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RECENT CASES INTERPRETING THE MONTREAL CONVENTION

The Montreal Convention, which has now been adhered to by seventy-eight countries, came into effect in the United States in November of 2003. Cases interpreting the provisions of the Montreal Convention have slowly wound their way through the U.S. courts and we now have several decisions interpreting the Montreal Convention. The decisions indicate that the federal district courts interpreting the provisions of the Montreal Convention are likely to give the Convention wide deference and to apply the Convention to a plethora of situations, preempting state law claims and even some claims which arguably fall outside the explicit terms of the Montreal Convention. This Newsletter will focus on the recent cases interpreting the Montreal Convention.

A. Preemption of State Law Cases

While everyone knows there is no such thing as a free lunch, a recent case in Maryland, *Knowlton v. American Airlines, Inc.*, 31 Avi. Cas. 18,486 (D Md. 2007), held that there was no such thing as a free breakfast either. Ms. Knowlton bought a ticket from American providing for roundtrip transportation from Baltimore to the Dominican Republic. She received an electronic confirmation of her travel itinerary from the airline indicating that “breakfast” was to be served on the flight from BWI Airport in Baltimore to San Juan on the outbound leg of her trip. Plaintiff, however, did not receive her free breakfast because American had discontinued providing complimentary meals, but

she was advised that she could purchase breakfast for \$3.00 if she chose to do so. Plaintiff declined the offer and brought a class action lawsuit, claiming that American had breached its contract by failing to provide breakfast when her flight itinerary indicated that she would be receiving “breakfast” on board the flight. The issue before the federal district court was whether the claim for breach of contract fell within the provisions of the Montreal Convention so as to justify American’s removal of the case to federal court. Plaintiff argued that since the claim did not involve either an accident, delay or damage, the Montreal Convention was inapplicable and that her action was simply one for breach of contract, not encompassed within the Montreal Convention. After analyzing the various cases on point, the district court, while finding that there was a split of authority over whether the Montreal Convention preempts state law, was persuaded by the reasoning of those cases favoring preemption. The court held that the Montreal Convention was designed to create a uniform system of liability among airlines for claims arising from international flights and that removal was proper. Accordingly, the court denied plaintiff’s motion to remand the case to the state court, finding that “as a matter of public policy, airlines should not be subject to contract claims in state courts involving a \$3.00 breakfast”. *Knowlton*, 31 Avi. Cas. at 18,490.

The preemptive effect of the Montreal Convention, the inability of a passenger to recover damages for emotional injuries under the Convention, and the limitation of liability for damage to baggage were all discussed in a recent decision from United States

District Court for the Eastern District of New York, *Booker v. BWIA West Indies Airways Ltd.*, 2007 WL 1351927 (E.D.N.Y. May 8, 2007).

In *Booker*, the passenger and her infant daughter were traveling on round-trip tickets from New York to Georgetown, Guyana via Port of Spain, Trinidad on December 17, 2004. After boarding the flight at New York's JFK Airport, Ms. Booker was required to surrender two carry-on bags. One of the bags allegedly contained various medications, jewelry and cash. When her carry-on baggage was taken, she was given two baggage claim checks. Upon arrival at Georgetown, the two carry-on bags were not delivered.

When the delayed baggage was returned to Ms. Booker at the airport in Guyana several days later, she claimed that the two bags had been pilfered and that jewelry and cash were missing. Plaintiff also claimed that she suffered an asthma attack and swelling to her feet when the bags were returned. Plaintiff and her daughter also allegedly suffered "great emotional stress" as a result of the delay in delivering the two bags.

Plaintiff commenced action against the airline in New York state court, seeking both compensatory and punitive damages. The airline removed the case to federal court on the basis, *inter alia*, of federal question jurisdiction (*i.e.*, the action was governed by the Montreal Convention). The airline then moved for partial summary judgment on the grounds that: (1) plaintiff's state law causes of action were preempted by the Montreal Convention; (2) plaintiff could not satisfy Article 17 of the Convention because she did not sustain a "bodily injury;" (3) damages for emotional injuries and punitive damages are not recoverable under the Convention; and (4) the airline's liability, if any, for damage to baggage is limited pursuant to Article 22 to 1,000 Special Drawing Rights.

Plaintiff opposed the motion, arguing that the airline's willful misconduct in pilfering her baggage created an exception to the applicability of the Montreal Convention and that plaintiff sustained swelling to her feet, *i.e.*, a bodily injury, as a result of the taking of her bags.

Finding that the Montreal Convention preempted plaintiff's state law causes of action and was plaintiff's exclusive remedy, the federal court concluded that the airline was not liable under the Montreal Convention for emotional injuries sustained by plaintiff. The court further noted that the cause of plaintiff's asthma attack and swollen feet was the alleged theft of jewelry and approximately \$5,000 from her baggage, not the seizure of her baggage on board the aircraft. Accordingly, the court concluded that plaintiff had not established liability under Article 17(1) of the Montreal Convention.

Turning its focus to plaintiff's claims for the pilfered baggage, the court addressed the liability limitation under Article 22 which is inapplicable if the damage results from an act or omission of the carrier or its agents "done with intent to cause the damage or recklessly and with knowledge that damage would probably result." The court held that theft by an employee, as alleged by plaintiff, would be outside the scope of his employment and would not remove the carrier liability limitation under Article 22(5). Accordingly, the court limited the airline's liability to a maximum of 1,000 Special Drawing Rights, approximately US \$1,500.

The court also relied on the specific language of Article 29 of the Montreal Convention, which states that "punitive, exemplary or any other non-compensatory damages shall not be recoverable," to dismiss plaintiff's claim for punitive damages.

Requiring a passenger to surrender carry-on baggage presents a unique situation. Conditions of carriage generally do not differentiate between checked baggage and gate checked baggage. At times, carriers are faced with overloading the cabin with carry-on baggage, which may create hazardous conditions on board an aircraft, or gate checking baggage, which may result in a baggage delay, loss or damage.

Few courts have addressed carrier liability on this issue. The Court of Appeals for the Ninth Circuit in *Prescod v. AMR, Inc.*, 383 F.3d 861 (9th Cir. 2004), treated the taking of a passenger's carry-on baggage as an Article 17 "accident," which was a "link in the chain of causation" that ultimately resulted in a

passenger's death when her prescription medication was delayed.

The *Booker* decision draws upon the language of the Montreal Convention to distinguish between passenger injury, Article 17(1), and baggage damage, Article 17(2). This decision should provide assistance to carriers in predicting how courts may address the taking and delay of passenger carry-on baggage.

B. Delay Under Article 19

In *Igwe v. Northwest Airlines*, 2001 WL 43811 (S.D. Tex. 2007), plaintiffs, a father and his 4 year-old daughter, sued Northwest and KLM alleging negligence, breach of contract, and violations of the Texas Deceptive Trade Practices Act when they were denied boarding on a flight from Houston to Nigeria. After allegedly arriving at the airport approximately two hours before their scheduled flight, plaintiffs were checked-in at the airline counter approximately one hour before the flight. During check-in, the computer automatically transferred the Igwes to a "waiting list," as a result of which they were no longer guaranteed seats on their flight. They were issued "passenger verification cards" which they were told would not guarantee their seats and that the best chance of making their flight was to go through security as quickly as possible and proceed to the departure gate.

The Igwes did not go to the departure gate after clearing security, despite being paged several times by the carrier's station manager. Accordingly, their seats were cancelled and assigned to other passengers on the waiting list. By the time the Igwes arrived at the departure gate, there was only one seat left on the aircraft. Plaintiffs refused the carrier's offer of two \$500 vouchers and a transfer of the tickets to a flight with British Airways, leaving Houston the next day. Instead, they purchased two tickets for a British Airways flight departing two days later.

Upon motion for summary judgment by the airline, the court held that the Igwes' claims were preempted by the Montreal Convention, which stemmed from their alleged "bumping" from the

KLM flight and, thus, were governed by Article 19 of the Montreal Convention dealing with delay. The court held that the airline was not responsible for the plaintiffs' failure to present themselves on time to claim and receive their assigned seats, and their refusal of the airline's reasonable offer of alternative transportation and two \$500 vouchers precluded their claim of non-performance by the airline.

A second delay case decided by the District Court in Texas was *Onwuteaka v. Northwest Airlines, Inc.*, 2007 WL 1406419 (S.D. Tex. May 10, 2007). Plaintiff and his family filed an action against Northwest Airlines and KLM for compensation arising out of a delay in transportation and for not receiving their assigned seats on their flights. The plaintiff, an attorney in Houston, Texas, was traveling with his family from Houston to Lagos, Nigeria, via Amsterdam, The Netherlands, in December 2005. He claimed his family did not receive "special assigned seats in a row" on any of their flights. He also claimed that the KLM flight from Amsterdam to Lagos returned to Amsterdam for mechanical repairs, resulting in a delay in the scheduled arrival time in Lagos.

The Complaint filed in Texas state court sought unspecified damages for state law causes of action including deceptive trade practices, fraud, false imprisonment, negligent misrepresentation, and breach of contract. After defendant airlines removed the action to federal district court, the airlines moved for dismissal. The district court held that the case was exclusively governed by the Montreal Convention and since plaintiffs failed to adequately allege claims under the Convention, the court dismissed the Complaint.

C. Accidents and Bodily Injury – Article 17

A less controversial decision was reached by the District Court in the Northern District of California in *Kruger v. United Air Lines, Inc.*, 31 Avi. Cas. 18,565 (N.D. Cal. 2007) where the plaintiff was struck in the back of the head by a flying backpack wielded by a fellow passenger who was being prevented from boarding a United flight. The court made several rulings interpreting the provisions of the Montreal Convention, finding that claims for

punitive damages were not permitted, that emotional distress damages were limited to those which flowed from the physical injuries sustained by the plaintiff and that the claim for being struck in the head by a fellow passenger during boarding of the flight stated a cause of action under the Montreal Convention for personal injuries. Finally, the court concluded that plaintiff's claim for loss of consortium was recognizable under the Montreal Convention since the Convention had left it to domestic law to specify what harm is cognizable. Following *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996), the court considered the issue of loss of consortium to be a "pass through" and, if California law permitted such a claim, it would be allowed under the provisions of the Montreal Convention.

In *Watts v. American Airlines*, Docket 1:07-CV-0434 (S.D. Indiana), plaintiff filed suit in connection with the death of her husband, who apparently died of a heart attack in the bathroom of an airliner en route from Tokyo to Chicago. The flight landed in Chicago and the decedent was found more than two hours later by an aircraft cleaning crew. Plaintiff alleged that American failed to periodically check the lavatories and failed to notice that her husband was not in his seat at the time of landing, arguing that American violated industry standards and its own policies by landing and deplaning with a passenger locked in the lavatory. American recently filed a motion to dismiss the Complaint, arguing that the incident did not constitute an "accident" under Article 17 of the Montreal Convention since the heart attack resulted from the passenger's own internal reactions to the normal and expected operation of the aircraft. A decision is expected by the end of the year.

D. Article 13 – Delivery of the Cargo

A recent cargo case interpreting the Montreal Convention is *Wea Farms, Lima, Peru v. American Airlines, Inc.*, 31 Avi. Cas. 18,739 (S.D. Fla. 2007). While cargo cases under the Montreal Convention have been sparse since the limits of liability contained in Article 22(3) of the Montreal Convention are unbreakable, *Wea Farms* raised the issue of the liability of the carrier for failure to

timely notify the consignee of the arrival of the goods. *Wea Farms* involved a consignment of asparagus being transported in open cartons from Lima to Miami. American furnished the cargo containers into which the asparagus consignment was required to be loaded for transportation. The goods arrived in Miami in the afternoon of June 26, 2005 and there was no notification to the consignee until nearly nineteen hours later. The court found that under Article 13 of the Convention, as well as the provisions of American's air waybills, American was obligated to give the consignee prompt notice of arrival of the goods. Failure to give notice for nineteen hours constituted a delay which made the airline responsible for the spoiled asparagus, which had been left outside in the hot Miami sun. The court rejected the argument that because the goods were "perishables", they were not properly packaged and, therefore, American was excused from responsibility for the loss. Instead, it held that the failure to pack the asparagus to withstand seventy-two hours of transit, as required by American's rules for the transportation of perishables, was not the proximate cause of the damage and that the damage was caused by the airline's failure to contact the consignee when the asparagus arrived in Miami. The court concluded that the perishable goods limitation, which required that the goods must be prepared and properly packed to withstand a seventy-two hour transit time, did not excuse American of its duty of prompt notification. The court also awarded the plaintiff prejudgment interest.

E. Decisions from Other Signatory Nations

We conclude this roundup of Montreal Convention decisions with a decision from the courts of our northern neighbor, the Court of Appeal in Canada. In *Pourde v. Service Aérien F.B.O. Inc. (Skyservice)* Court of Appeal, Canada, Providence of Quebec, District of Montreal (May 28, 2007), the applicant and five members of his family sought leave to institute a class action suit after an emergency landing of defendant's flight from Montreal, Canada to Cancun, Mexico. During the flight, an alleged engine fire caused the aircraft to make an emergency landing at Orlando, Florida. After an uneventful landing, the aircraft was towed to a gate and the passengers disembarked. Nine hours later,

the passengers boarded another aircraft to continue to their final destination. As a result, applicant sought \$30,000 in damages for the “psychological harm suffered, the disastrous impact of his vacation and the delays to the incident.”

Relying upon the Montreal Convention, the trial court held that damages are not recoverable for psychological harm suffered by a passenger following an aircraft accident. In making its decision, the court relied upon the text of the Convention as well as international case law.

The Court of Appeal affirmed the trial court’s decision rejecting Plourde’s argument that the “Montreal Convention changed the state of the law with respect to compensation for psychological harm by an air carrier.” In relying upon a decision from the Court of Appeals for the Second Circuit, *Ehrlich v. American Airlines Inc.*, 360 F.3d 366 (2d Cir. 2004), the court held that the “text of the Montreal Convention was not intended to alter existing case law under the Warsaw Convention” and, thus, a carrier is not liable for psychological injuries sustained by a passenger.

While there had been a lapse of time in cases interpreting the Montreal Convention, the latest cases indicate that we will see a steady stream of decisions applying the Montreal Convention as the courts become more conversant with its provisions and innovative plaintiffs’ lawyers will attempt to find ways around the exclusions and limits contained within the Convention.

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