

With Compliments of

CONDON & FORSYTH LLP

7 TIMES SQUARE
NEW YORK, NEW YORK 10036
TEL: 212.490.9100
FAX: 212.370.4453

1901 AVENUE OF THE STARS
LOS ANGELES, CALIFORNIA 90067
TEL: 310.557.2030
FAX: 310.557.1299

FALL 2007

RECENT DVT LITIGATION

Over the past several years, courts in various jurisdictions around the world have been adjudicating disputes between passengers (or their relatives) and air carriers regarding claims of deep vein thrombosis (“DVT”).¹ Plaintiffs in these cases have been mostly unsuccessful in persuading courts to find any liability on the part of air carriers for these claims. However, recent decisions in the past month have provided an opportunity for plaintiffs in limited and specific factual situations to avoid early dismissals of the cases. The decisions also provide some guidance in other areas of aviation litigation, especially with regard to federal preemption of state law and the interpretation of an “accident” under Article 17 of the Warsaw Convention.

DVT Litigation

In 2004, the Judicial Panel on Multidistrict Litigation (“MDL”) centralized pre-trial proceedings for all cases brought in the United States by plaintiffs who allegedly suffered, or sued on behalf of an individual who allegedly suffered, from a DVT-related injury during or after travel aboard commercial aircraft. All of the transferred cases were assigned to Chief Judge Vaughn Walker in the Northern District of California (San Francisco).

To date, a majority of the DVT cases have been dismissed. In February 2005, Judge Walker granted summary judgment in favor of Boeing in its capacity as manufacturer of the aircraft in question

in 17 cases.² All claims against airline defendants arising from domestic flights (“non-Warsaw cases”) also were dismissed pursuant to federal preemption in March 2005.³

Many of the approximately 50 cases involving DVT-related injuries arising out of international flights (“Warsaw cases”) have also been dismissed. In August 2006, the court granted summary judgment in 37 “Warsaw cases” in which plaintiffs alleged liability based on the failure to warn passengers of the risks of DVT, *i.e.*, “the absence or insufficiency of a warning regarding DVT or policy level decisions regarding the same.”⁴

DVT and Preemption - *Montalvo v. Spirit Airlines*

The plaintiffs appealed the dismissal of the “non-Warsaw” cases and the Court of Appeals for the Ninth Circuit issued a decision on October 4, 2007. The Court of Appeals affirmed, in part, Judge Walker’s ruling, finding that “failure to warn” claims against airline defendants arising from domestic flights were preempted by the Federal Aviation Act (“FAA”), but remanded plaintiffs’ seating configuration claim for further factual discovery.⁵

In their initial complaints and in their consolidated appeal before the Ninth Circuit, plaintiffs raised common (state) law personal injury claims against several airlines. They alleged that the airline defendants failed to warn about the risk of developing DVT and the airlines failed to inform passengers about steps they could have taken during

the flights to mitigate any risk of DVT. Additionally, the plaintiffs alleged that the airlines provided an unsafe seating configuration by limiting each passenger's legroom.

The Ninth Circuit agreed with Judge Walker that the plaintiffs' failure to warn claims were preempted by the FAA. After reviewing the purpose, history and language of the FAA, the Ninth Circuit stated that "federal law occupies the entire field of aviation safety. Congress' intent to displace state law is implicit in the pervasiveness of the federal regulations, the dominance of the federal interest in this area, and the legislative goal of establishing a single, uniform system of control over air safety."⁶

With respect to plaintiffs' second claim of unsafe seating configuration, the Ninth Circuit reversed and remanded Judge Walker's finding that such claims were preempted by the Airline Deregulation Act ("ADA").⁷ The Ninth Circuit reasoned that the Supreme Court had instructed in *Morales v. Trans World Airlines, Inc.*⁸ and *American Airlines v. Wolens*⁹ that only those state laws that have a significant effect on prices were preempted by the ADA. The Ninth Circuit therefore held that more factual discovery was necessary to determine the extent seat reconfiguration would affect airline prices.

This decision confirms the principle that federal regulations preempt the entire field of aviation safety, and causes of action based upon common (state) law are preempted. In addition, since it is likely that the air carriers involved in this litigation can produce evidence that seating configurations affect ticket prices, plaintiffs' remaining claims which have been remanded back to the district court may well be preempted by federal law.

DVT and the Warsaw Convention – Part I - *Halterman v. Qantas Airways*

On July 10, 2007, Judge Walker granted summary judgment in favor of Qantas Airways in a case in which plaintiff claimed he developed DVT as a result of a number of factors, including an unplanned layover in Sydney during his flights to Melbourne and other "prolonged sitting."¹⁰

During discovery, Halterman alleged that the DVT was caused by several conditions on the aircraft, including cramped seating, dehydration, and being rendered immobile as the result of sleeping passengers, the "fasten safety belt" sign and the flight attendants' service of in-flight meals. Qantas challenged each of those assertions in its motion for summary judgment and argued that Halterman failed to produce any support for his allegation that he developed DVT as a result of an "accident" within the meaning of the Warsaw Convention.

In opposition, Halterman offered three events which he claimed were "unusual or unexpected and external to him" that caused his DVT: (1) the delay as the result of the stopover in Sydney; (2) atypical turbulence which forced him to stay seated; and (3) inadequate pressurization or inadequate oxygen supply.

The court concluded Halterman's allegation that there might have been inadequate pressurization or inadequate oxygen supply because he felt the air was stuffy failed to meet any "significant probative evidence standard" to overcome summary judgment. The court found that this allegation was contrary to Halterman's deposition testimony wherein he admitted he had no reason to believe that there was irregular altitude or inadequate air circulation on the flight. Although the court said an unplanned layover could be a link in the chain of causation, there was no evidence that the layover here actually caused Halterman's injury.

Finally, the court rejected Halterman's allegation that atypical turbulence during the flight caused his DVT because it forced him to remain seated. Halterman testified that the turbulence lasted only 20 to 30 minutes and that he did get up when able to do so. The court reasoned that prolonged sitting either due to a layover or to some other reason does not constitute an "accident" under the Convention.¹¹

As discussed in the next section, the court subsequently modified the blanket assertion that prolonged sitting does not constitute an Article 17 accident, but left the result (dismissal of the Complaint) intact.

DVT and the Warsaw Convention – Part II - *Dabulis v. Singapore Airlines; Braha v. Delta Airlines; Rietschel v. US Airways; and Bianchetti v. Delta*

On October 12, 2007, Judge Walker issued a decision addressing the summary judgment motions of the air carriers in the following “Warsaw cases”: *Dabulis v. Singapore Airlines*, *Braha v. Delta Airlines*, *Rietschel v. US Airways*, and *Bianchetti v. Delta*.¹²

a. *Dabulis v. Singapore Airlines*

Plaintiff Marsha Dabulis was on an international flight from Singapore to New York, with a stop in Frankfurt, Germany. According to her testimony, her middle seat apparently had a metal bar directly in front of her feet which restricted her leg room. During the flight, Dabulis began experiencing pain in her left leg which she blamed on her inability to adequately stretch her legs. She asked to be moved to another seat, but the only seat the flight attendant offered was one that did not recline. (It was later determined that there were other available seats on the aircraft which reclined.) Dabulis chose to remain in her assigned seat. After the flight, her symptoms grew worse and she went to the hospital where she was diagnosed with DVT.

Judge Walker denied Singapore’s motion for summary judgment on the ground that a reasonable jury could find that the flight attendant’s refusal to reseat Dabulis constituted an Article 17 accident which caused her DVT. In so holding, Judge Walker relied on two cases, *Olympic Airways v. Husain*¹³ and *McCasky v. Continental Airlines*.¹⁴ In *Husain*, the district court found that the flight attendant’s refusal to reseat the passenger away from the smoking section even though he was allergic to cigarette smoke constituted an Article 17 accident.¹⁵ In *McCasky*, the court did not grant summary judgment, finding genuine issues of material fact as to whether the alleged rude behavior of airline staff, failure to divert the plane after a passenger suffered a stroke and improper training of flight crew for handling medical emergencies constituted an accident.¹⁶

Based on these facts, Judge Walker held that a reasonable jury could find that Singapore’s refusal to reseat Dabulis in a reclining seat with more leg room was an “unexpected or unusual” event, sufficient to qualify as an Article 17 accident.

The decision in the *Dabulis* case can be contrasted with a recent decision in a case also involving a seat change, *Zarlin v. Air France*,¹⁷ in which a federal court in the Southern District of New York recently held that an air carrier was not liable under the Warsaw Convention to a passenger who allegedly sustained a knee injury from a fellow passenger reclining his seat.

The court expressed doubt that the forceful reclining of the seat was an “accident” under the Warsaw Convention because it probably was not “unusual or unexpected.” In addition, because the cabin crew moved plaintiff to a different seat after she had a problem with the reclining seat in front of her, and she subsequently moved back to her original seat on her own volition and without informing the flight crew, such an action by plaintiff broke the “chain of causation” for a finding that an “accident” caused her injury.

Like plaintiff in *Zarlin* who decided to return to her original seat where the injury was being caused, plaintiff in the *Dabulis* case also made a decision to keep her original seat where the injury was being caused. However, the court in *Daublis* said the offer of a seat which did not recline was not an acceptable alternative and was the equivalent of not offering to move her at all, even though plaintiff claimed the lack of leg room caused her DVT, not an inability to recline her seat.

b. *Braha v. Delta Airlines*

Plaintiff Gilberto Braha brought an action on behalf of his wife, who died several days after boarding an international flight from New York to Rome. Plaintiff argued that his wife experienced an abnormal degree of turbulence on the flight, irregular altitude, inadequate air circulation and oxygenation and cramped seating. Plaintiff claimed these conditions were unexpected and unusual and constituted an “accident” under the Convention.

Judge Walker granted Delta's motion for summary judgment because the plaintiff produced no evidence to support any of his claims. In fact, Delta produced affirmative evidence that there was no strong turbulence on the flight. Moreover, there was no evidence that his wife's death was actually caused by DVT or that she suffered from DVT during or after the flight.

c. *Rietschel v. US Airways*

In this case, the court denied US Airway's motion for summary judgment and clarified its holding in the *Halterman* case (discussed above) a few months earlier that prolonged sitting cannot constitute an Article 17 "accident."

The plaintiff, Ernst-Wilhelm Rietschel, traveled from San Francisco to Frankfurt via Philadelphia, and developed DVT after arriving in Germany. The flight from Philadelphia to Frankfurt was grounded for two hours before take-off due to bad weather, during which time the passengers allegedly were told to stay seated without being offered drinks.

While the court concluded that bad weather conditions or prolonged sitting alone should not be considered unusual or unexpected events, a reasonable jury could find that the events surrounding the delay and sitting, specifically the alleged two-hour confinement without the service of drinks, could be considered unusual and unexpected and constitute an "accident."

The court opined that some claims of prolonged sitting are recoverable because there are differences between: (1) prolonged sitting that includes periods of mobility, *e.g.*, during a normal long-haul flight; (2) prolonged sitting that precludes any mobility due to safety risks, such as during periods of turbulence or a bomb threat; and (3) prolonged sitting for no apparent reason. He stated that while the first two are not unusual and unexpected and, thus, would not be considered an Article 17 accident, "[w]hole sale preclusion of recovery for injuries arising from cases in the third category would give airlines *cart blanche* to force passengers to remain seated without reason. This is untenable and the court does not read those cases that address prolonged sitting to go so far."¹⁸

In so holding, the court deleted the language from its decision in *Halterman* stating that prolonged sitting does not qualify as a Warsaw accident. Instead, the court offered the following clarification:

Forced prolonged sitting may qualify as an accident depending on the circumstances. But prolonged sitting does not become an accident simply because it is a "link in the chain" of causation. This impermissibly conflates the accident inquiry with the causation inquiry.¹⁹

d. *Bianchetti v. Delta Airlines*

The plaintiffs brought this action on behalf of Mary Bianchetti, who died after falling ill while flying from London to Atlanta. During the flight, she experienced abnormal breathing and one of the assisting passengers thought she had a blood clot in her legs. The captain of the aircraft received an emergency clearing to land in Atlanta. After the plane reached the gate, emergency paramedics boarded and attempted to treat Ms. Bianchetti.²⁰

The plaintiffs pointed to three possible Article 17 accidents: Delta's alleged failure to (1) divert the aircraft; (2) expedite care to Ms. Bianchetti upon landing in Atlanta; and (3) ensure that appropriate personnel, able to provide the correct care, met the aircraft. As to plaintiffs' argument that the aircraft should have been diverted to Cincinnati, the Court found that all the evidence actually showed that continuing the flight to Atlanta created the shortest possible flight time.

As to plaintiffs' two other points, the court held that failure to respond to a passenger's illness could create an Article 17 claim. The court found that there were several factual disputes regarding (1) whether Delta's failure to warn the paramedics that Ms. Bianchetti was suffering from DVT was an Article 17 accident and/or a causal factor in her death; (2) whether there was a delay by Delta to expedite the paramedic's entry onboard following the landing; and (3) when exactly the paramedics boarded the plane. Thus the court found that a reasonable jury could find that Delta's response to

Ms. Bianchetti's condition constituted an Article 17 accident that was in part attributable to her death.

The court's denial of some of the summary judgment motions in these cases does not mean the carriers are liable as a matter of law. In fact, the court suggested that a jury may find in favor of carriers on these issues after weighing all the evidence. However, failing to dismiss the claims outright increases the time and resources the courts and the parties must expend to resolve these cases.

These cases show an increasing trend of plaintiffs attempting to focus on some unusual or unexpected event in the "link in the chain of causation," no matter how attenuated from the actual cause of the injury, to avoid dismissal when the actual cause of the injury is not likely to be considered an accident under Article 17 of the Convention.

EDITORS

MICHAEL J. HOLLAND
KATHERINE B. POSNER
PARTNERS, NEW YORK OFFICE
mholland@condonlaw.com
kposner@condonlaw.com

CONTRIBUTORS TO FALL 2007 ISSUE

BARTHOLOMEW BANINO
DIANA KIM
ASSOCIATES, NEW YORK OFFICE
bbanino@condonlaw.com
dkim@condonlaw.com

<http://www.condonlaw.com>

This Condon & Forsyth LLP Newsletter is intended to provide a summary of aspects of the subject matters covered, not to render comprehensive legal or other professional advice.

¹ Deep vein thrombosis is a medical condition that occurs when a blood clot (a thrombus) forms in a deep vein, usually in the extremities of the leg. DVT can lead to serious injury or death if the thrombus breaks off and lodges in the brain, lungs or heart, thereby causing a heart attack, stroke or other debilitating effects. See also Tanya Mohn, *Flying and Blood Clots: A Deadly Risk*, N.Y. Times, Nov. 6, 2007, at C5; Saskia Kuipers, Suzanne C. Cannegiester, et al., *The Absolute Risk of Venous Thrombosis after Air Travel: A Cohort Study of 8,755 Employees of International Organisations*, Pub. Lib. of Science Medicine, Vol. 4, No. 9, e290, Sept. 25, 2007, at 1508.

² *In re Deep Vein Thrombosis Litig.*, 356 F. Supp. 2d 1055 (N.D. Cal. 2005)

³ 2005 WL 591241 (N.D. Cal. Mar. 11, 2005).

⁴ 2006 WL 2547459 (N.D. Cal. Aug. 21, 2006)

⁵ *Montalvo v. Spirit Airlines*, 2007 WL 2874401 (9th Cir. 2007).

⁶ *Id.* at *6.

⁷ *Id.* at *7-8.

⁸ 504 U.S. 374, 388 (1992)

⁹ 513 U.S. 219 (1995)

¹⁰ *Halterman v. Qantas Airways*, 2007 WL 2029326 (N.D. Cal. July 10, 2007).

¹¹ *Id.* But see *In re Deep Vein Thrombosis (Halterman v. Delta Airlines, Inc.)*, 2007 WL 3027351, *16 (N.D. Cal. Oct. 12, 2007).

¹² 2007 WL 3027351 (N.D. Cal. Oct. 12, 2007).

¹³ 316 F.3d 829 (9th Cir. 2002).

¹⁴ 159 F. Supp. 2d 562, 572 (S.D. Tex. 2001).

¹⁵ 116 F. Supp. 2d 1121, 1134 (N.D. Cal. 2000).

¹⁶ 159 F. Supp. 23 at 574.

¹⁷ 2007 WL 2585061 (S.D.N.Y. Sept. 6, 2007)

¹⁸ 2007 WL 3027351 at *16

¹⁹ *Id.*

²⁰ *Id.* at *17-19.