

Client Bulletin

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Ninth Circuit Court Of Appeals Affirms That Failure To Warn Of DVT Risks Is Not An “Accident” Under The Warsaw Convention

The Ninth Circuit Court of Appeals has affirmed the decision of the U.S. District Court for the Northern District of California (“District Court”) dismissing the litigation concerning air carriers’ alleged failure to warn passengers of the risk of developing Deep Vein Thrombosis (“DVT”) on international flights. In *Twardowski, et al. v. American Airlines, Inc., et al.*,¹ the Ninth Circuit held that failure to warn about the risk of DVT despite requests for warnings from various public agencies does not qualify as an “event” or an “accident” under Article 17 of the Warsaw Convention.

DVT is a medical condition in which a blood clot forms in the deep veins of the legs. Between 2001 and 2004, the plaintiffs or their decedents had purchased tickets from defendant air carriers for various international flights, during which they allegedly sustained injuries or death which they attributed to DVT. The plaintiffs asserted that before the plaintiffs’ or their decedents’ flights, the International Air Transport Association (“IATA”), the English House of Lords, and certain airlines’ medical personnel had recommended that airlines warn passengers of the risk of developing DVT during long flights.

In August of 2006, the District Court granted the air carriers’ motion for summary judgment, concluding that to the extent the airlines failed to give warnings, the decision not to warn was too remote from the embarking, disembarking, and on-board flight operations for the injury to be compensable under Article 17 of the Warsaw Convention.² The court permitted discovery into industry practice and airline policies, but rejected the plaintiffs’ requests for additional discovery.

On appeal, the Ninth Circuit noted that it had already held that developing DVT in-flight is not an “accident,”³ and that failing to warn about its risk is not an “event” for purpose of liability for an “accident” under Article 17.⁴ The Ninth Circuit held that the development of DVT does not become an “accident” simply because public agencies have recommended, or “requested,” warnings.⁵

In attempting to distinguish the Ninth Circuit’s previous decisions, the plaintiffs relied on the holding in *Olympic Airways v. Husain*, 540 U.S. 644 (2004), where the United States Supreme Court held that the rejection of an explicit request by a passenger for in-flight assistance could be considered an “event.” *Husain*, 540 U.S. at 655. The plaintiffs argued that this rationale also applies when an air carrier fails to warn effectively about DVT after requests to do so by IATA, the English House of Lords, and airline doctors.

In rejecting the plaintiffs’ arguments, the Ninth Circuit held that generalized requests by public agencies are quite different from particularized requests by individual passengers for assistance. The Court found that not every passenger injury is an unexpected “event” simply because airlines have declared that avoiding injury to passengers is a priority, and confirmed that air carriers have no duty to warn passengers of the risk of developing DVT.



If you should have any further questions, or would like further information, please contact:

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¹ 2008 WL 2908101, -- F.3d -- (9th Cir. July 30, 2008).

² See *In re Deep Vein Thrombosis Litig.*, 2006 WL 2549459 at *8 (N.D. Cal. Aug. 21, 2006).

³ *Rodriguez v. Ansett Australia, Ltd.*, 383 F.3d 914, 917 (9th Cir.2004).

⁴ *Caman v. Continental Airlines, Inc.*, 455 F.3d 1087, 1092(9th Cir.2006).

⁵ The Ninth Circuit also noted that other courts, including those of signatory nations whose views are entitled to weight, are in accord with this holding, citing, *Blansett v. Continental Airlines, Inc.*, 379 F.3d 177, 180(5th Cir.2004) (acknowledging that the IATA has recommended that airlines implement a schedule of instructions on the risks of DVT, and holding that Continental's failure to warn of DVT was not an "unusual or unexpected event" and therefore not a qualifying "accident"); *Povey v. Qantas Airways Ltd.*, (2005) 223 C.L.R. 189 (Austl.) (holding that the failure to warn of DVT is not an actionable "accident" under the Convention); *Deep Vein Thrombosis and Air Travel Group Litig.*, [2005] UKHL 72, [2006] 1 A.C. 495 (U.K.) (same).