With Compliments of

CONDON & FORSYTH llp

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

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

1016 SIXTEENTH ST., N.W.
WASHINGTON, D.C. 20036
TEL: 202.289.0500
FAX: 202.289.4524

JANUARY 2005

WARSAW CONVENTION

Ninth Circuit Holds That Passenger's DVT Was Not Caused By An Article 17 Accident In *Rodriguez v. Ansett Australia Ltd.*, 383 F.3d 914 (9th Cir. 2004), *cert. denied*, __ S. Ct. __, 73 U.S.L.W. 3462 (Mar. 21, 2005)

In *Rodriguez*, plaintiff suffered a deep-vein thrombosis (DVT) after disembarking from a 12-hour Air New Zealand flight from Los Angeles to Auckland during which plaintiff slept but failed to eat or drink anything. Plaintiff claimed that the carrier negligently operated the flight and engaged in willful misconduct by intentionally violating safety procedures, failing to properly design the aircraft and failing to warn passengers of the risks of DVT.

The Ninth Circuit affirmed the lower court's grant of summary judgment to the carrier since plaintiff had not alleged that an unexpected or unusual event occurred; rather, it was undisputed that the flight operated under normal conditions. The Court of Appeals held that because plaintiff's injury was caused by her own internal reaction to the usual, normal expected operation of the aircraft, plaintiff could not discharge her burden of proving that her injury was caused by an Article 17 accident.

The court further distinguished plaintiff's case from the decisions in *Olympic Airways v. Husain*[1] and *Fulop v. Malev Hungarian Airlines*,[2] which determined that a crew member's response to a passenger's medical emergency that violated industry standards or carrier policy could result in an Article 17 accident. Here, there was no response by the flight crew that could be considered such a violation.

The Ninth Circuit limited its decision to the facts before it, and left for another day resolution of the question whether an airline's failure to comply with industry standards or company practices regarding DVT warnings could be an abnormal or unexpected event and, thus, constitute an accident. Although plaintiff had submitted evidence, including articles and in-flight magazines about DVT warnings, the Ninth Circuit dismissed such evidence because it did not address whether there was an industry standard or airline policy on the issuance of DVT warnings. In fact, the evidence showed that Air New Zealand's in-flight magazine (read by plaintiff) recommended that passengers drink water and exercise during long-haul flights.

The Court of Appeals took note of the Fifth Circuit's decision in *Blansett v. Continental Airlines, Inc.,*[3] but declined to decide whether a failure to warn of DVT may constitute an accident (an argument made and rejected in *Blansett*). The Ninth Circuit was not presented with any evidence that Air New Zealand failed to comply with any industry standard existing on the date of plaintiff's

injury. Plaintiff filed a petition for *certiorari* with the United States Supreme Court on January 21, 2005, which now has been denied.

Summary Judgment Granted In Part As To Whether Carrier Took "All Necessary Measures" In *Lee v. American Airlines*, 2004 WL 2624647 (N.D. Tex. Nov. 14, 2004)

A federal court in Texas addressed the claims of 29 passengers seeking damages caused by cancellation of American Airlines Flight 100 from New York to London on May 18, 2001. The court determined that issues of fact remained as to whether the carrier took "all necessary measures" to prevent plaintiffs' losses when it canceled the flight and failed to place the passengers on alternative transportation that same day.[4] To meet this burden, American had to demonstrate that it took "all precautions that in sum are appropriate to the risk, *i.e.* measures reasonably available to defendant and reasonably calculated, in cumulation, to prevent the subject loss."[5]

American Flight 100 was scheduled to depart from New York at 6:35 p.m., but was delayed due to maintenance problems on two different aircraft and was canceled ultimately at approximately 1:10 a.m. Prior to the cancellation, American had placed 19 of the 244 passengers on other flights and had secured alternative transportation for 30-50 passengers to Heathrow that evening.

While American maintained that it had taken all reasonable measures to avoid the passengers' losses as a result of the delay, the court held that there were disputed issues of fact as to when American had started the repair on the first aircraft, and had communicated accurate information to the passengers in a timely manner. An American mechanic testified that he began to work on the wing tip light malfunction around 5:30-6:00 p.m.; however, American's maintenance records identified the aircraft as "out of service" at 3:00 p.m. Plaintiffs, thus, contended that there was an unreasonable three-hour delay in conducting repairs. Finding this inference justifiable from the conflicting evidence, the court denied summary judgment – it would remain an issue for trial as to whether American's scheduling of repair met Article 20(1)'s standard.

The court further determined that the evidence showed that up until 7:50 p.m., the passengers only had been advised that their pilot had been delayed, not that there was a mechanical issue. The court determined that "[c]ommunicating accurate information is a reasonable measure American should have taken to enable passengers to avoid damage caused by the delay." The carrier was unable to show on motion that, since the passengers were aware of the pilot delay, it was not material to the passengers that there also was a mechanical problem with the first aircraft.

The court also granted, in part, American's motion, finding that American acted reasonably in attempting to repair the first aircraft and secure a new crew rather than immediately transfer passengers to other aircraft. Similarly, plaintiffs could not show that American's holding of 1% of its fleet in reserve as spare aircraft was an insufficient or unreasonable number of aircraft.

Court Denies Certification For Interlocutory Appeal Of Decision Holding That Article 28 Does Not Apply To Manufacturers' Third-Party Claims Against The Carrier In *In re Air Crash Near Nantucket Island, Mass. On Oct. 31, 1999,* 2004 WL 2269675 (E.D.N.Y. Oct. 8, 2004)

In multidistrict litigation arising out of the crash of Egyptair Flight 990, Egyptair sought interlocutory appeal of the court's order denying dismissal of The Boeing Co. and Parker Hannifin's cross-claims and third-party claims for contribution and indemnity in those passenger cases against Egyptair where subject matter jurisdiction was lacking in the United States under Article 28 of the Warsaw Convention. A district court may certify an order for interlocutory appeal when the decision (1) involves a controlling question of law; (2) as to which there exists a substantial ground for difference of opinion and; (3) an immediate appeal would materially advance the ultimate termination of the litigation.[6]

The court previously had ruled that the Article 28 jurisdictional requirements did not apply

to the manufacturers' claims on the basis that the Convention only governed the relationship between the passengers and the carrier, despite the derivative nature of the contribution and indemnity claims.[7] The court found its ruling in accord with the only federal case directly on point, *In re Air Crash at Agana, Guam*,[8] which held that such claims were independent of, and not governed by, the Convention as they involved parties not contemplated by the Convention's drafters.

The court denied certification of the decision, even though the court's order involved a controlling question of law, which would lead to dismissal of Boeing and Parker Hannifin's claims. Egyptair also had identified two decisions in conflict with *Agana, Guam*, one by a New Jersey appeals court and the other by a French court.[9]

The court nonetheless held that disagreement outside the Second Circuit does not establish a substantial ground for a difference of opinion. And, even assuming such a difference of opinion exists, resolution of the issue on appeal would not materially advance the termination of the litigation since the issue underlying the claims would still need to be litigated by the same parties with respect to the crew claims. Moreover, Boeing and Parker Hannifin could still raise their contribution and indemnity claims in countries where Article 28 jurisdiction indisputably is proper.

Court Denies Summary Judgment, Finding Fact Issues As To Timeliness Of Written Notice Of Claim And Fraud Allegations In *Watkins Syndicate at Lloyd's of London v. Tampa Airlines, S.A.*, 2004 WL 229051 (S.D.N.Y. Oct. 8, 2004)

Plaintiff the Watkins Syndicate sued Tampa Airlines, S.A. in subrogation for damage to a consignment of garment cutwork and trim that was transported from Cali, Colombia to Miami and delivered in damaged condition to plaintiff's insured, Apparel Contractors Association. Tampa, in turn, sued Apparel's trucking agent, Dynamic Express. Watkins moved for partial summary judgment on the ground that it provided adequate written notice of claim under Article 26 of the Convention and, if the notice was insufficient, defendant's conduct was fraudulent such that the court should deem that plaintiff had provided sufficient notice. Tampa filed cross-motions, seeking dismissal of the entire action.

The court denied all motions, finding that issues of facts remained as to whether Apparel had provided timely written notice of claim to Tampa, and also whether Tampa's cargo handling agent had fraudulently discouraged Apparel from doing so.

After arrival of the goods in Miami, Apparel sent Dynamic to retrieve the goods on September 6, 2002. Upon receipt, the driver noticed that the cartons were "swollen" and had "wet spots". He contacted Apparel's president, who instructed him to make the appropriate notations on the pick-up receipt. The driver also discussed the damaged cartons with Tampa's cargo agent. Although it was disputed who filled out the pickup receipt, the notation "cargo came with improper package" appeared on the trucker's copy. Upon inspection of the goods, Apparel determined them to be a total loss and, on October 11, 2002, sent Tampa a letter identifying the damage and advising that it was holding Tampa responsible for the loss.

While the Article 26 notice requirement is not intended to burden the party bearing the risk of loss with "hyper-technical hurdles" in making the claim, formal written notice is required and actual notice of the damage is insufficient.[10] Because Article 26 is applied stringently and because Apparel failed to dispatch written notice of claim (only the notation on the pickup form) within 14 days of receipt as required, the court denied plaintiff's motion for partial summary judgment.

The court also denied summary judgment on plaintiff's argument that Tampa's agent acted fraudulently in discouraging Apparel from sending written notice of claim. Under Article 26, fraud may excuse a claimant from the notice requirements if the carrier or its agents intentionally act to decrease the likelihood of the shipper giving written notice of claim. Finding that courts have interpreted this standard with "considerable flexibility," the court held that Tampa's agent may have prevented the Dynamic driver from making more detailed notations by telling him the notations

were complete and, thus, possibly discouraging Apparel from providing formal notice.

Court Holds Passenger Was Disembarking When Using Staircase To Deplane From Aircraft In *Hershkin v. EL AL Israel Airlines, Ltd.*, No. CV-04-1259 (CPS) (E.D.N.Y. Aug. 11, 2004)

In *Hershkin*, the court dismissed plaintiffs' personal injury action on the ground that they failed to satisfy the two-year condition precedent as required under Article 29. Plaintiffs' action arose from Mrs. Hershkin's fall on February 15, 2001 while using a metal staircase to deplane from an EL AL aircraft in Tel Aviv. Plaintiffs had commenced their action on February 9, 2004, just shy of the New York three-year statute of limitation period.

Although plaintiffs repeatedly had used the term disembarking in the Complaint, they nonetheless opposed EL AL's motion, contending that their claims fell outside the scope of the Warsaw Convention. Plaintiffs argued that they did not plead a Warsaw cause of action, only common law negligence, and further that, in any event, they had completed the operations of disembarking because EL AL admitted in one of its affirmative defenses that plaintiffs were outside EL AL's control at the time of the incident.

The court rejected these arguments, holding that application of the factors set forth in *Day v. Trans World Airlines, Inc.*[11] confirmed that plaintiffs' deplaning was a necessary part of the disembarking process: Mrs. Hershkin was walking down a flight of stairs restricted to EL AL passengers and crew; the stairs led directly from the aircraft to the tarmac; and she was engaged in an activity required of her to eventually arrive at a common area of the airport. Numerous courts applying the *Day* test to circumstances similar to this case have reached the same conclusion.[12]

Despite the clear failure to comply with Article 29 and that plaintiffs' counsel had the opportunity to withdraw the action voluntarily, the court denied EL AL recovery of its costs, expenses and attorneys' fees under 28 U.S.C. § 1927. The court found that the Convention is complex and unfamiliar to the average attorney, and there was no evidence that plaintiffs' counsel acted in bad faith in refusing to voluntarily discontinue the action.

Warsaw Convention Held Not Applicable To Claims Against AAA In *Vaughn v. American Automobile Assoc.(AAA)*, 326 F. Supp. 2d 195 (D. Mass. 2004)

Plaintiffs sued US Airways and AAA, alleging that defendants were liable for damages plaintiffs sustained as a result of their trip to Italy being cut short when their baggage was lost. Plaintiffs had used AAA's travel agency services to arrange their tour, which included travel on US Airways. Plaintiffs missed their connecting flight to Rome, and although they had secured another flight, their bags were delayed. After waiting a few days for the bags to arrive, plaintiffs decided to return to the United States. Their bags were returned a few weeks later.

The action against US Airways was stayed due to the carrier's bankruptcy. AAA moved for summary judgment contending that the action is time-barred under both the Warsaw Convention and Massachusetts law. While the Convention may govern plaintiffs' claims against US Airways, the court held, the treaty had no application to AAA since it was not a "carrier" and the lost baggage was not AAA's responsibility. Rather, it was AAA's failure to assist the passengers that formed the basis of the claim against AAA, and there was nothing in the record to support that AAA, as a travel agent, should be deemed a "carrier."

The court also held that the action was timely under the Massachusetts statute, but that summary dismissal was warranted since plaintiffs could not establish that AAA committed a deceptive or unfair act that caused plaintiffs' injury.

Convention Was Held Inapplicable To Non-Carrier Defendants In *Certain Interested Underwriters at Lloyds v. Baridoff Galleries*, 2004 WL 1877806 (D. Me. Aug. 20, 2004)

In *Baridoff Galleries*, the court concluded that the Warsaw Convention did not apply to claims against various defendants who had possession of a painting worth approximately $140,000 prior to its

transportation from Maine to London. Plaintiffs commenced the action against the gallery from which the painting had been purchased, the gallery's agents who had possession of the painting prior to its transportation, the company that packed and crated the painting, and the shipping company that arranged and contracted with FedEx for the overseas transportation.

The court determined that none of the claims against the foregoing defendants was, as argued by plaintiffs, governed by the Warsaw Convention. While the Convention provides a presumption of liability that any damage to goods shipped by air resulted from an event taking place during such air transportation, this presumption had no relevance here. All of the movement and activity among the named defendants occurred prior to the execution of the FedEx air waybill, which established the contract for air transportation.

The court distinguished the case of *Commercial Union Ins. v. Alitalia Airlines*,[13] where a freight forwarder acted as the agent of the airline in arranging the transportation of goods by land and air. Here, the shipping company acted only as an agent for the purchaser (consignee), not for FedEx (the carrier). No evidence was presented showing that the shipping company had the ability or authority to contract on behalf of FedEx. Plaintiffs also failed to explain why the cases they relied on supported their argument that defendants qualified for treatment as "carriers."

Endnotes

[1] 124 S.Ct. 1221 (2004).

[2] 175 F. Supp. 2d 651 (S.D.N.Y. 2001).

[3] 379 F.3d 177 (5th Cir. 2004). In *Blansett,* the Fifth Circuit held that Continental's alleged failure to warn its passengers of the risks of developing DVT was not an unusual or unexpected event and had found no departure from industry standards or company policy since the flight crew had complied with Continental's standard policies, which were in accord with FAA regulations.

[4] The court previously had held that plaintiff's damages for "inconvenience" were "merely an attempted re-characterization of mental anguish damages" and, thus, not recoverable under *Eastern Airlines v. Floyd*, 499 U.S. 530 (1991). *See Lee v. American Airlines*, 2004 WL 18008 (5th Cir. Jan. 14, 2004) (affirming lower court's decision).

[5] *See Verdesca v. American Airlines, Inc.,* 2000 WL 1538704 (N.D. Tex. Oct. 17, 2000); *Obuzor v. Sabena Belgian World Airways*, 1999 WL 22316 (S.D.N.Y. April 16, 1999).

[6] *See* 28 U.S.C. § 1292(b).

[7] 2004 WL 1824387 (E.D.N.Y. Aug. 16, 2004).

[8] MDL No. 1237, No. 98 ml 7211 (C.D. Cal. Jan. 25, 1999).

[9] *See Carroll v. United Airlines, Inc.,* 739 A.2d 442 (N.J. Super. Ct. 1999); *Societe Pratt v. Sterling Airways*, T.G.I. Paris, May 15, 1985.

[10] *Denby v. Seaboard World Airlines*, 575 F. Supp. 1134, 1144 (E.D.N.Y. 1983), *rev'd on other grounds*, 737 F.2d 172 (2d Cir. 1984) ("[a]ctual notice gives the carrier nothing to indicate that he, rather than another party, is the object of the shipper's claim").

[11] 528 F.2d 31, 33 (2d Cir. 1975).

[12] *See, e.g., Ricotta v. Iberia Lineas Aereas de Espana*, 482 F. Supp. 497 (E.D.N.Y. 1979) (plaintiff fell after exiting aircraft in restricted area which was under carrier's control).

[13] 346 F.3d 448 (2d Cir. 2003).

EDITOR

DIANE WESTWOOD WILSON
PARTNER, NEW YORK OFFICE
dwilson@condonlaw.com

CONTRIBUTOR TO JANUARY 2005 ISSUE

JUDITH R. NEMSICK
ASSOCIATE, NEW YORK OFFICE

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.

© 2005 CONDON & FORSYTH LLP