Condon & Forsyth LLP

Client Bulletin

August 2006

Failure To Warn Of DVT Risks Is Not An "Accident" Under The Warsaw Convention

Deep vein thrombosis (DVT) is a medical condition that occurs when a thrombosis (a blood clot) forms in a deep vein, usually in the thigh or calf. DVT can lead to serious injury or death if the clot breaks off and lodges in the brain, lungs or heart, causing a heart attack, stroke or other debilitating injury. Some studies suggest that there may be a link between air travel and DVT, which can be attributed to prolonged periods of immobility, low cabin pressure and poor oxygenation.

Following decisions from the U.K. House of Lords in *In re Deep Vein Thrombosis and Air Travel Litigation*, [2005] UKHL 72, 2005 WL 3299091, and the High Court of Australia in *Povey v. Qantas Airways, Ltd.*, (2005) 216 A.L.R. 427, 2005 WL 1460709, this month the Ninth Circuit Court of Appeals in *Caman v. Continental Airlines, Inc.*, 2006 WL 2136623 (9th Cir. Aug. 2, 2006), ruled that the failure to warn passengers of the possibility of developing DVT during the course of an international flight does not constitute an "accident" under Article 17 of the Warsaw Convention as a matter of law.

On May 28, 2002, Guy Caman departed from Los Angeles, California, on a Continental Airlines flight destined for Paris, France. The flight was uneventful with no equipment malfunction or other anomaly occurring. Caman did not receive any warning regarding the potential hazard of developing DVT while traveling on his international flight. During the course of his air travel, up to and including his disembarkation from the aircraft, Caman did not request any assistance or other accommodation from Continental personnel. Upon his arrival in France, Caman found it difficult to walk on his right leg and immediately sought medical attention. He was diagnosed with DVT and was admitted to a hospital where he remained for three days.

Caman filed an action against Continental Airlines in the U.S. District Court for the Central District of California alleging that Continental should have warned him about the risks of developing DVT and that its failure to do so constituted an "accident" for purposes of Article 17 of the Warsaw Convention. The district court granted Continental's motion for summary judgment on the grounds that its failure to warn of the risks of developing DVT did not constitute an "accident" under Article 17 of the Warsaw Convention.

On appeal, Caman argued that "Continental's failure to advise him of the risk of DVT, which can result from immobility, dehydration and being cramped in a small pitch seat over the course of an international flight, constitutes an 'accident' for purposes of establishing liability under the Warsaw Convention."

The Ninth Circuit rejected Caman's argument and held that an air carrier's failure to warn a passenger of the risk of developing DVT during the course of an international flight does not constitute an "accident" for purposes of Article 17 of the Convention. The Court found that Caman failed to establish that his DVT was the result of an "accident" because he could not show that the DVT resulted from an "unexpected or unusual event."

In relying on its decision in *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914 (9th Cir. 2004), and the decision of *Scherer v. Pan Am. World Airways, Inc.*, 54 A.D.2d 636, 387 N.Y.2d 580 (N.Y. 1976), the Ninth Circuit noted that "[i]t is well settled that development of DVT as the result of international air travel, without more, does not constitute an "accident" for purposes of Article 17 liability." The Court explained that the proper focus should be on "the nature of the event that caused" the DVT, not the "alleged failure of the carrier to avert" the DVT, and held that "attributing liability to an air carrier for failing to do all it can to prevent an injury that is inherent in air travel, as Caman requested,

improperly shifts the focus of the inquiry from the nature of the event which caused the injury to the alleged failure of the air carrier to avert the same. In addition, interpreting the term "accident" to include a failure to warn of a possible risk of flight would incorporate into Article 17 an inquiry that is properly left to analysis under Article 20(1) once it has been established that an accident has occurred." Accordingly, future arguments based on a carrier's alleged "inadequate" or "ineffective" warnings should be rejected because the focus of these arguments is on what the carrier did to avert the DVT, rather than the nature of the event that caused the DVT.

An interesting aspect of the *Caman* Court decision was its reading of the United States Supreme Court decision in *Olympic Airways v. Husain*, 540 U.S. 644 (2004). *Caman*, 2006 WL 2136623, at *4. The Court explained that Continental's failure to warn was "an act of omission (inaction that idly allows an unfolding series of events to reach their natural conclusion) as opposed to an act of commission (inaction that produces an effect, result or consequence)" as in the flight attendant's rejection of a direct plea for help in the *Husain* case. Since Caman argued that the air carrier failed to provide an oral warning of the risks of developing DVT during international flights, this failure constituted an act of omission and, therefore, the court concluded such failure to warn could not constitute an "event."

On the heels of the *Caman* decision, on August 18, 2006, the Northern District of California granted numerous summary judgment motions in favor of air carriers finding that the failure to warn passengers of the risk of DVT is not an "accident" for purposes of Article 17 of the Warsaw Convention. In *In re Deep Vein Thrombosis Litigation*, a Multidistrict Litigation Proceeding involving approximately fifty DVT cases from around the United States, Judge Walker held that he was bound by the recent Ninth Circuit decision in *Caman v. Continental Airlines*, which he described as the most recent example of the growing international consensus among signatories of the Warsaw Convention that the absence of a DVT warning does not give rise to liability under Article 17 of the Convention. In accordance with *Caman*, Judge Walker held that the failure to provide DVT-related warnings before or during flight is not an "event" and, therefore, does not qualify as an Article 17 accident, regardless of an industry standard or individual airline policy of providing warnings. The court explained that a carrier's decision not to issue DVT warnings onboard its aircraft could not constitute an accident because such decisions would have been made in the boardroom and, thus, could not have occurred in connection with the passenger's flight, or during the process of embarkation or disembarkation.

Judge Walker concluded that the plaintiffs had not submitted any evidence to justify their motions for additional discovery on industry and individual air carrier practices relative to issuing DVT warnings.

In light of the above, Judge Walker granted summary judgment in favor of those carriers against which the only Article 17 "accidents" alleged were the onset of DVT or the absence or insufficiency of a warning regarding DVT. Hopefully, these recent decisions will hasten the end to DVT related litigation.

If you would like more information on DVT litigation or a copy of the referenced cases please contact:

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