

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

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DEVELOPMENTS IN HAZARDOUS MATERIALS TRANSPORTATION AND RECENT DEVELOPMENTS IN TREATY PREEMPTION CASELAW

This Newsletter addresses important developments in hazardous materials transportation regulations and reviews recent federal court decisions interpreting the applicability of the Warsaw and Montreal Conventions and their preemptive effect on state law causes of action.

DEVELOPMENTS IN HAZARDOUS MATERIALS TRANSPORTATION

Hazardous materials are articles or substances which are capable of posing a risk to health, safety, property or the environment and which are classified as such under federal regulations. The United States Department of Transportation (“DOT”), through federal regulations, governs the transportation, classification and shipping of hazardous materials with respect to domestic air carriers.¹ Foreign air carriers also must comply with federal regulations² requiring foreign air carriers to operate in accordance with the Standards and Recommended Practices set forth by the International Civil Aviation Organization (“ICAO”).³ Earlier this year, the DOT issued several final rules on the transportation and classification of hazardous materials.

- ***Transport of Infectious Substances***

On June 2, 2006, the Pipeline and Hazardous Materials Safety Administration (“PHMSA”), an

agency of the DOT, issued a final rule revising the requirements for the transportation of infectious substances in the United States.⁴ By issuing this rule, the DOT brings the U.S. regulations in line with the international standards set by ICAO for goods transported by air.⁵ The new regulations become effective on October 1, 2006.⁶

In the new rule, PHMSA adopts new classification criteria for infectious substances, including medical waste and toxins. The rule amends packaging and communication requirements to mirror international requirements designed to ensure an acceptable, continuous level of safety in domestic and international transportation.

- ***Changes for Carriage by Air***

In March 2006, the PHMSA issued a final rule amending regulations for the transport of hazardous materials by air.⁷ The goal of the new rule is to: 1) clarify requirements in order to promote compliance; 2) enhance the security of transportation of explosives by air; and 3) facilitate international commerce.

The rule achieves these goals by clarifying already established regulations. The rule provides exceptions for airline company equipment and supplies, special aircraft operations, and passengers and crew members. It also revises aircraft storage separation distances for radioactive materials shipped on cargo aircraft and harmonizes hazardous material and security regulations.

In approving this final rule, the DOT commented that the rule will “enable shippers, carriers, and enforcement officers to gain a better understanding of the regulations.”⁸ Additionally, the DOT represented that the regulations are in line with ICAO international standards and should result in an overall cost savings to shippers and carriers alike.⁹ The effective date of the new regulations is October 1, 2006.¹⁰

- ***Revisions to Civil and Criminal Penalties for Hazardous Materials Violations***

In February 2006, the PHMSA revised regulations to reflect the revisions to the civil and criminal penalties in the Hazardous Materials Safety and Security Reauthorization Act.¹¹ The statutory changes include: 1) increasing the maximum civil penalty from \$32,500 to \$50,000 for a knowing violation and up to \$100,000 if the violation results in death, serious illness or severe injury to any person, or substantial destruction of property; 2) reducing the minimum civil penalty from \$275 to \$250, but providing a minimum civil penalty of \$450 for violations related to training; 3) the application of criminal penalties to both reckless and willful violations of federal hazardous materials regulations, orders or special permits; and, 4) a maximum criminal penalty of 5 years imprisonment and a fine in accordance with Title 18 of the United States Code (\$250,00 for an individual, \$500,000 for a corporation). The maximum time of imprisonment has been increased to 10 years in any case in which the violation involves the release of a hazardous material which results in death or bodily injury to a person.¹²

The rule revises baseline assessments for violations related to training and security plans. It went into effect on February 17, 2006.

- ***Violations of Federal Regulations May Result in Criminal Penalties***

Violations of federal safety regulations, including those relating to hazardous materials, not only have

the potential for contributing to air disasters, but also may result in the criminal prosecution of members of the aviation industry. The foremost example is the crash of ValuJet Flight 592. Ten years ago, ValuJet Flight 592 crashed in the Florida everglades resulting in the deaths of all onboard. The National Transportation Safety Board (“NTSB”) concluded that the crash was caused by an uncontrollable fire which originated with oxygen canisters that were being transported illegally. These canisters were oxygen generators which when triggered generate oxygen by chemical reaction. The reaction produced heat and very high temperatures leading to the fire. The canisters should have been handled as hazardous materials, but were not. The maintenance company SabreTech had loaded the canisters in error as ValuJet was not an authorized hazardous materials carrier.

After a six-month accident investigation, the NTSB concluded that: 1) the Federal Aviation Administration (“FAA”) failed to adequately monitor ValuJet’s heavy maintenance program and responsibilities; 2) the FAA failed to respond adequately to prior chemical oxygen generator fires with programs to address the potential hazards; and 3) ValuJet failed to ensure that employees/handlers were aware of the carrier’s “no-carry” hazardous materials policy and had received appropriate hazardous materials training.

After investigation by various federal and state agencies, state charges of murder and manslaughter were filed against SabreTech. In addition, federal charges of conspiracy and making false statements were brought against the company and its employees. The employees were acquitted of the federal charges; however, a jury found SabreTech guilty on eight counts of willfully causing the transportation in air commerce of oxygen generators and willfully failing to train its employees in accordance with hazardous materials regulations. On appeal, the Eleventh Circuit Court of Appeals vacated SabreTech’s conviction on the reckless counts regarding the transportation of oxygen

containers, but affirmed the conviction for willfully failing to train its employees in accordance with the hazardous materials regulations.¹³ It was the first time that a U.S. company within the aviation industry faced criminal charges in connection with an aviation accident.

Since the criminal enforcement actions filed against SabreTech, the aviation industry has seen a trend toward the criminalization of aircraft accidents. Included within these criminal prosecutions are charges related to the handling of hazardous materials. Investigations into several airlines – domestic and foreign – have resulted in felony convictions and restitution payments ranging from thousand of dollars to millions of dollars by carriers, all arising from the storage and transport of hazardous materials.

Many view the criminalization of aviation accidents as an ominous development for the aviation industry since it may impede cooperation by mechanics, flight crews, manufacturers, and others with the NTSB investigatory process. For example, NTSB investigators reported reluctance on the part of certain witnesses in connection with the Alaskan Airlines crash of January 2000. The NTSB found that the crash was caused by the failure of maintenance workers to sufficiently lubricate the jackscrew assembly. A separate investigation had begun a year prior for various violations of maintenance regulations.

Federal agencies are using criminal laws across the board in various modes of transportation. For instance, in the Staten Island Ferry boat accident that occurred on October 15, 2003, the NTSB determined one of the causes of the accident was the failure of the New York City Department of Transportation to implement and oversee safe, effective operating procedures for its ferries. Another factor was found to be the failure of the captain to exercise his command responsibility over the vessel by ensuring the safety of its operations – a violation of state regulations.

Fifteen crew members and an estimated 1,500 passengers were on board when the ferry struck a concrete maintenance pier several hundred yards away from its St. George terminal dock on Staten Island. Ten passengers died in the accident and seventy were injured. An eleventh passenger died two months later as a result of injuries sustained in the accident. The ferry's captain attempted to commit suicide after the accident.

The assistant captain pled guilty in 2004 to seamen's manslaughter and for lying to investigators. On January 9, 2006, a federal judge sentenced him to 18 months in prison, concluding he was negligent, not reckless. The judge also sentenced the former director of ferry operations to one year and one day. He pled guilty to manslaughter and making false statements.

Now more than ever, it is crucial for air carriers and their handlers to keep abreast of developments with federal hazardous materials regulations. The threat of criminal prosecutions looms large as the government seeks to impose criminal penalties on individuals and companies who deliberately fail to comply with the federal hazardous materials regulations.

WARSAW/MONTREAL UPDATE – RECENT CASE DEVELOPMENTS ON TREATY PREEMPTION

Two U.S. federal appellate courts and a federal district (trial) court recently weighed in on the issue of whether the Warsaw or Montreal Conventions preempt state law causes of action. The district court decision is of particular significance as it holds that a claim for denied boarding falls outside the Montreal Convention and accordingly allows a breach of contract action to proceed against the carrier.

- ***First Circuit Decides Negligence Action Arising from Denied Entry Based on Incorrect Travel Documents Reviewed by Airline May Not Be Preempted by Warsaw Convention***

In *Acevedo-Reinoso v. Iberia Lineas Aereas De Espana, S.A.*, 449 F.3d 7 (1st Cir. 2006), the First

Circuit Court of Appeals recently addressed the proper analysis by a court when deciding the interplay of the Warsaw Convention and state law claims. Plaintiff, a Cuban citizen who legally resides in the United States, traveled from Puerto Rico to Madrid to attend a business meeting. In his action against the airline, he alleged that he was assured at the airport check-in counter that his travel documents were in order, but upon arrival in Spain he was detained after showing his Cuban passport. He further alleged that he was questioned, detained overnight and subjected to a humiliating strip search by Spanish immigration authorities who also threatened to deport him to Cuba. Ultimately, he was put on a flight back to Puerto Rico, detained until the crew boarded and then released.

Plaintiff Acevedo-Reinoso sued Iberia, alleging negligence under Puerto Rican law. Iberia moved to dismiss the action, arguing that the complaint failed to state a cause of action under Puerto Rican law and, alternatively, that the Warsaw Convention preempted the tort claim asserted under Puerto Rican law.

The lower court, the federal district court, dismissed plaintiff's negligence claim under Puerto Rican law, concluding that it was preempted by the Warsaw Convention because he had failed to state a claim for liability under the Convention. Plaintiff had not alleged that he sustained "bodily injury" as required by Article 17 of the Warsaw Convention. Rather, he had alleged only humiliation, embarrassment and anguish which are not compensable under Article 17. Since he was barred from recovery under the Convention for the alleged mental anguish damage, the court concluded that he also was barred from pursuing a local law claim against the airline.

On appeal, plaintiff argued, and the First Circuit agreed, that the district court had erroneously assumed the Convention's applicability without resolving the threshold issue of whether plaintiff's injuries were sustained on board the aircraft or in the process of embarking or disembarking as required by Article 17. Absent this threshold determination, the court could not dismiss the case based on the

preemptive effect of the Convention and plaintiff's failure to state a valid claim under its terms. Only if the Convention is applicable to a particular case is it preemptive. "If the Convention is not applicable, it is not pre-emptive, and the passenger is free to pursue his or her claim under local law." *Acevedo-Reinoso*, 449 F.3d at 13. Since the district court never determined whether plaintiff's injury occurred on board the airplane or in the process of embarking or disembarking and, therefore, that the Convention did indeed apply, the First Circuit concluded that it had erred in dismissing plaintiff's claim under local law as preempted by the Convention.

The First Circuit also concluded that the facts stated by Acevedo-Reinoso were sufficient to state a claim for negligent failure to advise under Puerto Rican law should that claim not be preempted by the Convention.

As a result of its findings, the First Circuit sent the case back to the district court for further proceedings to determine whether the Warsaw Convention applied. If the district court determines the Convention applies, the Convention preempts the local law claim, thus limiting plaintiff's claim to one that meets the requirements of the Convention (an analysis which the district court previously had made and, therefore, presumably would again dismiss the case). If, on the other hand, the court determines that the Convention does not apply, then a determination of the merits of the tort claim under Puerto Rican law will be required.

Curiously, a complete defense to plaintiff's claims apparently was not raised by the parties, at least not at this juncture of the proceedings. Under the airline passenger rules tariff the passenger is responsible for having all travel documents necessary to enter a country and the failure of the passenger to have the necessary documents, regardless of whether the passenger relied upon the advice of the airline or its agents, operates as a complete bar to a claim by the passenger.

- ***District Court Holds Denied Boarding Claim Falls Outside the Montreal Convention and Allows Breach of Contract Action to Proceed***

In *Weiss v. El Al Israel Airlines, Ltd.*, 2006 WL 1409736 (S.D.N.Y. May 22, 2006), plaintiffs brought an action against the airline to recover damages as a result of being “bumped” from a flight from New York to Jerusalem.

Plaintiffs purchased round trip tickets between New York and Jerusalem. When they arrived at the airport, they were involuntarily denied boarding because the flight had been oversold by the airline. As a result, they were placed on the airline’s standby list in order to obtain seats on future departing flights. In their lawsuit against the airline, they allege that they had to remain at the airport for two days in hopes of obtaining seats and as a result suffered physical fatigue and exhaustion as well as emotional stress and anxiety. Plaintiffs eventually flew on a different airline and, as of the date of their complaint, had not received a refund for the cost of the tickets or compensation for having been “bumped”.

Plaintiffs brought an action against the airline under federal regulations, and state tort and contract law. The airline moved to dismiss the action on the basis of preemption by the Montreal Convention and the Airline Deregulation Act (“ADA”) and that no cause of action is available under the federal regulations. Plaintiffs countered that the Montreal Convention did not preempt their claims because their “bumping” by the airline amounted to complete non-performance of the contract rather than delay which is covered by the Convention.

In determining whether the Montreal Convention preempted plaintiffs’ claims, the court was faced with two questions - 1) whether the Montreal Convention applied to plaintiffs’ travel even though Israel is not a party to the Convention; and, 2) whether a claim for “bumping” was a claim for “delay” under Article 19 of the Convention.

The district court avoided deciding the first question by concluding that “bumping” is not covered by the Convention, at least under the circumstances of this case. Relying on *Wolgel v. Mexicana Airlines*, 821 F.2d 442 (7th Cir. 1987), and the drafting history of the Montreal Convention, the court held that “bumping” constitutes nonperformance and not “delay” for which the Convention supplies the exclusive remedy. The court, however, agreed with the airline that the ADA preempted plaintiffs’ state law tort claims.

The court also dismissed plaintiffs’ claims based on the airline’s alleged violation of the federal regulations, agreeing that there is no private right of action for violation of the regulations. In so holding, it relied on several cases, including the U.S. Supreme Court’s decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001) as well as a number of federal district court cases.

- ***Fifth Circuit Holds State Law Claims Arising from Excess Baggage Charges Are Preempted by Montreal Protocol No. 4***

The most recent case to address the preemptive effect of the Warsaw Convention is *Mbaba v. Societe Air France*, 2006 WL 2054043 (5th Cir. 2006). The plaintiff, Edo George Mbaba, argued that his claims stemming from excess baggage fees were not preempted because such injuries were not contemplated by the Warsaw Convention, as amended by Montreal Protocol No. 4. Societe Air France (“Air France”) argued that Mbaba’s claims were preempted due to the Convention’s broad exclusivity.

Plaintiff filed a suit against Air France, asserting state law claims after paying over \$4,000 in excess baggage fees. The airline’s motion for summary judgment on preemption grounds was granted. On appeal, Mbaba argued that his injury did not fall within any broad category of the Convention, which includes personal injury, lost or damaged baggage, and delay, and asserted that the effect of the district court’s holding would be to leave passengers

without a remedy unless the injury was specified in the Convention. He also relied on a portion of *El Al Israel Airlines Ltd v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), which suggested that the Convention's preemptive effect on local law extended no further than its own substantive scope.

The Fifth Circuit held that Mbaba's arguments failed to overcome the text of Article 24 specifically preempting claims resulting from the carriage of baggage "however founded." It also pointed to the Second Circuit's opinion in *King v. American Airlines, Inc.*, 284 F.3d 352, 357 (2d Cir. 2002) which "held that the Convention's preemptive effect on local law extends to all causes of action . . . regardless of whether a claim actually could be maintained under the provisions of the Convention".

ENDNOTES

¹ 49 CFR Parts 171-180

² 14 CFR §129.11

³ ICAO is a specialized agency of the United Nations and is charged with administration of the Convention on International Civil Aviation signed in Chicago on December 7, 1944. 61 Stat. 1180

⁴ 70 *Fed. Reg.* 32244 (June 2, 2006)

⁵ ICAO, Technical Instructions for the Safe Transport of Dangerous Goods by Air (2005-2006 eds.)

⁶ 49 CFR Parts 171, 172, 173 and 175

⁷ 71 *Fed. Reg.* 14586 (Mar. 22, 2006)

⁸ 71 *Fed. Reg.* 14600 (Mar. 22, 2006)

⁹ *Id.*

¹⁰ *See* 49 CFR §§ 171, 172, 173 and 175

¹¹ Title VII of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), Pub. L. 109-59, 119 Stat. 1144, enacted on August 10, 2005

¹² 71 *Fed. Reg.* 8485 (Feb. 17, 2005)

¹³ *United States v. SabreTech, Inc.*, 271 F.3d 1018 (11th Cir. 2001)

EDITORS

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

CONTRIBUTORS TO JUNE/JULY 2006 ISSUE

JOHN D. HORENSTEIN
PARTNER, NEW YORK OFFICE
jhorenstein@condonlaw.com

DIANA K. KIM
ASSOCIATE, NEW YORK OFFICE
dkim@condonlaw.com

<http://www.condonlaw.com>

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