (3) defendants failed to warn plaintiffs of the risks of developing DVT and steps that could be taken to mitigate this risk. Plaintiffs based their claims on theories of negligence, breach of the duty of a common carrier, products liability and breach of warranty. Plaintiffs sought punitive as well as compensatory damages.

The defendant carriers urged the court to adopt the decision by the U.S. Court of Appeals for the Fifth Circuit in *Witty v. Delta Air Lines, Inc.*,⁹ which held that plaintiff's DVT claim was preempted by federal law,¹⁰ namely the Airline Deregulation Act of 1978 (ADA) and the Federal Aviation Act of 1958 [(FAA), which directs the Administrator of the Federal Aviation

Administration to promulgate air safety standards and regulations].¹¹

In *Witty*, the plaintiff developed DVT after a domestic flight and sued Delta for defective seat configuration and failure to warn passengers of the risk of DVT. The Fifth Circuit held that the defective seat design claim was preempted by the ADA, which expressly preempts all state laws that have the "force and effect of law related to a price, route or service of an air carrier."¹² The Fifth Circuit found that the ADA preempts not only *direct* regulation of airline prices by states, but also *indirect* regulation relating to prices.¹³ Exposing Delta to liability for not providing adequate leg room would require Delta to reconfigure its aircraft at considerable expense by decreasing the number of seats on the aircraft. This would have a "significant effect" on pricing as it would result in an increase of Delta's fares. The *Witty* court concluded that such *indirect* state regulation was expressly preempted by the ADA.

Regarding the failure to warn claim, the Fifth Circuit focused on the large number of FAA regulations governing warnings and instructions that airlines must provide to their passengers. These extensive, mandatory warnings reflected Congress' intent to occupy the entire field of air safety. Because "Congress enacted a pervasive regulatory scheme covering air safety concerns" (including instructions to passengers), Congress impliedly preempted this field and any failure to warn claim must be based on a violation of those "federally mandated warnings." Because the FAA regulations do not require warning of the risks of DVT or methods to prevent it, Delta could not be held liable for failure to make such warnings.

Plaintiffs argued that *Witty* was wrongly decided and attempted to distinguish the decision with respect to each of their theories of liability.

Defective Seating Configuration

Plaintiffs contended that the ADA has a narrow preemption provision not intended to cover personal injury claims, and that even if some claims fall within the FAA's preemptive reach, plaintiffs' specific claims regarding defective seating

configuration do not because they do not relate to “a price.” Plaintiffs relied on *American Airlines, Inc. v. Wolens*¹⁴ and the Ninth Circuit’s decision in *Charas v. Trans World Airlines, Inc.*¹⁵ to support their “sweeping proposition” that all personal injury claims are immune from ADA preemption. The court disagreed and determined that the U.S. Supreme Court in *Wolens* and the Ninth Circuit in *Charas* actually had advocated a case-by-case approach to the issue rather than a broad non-preemption rule.¹⁶

The court noted that even if a state law has nothing to do with the economic regulation of an airline, it may still be preempted if, in any given action, it has the “effect” of economically regulating an airline. Because “[s]uch a detailed inquiry does not lend itself to *per se* rules of inclusion or exclusion,” the court rejected plaintiffs’ assertion that *all* personal injury claims are immune from ADA preemption.

The court then analyzed whether plaintiffs’ state law tort claim relating to defective seating plans would have the force and effect of law on pricing. Although plaintiffs argued that the state conduct must make a “direct” change in an airline’s price to fall under the FAA’s preemptive scope, the court found this contention “utterly without merit” and contrary to *Witty*’s “significant economic effect” analysis, which finds preemption if the state law has a significant effect on fares.¹⁷

Even using this analysis, plaintiffs contended that their personal injury claims had only a “remote” economic effect on airline pricing. The court disagreed, since allowing personal injury claims based on inadequate leg room obviously would have a forbidden significant economic impact as carriers would sell fewer seats and incur enormous expense to reconfigure their aircraft. In fact, in a case brought by a group of tall passengers complaining about aircraft seating, a fellow district court judge impliedly held that any state law claim requiring a carrier to reconfigure its seating plan would necessarily be preempted by the ADA.¹⁸

Plaintiffs then argued that airlines would not be required to change their seating in response to their lawsuits; rather the carriers simply may be

required to compensate passengers who suffer personal injury as a result of the cabin environment. In other words, perpetual and costly monetary liability under state tort law did not amount to any form of state regulation of airline prices.

This argument, however, previously was rejected by the U.S. Supreme Court in *Cipollone v. Liggett Group, Inc.*,¹⁹ which held that an obligation to pay compensation can be, and indeed is, a potent method of governing conduct and controlling policy. Accordingly, plaintiffs’ personal injury claims based on defective seating configuration were held expressly preempted by the ADA.

Failure to Warn

While the ADA expressly preempts the “sphere of state law” relating to a price, route or service, the FAA regulations do not contain a similar express preemption provision. Nevertheless, the FAA regulations have been found to have the force of implied or field preemption. Courts, however, have struggled to determine when and how far to extend field or conflict preemption to the FAA regulations.

In *Witty*, the Fifth Circuit concluded that personal injury claims based on a carrier’s failure to warn of DVT and possible preventive measures were impliedly preempted by the FAA regulations under both the field and conflict preemption doctrines. While the Fifth Circuit viewed this as a close question due to lack of precedent in that circuit, the Ninth Circuit already has determined that the “whole tenor of the [FAA] and its principal purpose is to create and enforce one unified system of flight rules.”²⁰ The Ninth Circuit, on several occasions has recognized the broad scope of federal preemption in the field of air safety, and held that the FAA and its corresponding regulations “preempt a large portion, if not the entire field, of aviation safety.”²¹ Other circuits have reached the same conclusion, including the First,²² Second,²³ Third,²⁴ Fifth²⁵ and Seventh²⁶ Circuit Courts of Appeal.

Because the Ninth Circuit “indubitably gives implied field preemptive effect to the FAA,” the court needed only to decide whether plaintiffs’ failure to warn claims fell within this preemptive

scope. Because the FAA Administrator enacted numerous regulations governing the warnings and instructions that carriers are required to give to passengers, the court held that plaintiffs' failure to warn claims were impliedly preempted.²⁷

Furthermore, permitting state law suits based upon a failure to warn of DVT would lead to "non-uniformity" each time a jury sustains a failure to warn challenge. Inconsistent jury verdicts could result, and pre-flight warnings would require amendment. The court, therefore, concluded that "in order to achieve the purpose of the FAA, a personal injury claim based upon an airline's failure to warn must be premised on the airline's failure to give a *federally mandated* warning; state laws requiring supplemental warnings are preempted."

Defective Seat Design

Lastly, the court held that plaintiffs' claim based upon defective seat design lacked merit and was impliedly preempted by federal law. "As with pre-flight warnings and instructions, the FAA administrator has enacted a wealth of federal regulations governing the design, maintenance, structure and position of aircraft seats."²⁸

Because the FAA "left no room for states to regulate the sufficiency of aircraft seat design," the court dismissed, on implied preemption grounds, plaintiffs' defective seat design claims which were premised on state law products liability standards.

MDL Court Defines Scope Of Discovery In Warsaw Convention Cases In *In Re: Deep Vein Thrombosis Litigation*, MDL No. 04-1606 VRW (N.D. Cal. Apr. 20, 2005)

In the Warsaw DVT cases, the court issued a detailed order limiting the appropriate scope of discovery and at the same time phrasing its scope such that plaintiffs certainly will attempt to argue that the discovery being demanded is broader than envisioned by the airlines! The two areas are: "(1) whether, at the time of each plaintiff's international flight, there was an industry practice of warning passengers about the risk of DVT and (2) whether...the named airline defendant had [a]n

individual policy of warning passengers about the risk of DVT."

These areas of discovery would not include evidence pertaining to what the airlines knew or should have known about the risks of DVT or the possible preventative steps. Further, the court limited discovery of "industry practice" to a single demand for inspection of documents:

- All documents (regardless of source) in the airline defendant's possession at the time of plaintiff's flight referring or relating to any airline's actual practices concerning warning passengers of the risks of DVT or the risks associated with prolonged immobility in aircraft.

The court limited discovery as to the airlines' "individual policies" to two demands:

- All documents referring or relating to the individual airlines' actual practices or policies concerning warning passengers of the risks of DVT or the risks associated with prolonged immobility in aircraft.
- All documents referring or relating to the individual airline's actual practices or policies concerning warning its pilots and crewmembers of the risks of DVT or the risks associated with prolonged immobility in aircraft.

Finally, the court held that "[d]iscovery regarding whether conditions in aircraft make passengers peculiarly susceptible to DVT is not warranted at this time."

Endnotes

¹ The Judicial Panel on Multidistrict Litigation centralized over 30 actions, brought in several district courts, all alleging that various aspects of airline travel caused DVT in airline passengers. *In re Deep Vein Thrombosis Litig.*, 323 F. Supp. 2d 1378 (J.P.M.L. 2004).

² Plaintiffs brought state law claims for product liability, negligence and breach of warranty, but conceded judgment should be entered for Boeing on the warranty claims.

³ 61 Cal.2d 256, 37 Cal Rptr. 896, 391 P.2d 168 (1964).

⁴ The court denied discovery on Boeing's involvement in the aircraft seating market, which plaintiffs claimed Boeing controlled based on an article in which Boeing complimented a seat manufacturer's products. The court held that plaintiffs failed to diligently pursue discovery against Boeing, and that their theory was "unsupported speculation."

⁵ See *In re Firearm Cases*, 24 Cal.Rptr.3d 659, 2005 Cal. App. LEXIS 211 (Cal. App. 1 Dist. 2005) (manufacturers are not under duty to investigate and sanction wayward retailers).

⁶ The article was inadmissible hearsay and, in any event, stated there is "no conclusive medical evidence supporting the alleged connection of [DVT] with long distance travel."

⁷ See, e.g., *James v. Delta Airlines*, No. CV-3-2088 (C.D. Cal.) (stipulating to dismissal of claims against Boeing); *Plotkin v. British Airways*, No. C03-3242 (N.D. Cal.) (dismissing Boeing unless it could be shown that it was involved in designing or configuring seats); *Shumaker v. UAL Corp.*, No. 03-2997 (C.D. Cal. 2004) (granting summary judgment to Boeing).

⁸ In their case management statement, the carriers urged the court at the outset to adopt the Fifth Circuit's opinion in *Witty v. Delta Air Lines, Inc.*, *infra*. The court construed this as a joint motion to dismiss.

⁹ 366 F.3d 380 (5th Cir. 2004).

¹⁰ Congress may preempt state law: (1) by enacting an express preemption provision in a congressional Act; (2) by having the federal law thoroughly occupy the field so there is no room for state law to supplement it (implied/field preemption); and (3) by conflict preemption, where a state law is in conflict with federal law and one could not comply with both laws.

¹¹ 49 U.S.C. § 44701.

¹² 49 U.S.C. § 41713(b)(1).

¹³ *Witty*, 366 F.3d at 383.

¹⁴ 513 U.S. 219, 238 (1995).

¹⁵ 160 F.3d 1259 (9th Cir. 1998) (*en banc*).

¹⁶ Although Justice Stevens endorsed plaintiffs' approach, no other Justices joined in his opinion; the majority and Justice O'Connor seemed to endorse a case-by-case approach.

¹⁷ The Fifth Circuit based its analysis on *Morales v. Trans World Airlines*, 504 U.S. 374, 388 (1992), which held that state law restrictions on airline fare advertising were preempted not only because of the explicit reference to fares but also because of the "forbidden significant effect on fares."

¹⁸ *Citing Tall Club of Silicon Valley v. American Airlines*, 2000 U.S. Dist. LEXIS 11302, at *16 (N.D. Cal. 2000).

¹⁹ 505 U.S. 504 (1992).

²⁰ *United States v. Christensen*, 419 F.2d 1401, 1404 (9th Cir. 1969); see also *World Airways, Inc. v. Int'l Brotherhood of Teamsters, Airline Div.*, 578 F.2d 800, 803 (9th Cir. 1978).

²¹ See, e.g., *Skysign Int'l, Inc. v. City & Cty. of Honolulu*, 276 F.3d 1109, 1116 (9th Cir. 2002). (FAA may "completely occupy" the field of aviation safety "through the use of its authority to develop regulations for the use of the navigable airspace.")

²² *French v. Pan Am Express, Inc.*, 869 F.2d 1, 4 (1st Cir. 1989) ("comprehensive legal scheme" of FAA).

²³ *British Airways Bd. v. Port Auth. of New York*, 558 F.2d 75, 84 (2d Cir. 1977) ("control of flights through navigable airspace" is "totally preempted" by FAA).

²⁴ *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 367 (3d Cir. 1999) ("FAA and the relevant federal regulations establish complete and thorough safety standards . . .").

²⁵ See *Witty, supra*.

²⁶ *Kohr v. Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974).

²⁷ See, e.g., 14 C.F.R. § 121.571(a) (oral briefing on smoking, emergency exits, and use of safety belts and emergency flotation devices); § 121.571(b) (requiring printed cards of oral briefings, diagrams and instructions); § 121.585(d) (oral instructions to passengers seated next to emergency exits).

²⁸ See, e.g., 14 C.F.R. § 23.785 (regulating seats, berths, litters, safety belts and shoulder harnesses); §§ 23.562, 23.562 (regulating seat structures and accompanying dynamic test criteria to meet emergency landing conditions); § 25.785 (requiring FAA approval of all seat designs).

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