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Court Questions Federal Jurisdiction Over Bumping Claims

In *Mraz v. Lufthansa German Airlines*, 2006 WL 267361 (E.D.N.Y. Feb. 2, 2006), *pro se* plaintiff sued the airline in New York state court for "fraud, deceit, deceptive business practices, mistreatment, inconvenience and punitive damages" when his mother-in-law was bumped from a flight from New York to Croatia via Frankfurt. Lufthansa removed the action to federal court on the ground that plaintiff's claims arose under and were exclusively governed by the Warsaw Convention, and then moved to dismiss the action on the ground that plaintiff is not the real party in interest. The "incongruity" of the removal and the motion to dismiss caused the court to re-examine whether federal question jurisdiction over the dispute existed. Noting that the complaint did not seek damages incident to the delay, which would clearly fall within the purview of Article 19, but rather sought damages for Lufthansa's alleged wrongful handling of the situation, the court declined to rule that Warsaw completely preempted these claims and directed the parties to further brief the issues of which claims fall within the scope of the Convention and whether the complete preemption doctrine applies to such claims.

State Law Claims for Bumping Not Preempted by Warsaw

In *Weiss v. El Al Israel Airlines,* 433 F. Supp. 2d 361 (S.D.N.Y. 2006), *pro se* plaintiff-attorney and his wife sued the airline after they were bumped from a flight from New York to Israel. After two days of waiting on standby lists for open seats, the couple purchased seats on another airline and claimed that to date; they had not received a refund for their round trip tickets or compensation for being bumped. Defendant moved to dismiss the claims.

The Court first questioned, but refrained from deciding, whether the Montreal Convention would apply to plaintiff's flight since Israel is not a party to that Convention. The Court held that deciding this issue was unnecessary since it determined that "bumping" is not covered by Article 19. Noting that the Second Circuit has not yet decided the issue, the court examined *Wolens v. Mexicana Airlines*, 821 F.2d 442 (7th Cir. 1987), which, relying on the drafting history of the Warsaw Convention, determined that bumping was a case of non-performance of the contract and, therefore, such claims

Continued on page 24

... bringing together plaintiffs' attorneys, defense attorneys and insurance and corporate counsel for the exchange of information and ideas.

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Warsaw…

Continued from page 1

were not governed by the Convention. The court also found the reasoning in *Wolens* supported by the minutes to the Montreal Convention and by sister signatory decisions that also treat bumping as non-performance of the contract.

With respect to the Airline Deregulation Act, the Court ruled that the contract action would not be preempted, but that plaintiffs' tort claims for "physical and emotional suffering" and "great inconvenience" were preempted and, therefore, dismissed. The court also ruled that the plaintiffs' claims alleging violations of 14 C.F.R. § 250.1 relating to overselling practices failed to state a claim because the federal regulations create no private remedy for their violations. Plaintiffs moved for reconsideration of the dismissal of their tort claims, contending that their suffering was not related to an airline service, particularly since EL AL ultimately did not provide them with any transportation. The court denied the motion, finding that the alleged mistreatment of plaintiffs was directly connected with airline services since plaintiffs' claims related to poor treatment by airline personnel in attempting to obtain alternate transportation. *Weiss v. El Al Israel Airlines,* 2006 WL 2129334 (S.D.N.Y. July 28, 2006).

Injury-Producing Event Determines Applicability of Warsaw

In *Singh v. North American Airlines*, 426 F. Supp. 2d 38 (E.D.N.Y. 2006), plaintiff sued for wrongful detention and nine-month incarceration that resulted from the discovery of illegal drugs in baggage bearing his name on a flight from Guyana to New York. Defendant's employees subsequently pled guilty to smuggling drugs in luggage marked in passengers' names and the indictment against the plaintiff was dropped. Although the parties disputed whether the district court had federal question jurisdiction pursuant to the Airline Deregulation Act and/or Warsaw Convention, the court determined that plaintiffs' claims fell within the scope of the Convention and therefore were completely preempted.

The court recognized that plaintiff's injuries resulting from his arrest and incarceration occurred at a time and place removed from the injury-causing event (mislabeling of baggage). Nonetheless, the determinative moment for purposes of establishing Warsaw's applicability under Article 17 is at the time of the injury-producing event, not when the injury manifests itself. *See Prescod v. American Airlines*, 383 F.3d 861 (9th Cir. 2004); *Pflug v. Egyptian Corp*., 961 F.2d 26 (2d Cir. 1992). Here, the mislabeling of narcotics-laden baggage with plaintiff's identification occurred in the process of checking in, which has been itself considered an operation of embarkation. *Day v. Trans World Airlines,* 393 F. Supp 217, 221 (1975). Moreover, once the bag was checked with the carrier, the carrier had control and became responsible under Article 18 for any loss or damage to the baggage. The court concluded that it would be "illogical" to hold that the Convention does not govern injuries to the passenger arising from that very same control.

Ninth Circuit Affirms Failure to Warn of DVT Not an Accident

The Ninth Circuit issued two significant decisions, both affirming that the airlines' failure to warn of the potential development of a deep vein thrombosis during an international flight is not an "accident" within the meaning of Article 17 of the Warsaw Convention. In *Blotteaux v. Qantas Airways, Ltd*., 171 Fed. Appx. 566, 2006 WL 475458 (9th Cir. 2006), the airline's instructional video, in-flight magazine and audio entertainment system warned about the risk of developing DVT on long flights and the importance of maintaining circulation on such flights. The Ninth Circuit found that this evidence undermined plaintiff's failure to warn claims. The Court of Appeals also distinguished *Olympic Airways v. Husain*, 540

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U.S. 644 (2004), because it was undisputed that flight personnel were not asked (as in *Husain*) to assist plaintiff in any way and were not even notified of any discomfort on plaintiff's part. Moreover, plaintiff failed to demonstrate "any clear industry standard against which Qantas' warnings could be measured in any event."

In *Caman v. Continental Airlines*, 455 F.3d 1087 (9th Cir. 2006), the Ninth Circuit again held that the airline's failure to warn of the possibility of developing DVT was not an Article 17 accident. While plaintiff relied on *Husain* for the proposition that an action lies under the Convention when an international carrier fails to act on information it has that leads to passenger injury, the Court of Appeals disagreed and concluded that imposing liability on an airline for failing to do everything it can to prevent injury inherent in air travel "improperly shifts the focus on the inquiry from the nature of the event which caused the injury to the alleged failure of the carrier to avert the same." Failure to warn is not an "event" and to interpret "accident" to include a failure to warn improperly incorporates into Article 17 an inquiry that should be left to analysis under Article 20, *i.e.,* whether the carrier had taken all necessary measures to avoid the "accident."

Cargo Lost at Airport Warehouse Covered by Warsaw Convention

In *Kaur v. All Nippon Airways Co.,* 2006 WL 997329 (N.D. Cal. Apr. 17, 2006), the district court dismissed plaintiff's state law claims arising from the loss of five pieces of cargo containing women's clothing and jewelry in a warehouse located on the grounds of San Francisco International Airport. The court held that the Warsaw Convention preempted plaintiff's claims of breach of contract, conversion and intentional and negligent infliction of emotional distress and dismissed the claims with prejudice. Plaintiff was given one month to file an amended complaint asserting a cause of action under the Warsaw Convention.

Disputed Fact Issue Precludes Summary Judgment on Article 26 Grounds

The court denied summary judgment to Alitalia in *Filgueira v. Alitalia-Linee Aeree Italiane S.P.A.*, 2006 WL 2038581 (S.D. Tex. July 20, 2006), finding that issues of fact existed as whether plaintiff provided timely written notice of claim of damage to her baggage as required under Article 26. During a flight from Italy to London, a flight attendant took plaintiff's carry-on bag and advised plaintiff that it would be placed in a forward cabin since the overhead bins were full. The bag, which contained a laptop computer, actually was stored in the cargo hold. Upon retrieval in London, plaintiff discovered that the laptop and other contents were stolen. Alitalia moved for summary judgment on the ground that plaintiff failed to comply with Article 26's requirement that written notice of the damage be dispatched to the airline within seven days of receipt of the damaged goods.

While the court agreed that plaintiff's complaint to the police department does not a constitute notice to Alitalia, there was an issue of fact as to whether plaintiff's letter to Atlanta allegedly mailed two days after the flight satisfied Article 26's requirements. Alitalia submitted an affidavit denying receipt of the letter. The court, however, followed the Fifth Circuit rule that a letter properly placed in a U.S. post office mail receptacle creates a presumption that it reached its destination. Once this presumption arises, the burden of producing evidence of non-delivery shifts to the party disputing receipt.

Plaintiff had produced a copy of her letter. Alitalia did not dispute that the address shown on the letter was its proper address, but argued that the presumption does not apply because plaintiff did not use certified mail with a return receipt. The court rejected that argument, and also distinguished the holding in *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.,* 210 F.3d 1099 (9th Cir. 2000), which granted the airline's summary judgment motion on the issue of timely notice and rejected the copies of letters and related documents that had been proffered by that plaintiff. Here, however, Alitalia did not urge the court to disregard plaintiff's letter, but simply argued it was insufficient evidence of notice.

Claims Arising from Excess Baggage Charges Held Preempted by Warsaw/MP4

In *Mbaba v. Societe Air France*, 457 F.3d 496 (5th Cir. 2006), the Fifth Circuit affirmed summary judgment in favor of the airline, holding that the Warsaw Convention preempted the plaintiff's state law claims regarding excess baggage charges. Plaintiff purchased through his employer Federal Express a ticket to travel on Air France from Houston, Texas, to Lagos, Nigeria, which included a layover in Paris, France. When plaintiff checked in for the flight in Houston he paid an excess baggage fee of $520 ($130 for each of his four extra bags). Upon

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arrival in Paris, Air France instructed plaintiff to unload his baggage because he was a "non-revenue" passenger, a fact disputed by the parties. Plaintiff missed his scheduled flight to Lagos and had to reclaim the bags and spend the night at the airport. When plaintiff checked in for the next Lagos flight, an agent advised that he would have to pay over $4,000 for the extra baggage. The carrier explained that in Paris, it charges excess baggage fees based upon the weight of the bags, not the quantity. According to plaintiff, the carrier's agent refused to allow him to send the bags back to Houston and warned that if he did not pay the fee, the bags would be taken off the aircraft and burned.

Plaintiff paid the fee with a credit card and then filed suit against the carrier in Texas state court alleging breach of contract, violation of the Texas Deceptive Trade Practices Act and common law fraud. Defendant removed the action to federal court, where the court held that the Warsaw Convention, as amended by Montreal Protocol No. 4 (MP4), governed plaintiff's case and preempted his state law claims. The Fifth Circuit affirmed. Although it agreed with plaintiff that his alleged claims do not fall within the liability-creating language of Articles 17, 18 or 19 (*i.e.*, no claim was made for death or bodily injury, damage to passenger baggage or damage caused by delay), the Court of Appeals found persuasive the language of Article 24 under MP4 which provides, in part, that "[i]n the carriage of cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and limits of liability set out in this Convention.... Such limits of liability constitute maximum limits and may not be exceeded whatever the circumstances which gave rise to the liability."

The Fifth Circuit concluded that plaintiff could not overcome the plain text of Article 24, which specifically preempts claims resulting from the carriage of baggage, "however founded." As explained in *El Al Israel Airlines v. Tseng*, 525 U.S. 155 (1999), MP4's amendment to the text of Article 24 clarified and confirmed the exclusivity of the Convention and its preclusion of recourse to local law. *Accord King v. American Airlines, Inc*., 284 F.3rd 352 (2d Cir. 2002) (Warsaw's preemptive effect extends to all claims regardless of whether the claim may be maintained under the Convention).

Small Claims Court Awards Damages for Delay and Damage to Baggage

In *Malek v. Societe Air France*, N.Y.S.2d , 2006 WL 2589836 (N.Y. City Civ. Ct. Sept. 8, 2006), the court dismissed plaintiffs' claims for breach of contract and deceptive trade practices arising from alleged mistreatment by the carrier. Plaintiff and his wife had missed their Paris-Newark flight because of a delay on their connecting Venice-Paris flight. Plaintiffs waited 8 hours for a substitute flight on a different carrier, received incorrect terminal information causing them to walk great distances and aggravate plaintiff's medical condition, and he was not provided with a wheelchair despite his request. Plaintiffs also incurred a $141 cab fare because the substitute flight was to New York, not Newark; and their baggage, which also was delayed, was damaged along with the contents therein.

While plaintiffs argued that their claims arose from the provision of a substitute flight, the bulk of the testimony concerned the inconvenience and exhaustion suffered as a result of the 8-hour wait in Paris. To the extent that plaintiffs' claims arose from delay and damaged baggage, the court held that they are exclusively governed by the Convention. Based on the evidence of out-of-pocket expenses and the value of the damaged baggage and personal items, the court awarded plaintiff $1,000.

The court further held that assuming, without deciding, that plaintiffs' claims are not preempted by the Convention, plaintiffs did not prove that the provision of a substitute flight was a breach of contract or a deceptive business practice. Notably, there was no "bumping" and plaintiffs consented to the substitute flight knowing that it was destined for New York.

No Abuse of Discretion in Denying Untimely Motion to Amend Pleadings

In *Compania Naviera Horamar v. Marine Gear, Inc.,* 2006 WL 2311117 (11th Cir. Aug. 10, 2006), the Eleventh Circuit found no abuse of discretion by the district court in denying plaintiff leave to amend its amended complaint to add a claim against Lan Chile Cargo, S.A. Plaintiff was aware for almost one year that the Warsaw Convention governed and preempted its state law negligence claim against Lan Chile, but did not seek to amend its amended complaint to add this claim until 11 months later, more than eight months past the pleadings deadline, less than two months before trial and six months

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after Lan had filed its motion for summary judgment asserting, *inter alia*, Warsaw preemption of plaintiff's state law negligence claims.

D.C. Circuit Affirms Dismissal of Class Action Complaint

In *Richards v. Delta Air Lines, Inc*., 453 F.3d 525 (D.C. Cir. 2006), the D.C. Circuit affirmed the lower court's decision denying class certification to airline passengers bringing a putative class action against Delta based on its allegedly unfair availment of the limits of liability for lost or damaged baggage under the Warsaw Convention. Plaintiffs, relying on *Cruz v. American Airlines, Inc*., 193 F.3d 526 (D.C. Cir. 1999), contended that Delta improperly advised customers that its liability for lost or damaged checked baggage was limited to $640 per bag under the Warsaw Convention, even though a carrier could not invoke this limit *unless* the carrier had recorded the weight of the baggage on the baggage tickets. According to plaintiffs, Delta did not do this as a matter of practice and, therefore, was liable for the full amount of the lost or damaged property.

The putative class consisted of 3,000 passengers who between December 17, 1997, and March 3, 1999, received from Delta less than market value for their lost or damaged luggage because of Delta's alleged mistake. The pleadings sought a declaration that Delta owed the putative class members monetary damages equal to the difference between the value of the passengers' baggage and what Delta had paid the passengers and also injunctive relief. The district court had denied certification under Rule 23(b)(2) because plaintiffs' claims were mainly for monetary damages and common questions of law and fact did not predominate the action. The D.C. Court of Appeals agreed, holding that plaintiff's claims, although framed as seeking declaratory and injunctive relief, actually demanded monetary damages.

Burden of Compliance with Customs Requirements is on Shipper of Consignment under Warsaw/Hague

In BDM, *LLC v. Federal Express Corp*., 2006 WL 889788, No. C05-1347, (W.D. Wash. March 31, 2006), consignor-BDM contracted with FedEx to arrange for pick-up and shipment of 21 cartons of gemstone beads from Washington to China. The shipment did not clear Customs in China and ultimately was destroyed by Chinese Customs after FedEx placed over 90 unsuccessful calls to BDM and also the consignee in an effort to correct the insufficient documentation. All documentation and the air waybill for the shipment were prepared by BDM.

BDM filed a breach of contract action in the U.S. District Court for the Western District of Washington against FedEx for lost profits it had expected to make in selling the gemstone beads, or in the alternative, the value of the gemstone beads. FedEx moved for summary judgment claiming it did not breach the contract and that BDM failed to provide timely notice. FedEx also moved for partial summary judgment limiting any recovery to 17 SDRs per kilogram pursuant to Article 22(a) of the Warsaw Convention as amended by the Hague Protocol of 1955. BDM responded that the motion should be denied because FedEx breached the contract by insisting that BDM ship on wood pallets that would not clear Chinese Customs, BDM complied with all applicable notice provisions, and that the Warsaw Convention's limitation of liability cannot be decided on summary judgment as issues remain as to whether there was willful misconduct. There was no dispute that both the U.S. and China were High Contracting Parties to the Warsaw Convention as amended by the Hague Protocol of 1955 and that the Convention applied here.

In deciding the motion, the Court looked to the FedEx Customer Exception Report, which conclusively showed that the reason the consignment was held and destroyed by Chinese Customs was the absence of certain documentation needed for formal entry. The Court agreed with FedEx that the Convention (Articles 10 and 16) and the FedEx Service Guide placed all burden of properly completed paperwork on the shipper and that such incomplete or insufficient documentation here rested with the shipper, BDM, and not the carrier, FedEx. The Court also cited to the "Liabilities Not Assumed" section of the FedEx Service Guide, which relieved FedEx from liability from inability to deliver a consignment resulting from "acts or omissions of customs or other regulatory agencies." The Court, thus, granted FedEx's motion for summary judgment and denied all of BDM's claims. The Court never reached the issue of notice as it found that there was no breach of contract by FedEx in the first instance.

In Non-Jury Trial, Court Finds Article 17 Accident and Awards $250,000 for Slip and Fall on Soap on Floor in Lavatory

In *Sharma v. Virgin Atlantic Airways*, 2006 WL 870959, No.

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CV04-06799, (C.D. Cal. March 20, 2006), the District Court held that an Article 17 "accident" occurred when a Virgin Atlantic passenger slipped and fell on a "slippery contaminate, most likely soap on the floor of the lavatory" and ultimately awarded (non-jury) plaintiff $251,880.28 in damages ($101,880.28 for past medical expenses; $150,000 for pain and suffering) for his injuries (meniscus tear and post-concussion syndrome). Plaintiff also was awarded costs of suit.

In *Sharma*, plaintiff was a passenger aboard a Virgin Atlantic flight on April 15, 2003, from London to San Francisco when approximately 4-5 hours into the flight plaintiff entered the lavatory. Approximately 20-30 minutes later, another passenger alerted a flight attendant that the "call" light was on for that lavatory. When the flight attendant arrived at the lavatory, she knocked and called out to plaintiff, and when she received no response, she opened the door and plaintiff fell out on her. Plaintiff relayed to her that he had banged his head and he appeared confused.

It is Virgin Atlantic policy and the responsibility of the in-flight supervisor to ensure that flight attendants periodically check the lavatories to make sure that the smoke detectors function and that they are tidy. In this case, the Court held that there was insufficient evidence to determine that the lavatory inspections occurred regularly or that they were done thoroughly. The Court, thus, found that Virgin failed to adequately protect its passengers from the risks of slippery substances, such as soap on the floor of lavatories. Additionally, based on medical evidence and witness testimony, the Court also "overwhelmingly" found that plaintiff suffered head trauma while in the lavatory and did have post-concussion syndrome.

In reaching its conclusion that plaintiff's slip and fall in the lavatory was an "accident," the Court compared cases in which the incident clearly constituted an "accident" (*e.g.,* flight attendant unscrewing lavatory door after smoke alarm mistakenly goes off and revealing passenger in state of undress; injury resulting from fellow passenger's bag of liquor bottles falling from overhead compartment; passenger stuck in leg by hypodermic needle protruding from forward seat; injury resulting from burns from hot coffee), and those that it did not (*e.g.,* passenger hearing loss in one ear while on flight from Paris to Los Angeles when no evidence of abnormal operation of the aircraft; injury resulting from fall on the way to lavatory after passenger consumed 8-10 beers). The Court, in furtherance of *Air France v. Saks*, 470 U.S. 392 (1985), also recognized that when an injury is the "product of a chain of causes," the passenger only must show "some link in the chain was an unusual or unexpected event external to the passenger."

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