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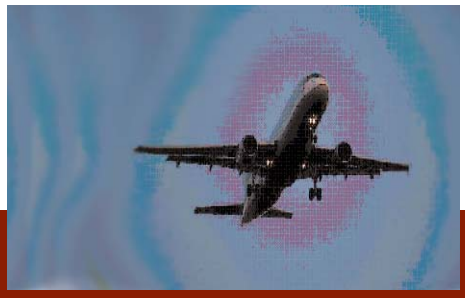

# SKY DOCKET

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A review of recent U.S. airline liability court activity
Winter 2004

## SUPREME COURT HEARS ORAL ARGUMENT IN *OLYMPIC AIRWAYS V. HUSAIN*

The U.S. Supreme Court heard oral argument on November 12, 2003 in *Olympic Airways v. Husain.* The Supreme Court is considering whether the Greece-based airline should be held responsible for the death of an asthmatic passenger who was seated near the smoking section. At issue is the definition of the word "accident." The question for the court to decide is whether according to the test laid out in a 1985 Supreme Court decision in *Air France v. Saks* what happened to the passenger was "an unexpected or unusual event" that is "external" to the passenger. In Saks, the court held that an ear injury caused by normal changes in cabin pressure did not constitute an accident.

Dr. Abid Hanson, 52, suffered an asthma attack on a flight from Athens, Greece, to New York in January 1998, after being exposed to secondhand smoke. Hanson, an asthma sufferer for decades, had had difficulty breathing in the smoke-filled waiting areas at the Athens airport. When he and his family boarded the plane, they found their seats were just three rows from the beginning of the smoking section. A flight attendant said the flight was full and that he could not be moved. But attorneys for his family told justices in a filing that there were 11 empty seats and 17 non-smoking seats assigned to airline employees and relatives who were flying for free.

According to Hanson's wife, Rubina Husain, she told the flight attendant several times that her husband needed to be moved away from the smoke. But each time she was rebuffed, even as Hanson's breathing difficulties increased. Finally, Hanson moved forward in the cabin for fresher air. He asked his wife to administer a shot of epinephrine, which he carried in an emergency medical kit. She did so and then went to the back of the plane to find Umesh Sabharwal, an allergist and family friend traveling with them. Sabharwal administered more shots, and performed CPR. But Hanson died.

Was the death an "accident" under the Warsaw Convention? A northern California federal district court agreed and awarded the widow $1.4 million in damages. In a non-jury trial, U.S. District Judge Charles Breyer found that Hanson's death was caused by an accident as defined in the Warsaw Convention and that because the accident was caused by the willful misconduct of the flight attendant, the family should be awarded $1.4 million in damages. The judge reduced the award by 50% to account for Hanson's contributory negligence. Thereafter, the judge added another $700,000 in non-pecuniary damages, for a total again of $1.4 million. The 9th U.S. Circuit Court of Appeals affirmed the ruling. This spring the Supreme Court blocked his family from collecting $1.4 million from Olympic Airways, to give justices time to consider reviewing the airline's appeal. Lawyers for Olympic asked the court to clarify when air carriers can be blamed for passenger illnesses.

The key issue from the airline's perspective is whether airlines should be held liable when a passenger's pre-existing medical condition is aggravated by exposure to the normal condition of the aircraft. The airline argued second-hand cigarette smoke in the cabin of an aircraft is normal and expected for a flight that allows smoking. There should be no recovery under the Warsaw Convention when a passenger suffers injury or death from a reaction to this normal aircraft operation.

The Air Transport Association, in an *amicus curae* brief, argued that if Hanson's widow wins, airlines would be responsible for preventing passengers from becoming ill while on a flight. Airlines would have to give passengers health questionnaires before they board a plane so a passenger with a head cold would not be seated near the engines, which could cause an illness created by depressurization. The airline would have to ensure a passenger with a smoke allergy is not seated near the smoking section, or that a passenger with a food allergy not be seated near certain foods. Moreover, the ATA argued, the airline would have to determine if the passenger merely disliked the second-hand smoke or food or whether the passenger had a medical condition. If they failed to do this, the potential result could be more litigation–or lengthy procedures and paperwork to avoid the threat.

"Nothing about this case was a departure from the existing Warsaw Convention law on accidents … for in-flight events," said Susie Injijian, a lawyer for the family. "[The case] has nothing to do with smoke in the cabin. It has everything to do with flight attendant misconduct. "If the Supreme Court reverses the decision, Injijian said the rights of the public, including the elderly, the disabled or people with "above average susceptibility to injury" to compensation for accidents occurring during flight would be greatly reduced. "[Olympic Airways] wants to use this case as a vehicle for redefining accident under the Warsaw Convention," she said. "[In that event,] the Warsaw Convention would only compensate people who have been injured or killed in plane crashes or terrorist attacks," she said.

At oral argument, the airline's attorney argued that the issue for this case is "What was the injury-producing-event?" Justice David Souter appeared to agree with the 9th Circuit that the unexpected and unusual event was the refusal of the flight attendant to move Hanson to a "smoke-free zone." Hanson was technically in a non-smoking seat already according to the airline's attorney, but Justice Souter remarked that it was a non-smoking seat that happened to be "in a zone of smoke."

Justice Souter and the airline's attorney exchanged their thoughts on whether the flight attendant's action needed to be an act or omission to count as an "event." Souter underscored that what was "accidental" was the "unexpectedness" of the flight attendant's refusal to accommodate a sick passenger. The airline's attorney responded that Souter was co-mingling common-law negligence with the Warsaw Convention's accident standard.

At one point, Chief Justice William H. Rehnquist asked whether there were other seats available in Economy Class. The airline's attorney replied that there were 11 free seats, but some were in the smoking section.

"Supposing," Justice John Paul Stevens said, "without asking the stewardess, he got into seat 7 or 8 in front, and she asked him to return to his seat?" The airline's attorney replied that would also not be an accident. Stevens then asked how there could be no accident if the stewardess had sent him back to his seat near the smoking section? The airline's attorney replied that Hanson was sitting in his normal seat and the fact that there was smoke near the smoking section was also normal. Therefore, there was no accident under the Warsaw Convention.

But Justice Anthony Kennedy observed that had Hanson been moved, the death would not have occurred, so there "has to be an accident." The airline's attorney disagreed explaining that one must examine the precise events causing the injury. There were none. Thus, there was no accident.

The Chief Justice then asked what exactly caused Hanson's death. "Exposure to secondhand smoke," replied the airline's attorney. But, he added, was exposure to ambient secondhand smoke unexpected? No. Thus, no accident.

Justice Ginsburg asked what courts in other Warsaw Convention countries have held in similar cases. The airline's attorney acknowledged that in Australia and Great Britain this type of incident has qualified as an "accident." Justice Antonin Scalia swiftly interjected, "That's dicta. We wouldn't give dispositive effect to our own dicta, much less a court of appeals in England."

Justice Scalia posed a hypothetical to the attorney for Husain in which a man "hurls himself into the sea, intending to commit suicide," while nearby there is a dock with 30 people, each with a life preserver at his feet, all of whom refuse to throw a life preserver to the drowning guy. "I don't know," he added. "Maybe they're 30 libertarians." Scalia posited that even though that result would be "unexpected," no one would call it an "accident." Husain's attorney then attempted to distinguish between the "colloquial" use of the word "accident" and the legal. He argued that it would be an "accident" if the flight attendant slapped someone in the face or threw hot coffee on them. Justice Scalia responded "No": "If the flight attendant *spills* coffee, that's an accident." Husain's attorney then suggested that even if the flight attendant was "purposefully throwing coffee," it would still be an accident under Article 17 since that is the "gateway" to get to the willful misconduct claim.

Chief Justice Rehnquist asked Husain's attorney what was industry practice and the airline's policy regarding moving passengers' seats (since Husain claimed that the flight attendant's action was "unexpected" as it violated routine policy). Husain's attorney responded that the general practice is to accommodate people who ask to move. Chief Justice Rehnquist then queried whether a stewardess throwing hot coffee at passengers could therefore be defended with the claim that "our stewardesses do it all the time." Husain's attorney replied that if one were to follow the airline's definition of accident, the Warsaw Convention would have a "hole in it" whenever there was "willful misconduct."

Transcripts of oral arguments at the Supreme Court are available at www.supremecourtus.gov.

## PASSENGER'S RACIAL DISCRIMINATION CLAIM ALLOWED


A federal court in Illinois, in *Wade v. American Airlines, Inc. (*August 29, 2003), denied the airline's motion for summary judgment in a racial discrimination claim brought by a passenger. The court refused to dismiss the passenger's state law claims for false imprisonment, malicious prosecution, and tortious interference with economic advantage.

Plaintiff was a passenger on an American Airlines flight; defendant Gail Paulson, an American employee, was a flight attendant aboard the plane, and defendant Dan McNamara was a customer service representative for American. Plaintiff alleged that Paulson took an instant dislike to her when she boarded the plane. She claimed that because she was black Paulson did not believe she was a first class passenger; that Paulson unfairly accused her of breaking an overhead bin on the plane, and that Paulson told the captain that the plaintiff was causing a disturbance. She further alleged that a member of the flight crew called the police, causing her to be arrested. Plaintiff claimed that she was wrongly charged with disorderly conduct after Paulson swore out a verified complaint against her. Although the charges later were dropped, because American did not send a representative to court, Plaintiff claimed that the incident resulted in her losing her job. She alleged that McNamara, or other American employees, sent a series of faxes to her superiors claiming that she had assaulted a police officer.

Paulson, and four passengers who were aboard the plane, testified at their depositions that Plaintiff was extremely aggressive towards Paulson, used abusive language, and left the flight crew no choice but to call the police. Paulson also testified that she never actually saw the complaint or signed it and the defendants deny that any American employees caused faxes containing incorrect information to be sent to Plaintiff's employers.

The court ruled that although it was undisputed that the flight crew called the police after the onboard incident, leading to the passenger's arrest, there was a genuine dispute as to what took place

aboard the aircraft. There also was an issue of fact as to whether American's employees had filed charges against the passenger and whether the disposition of the complaint gave rise to an inference of a lack of probable cause. In addition, evidence was produced showing that employees of the carrier disseminated false information about the incident to the passenger's employer, resulting in the loss of her job.

On the other hand, the court did reject the passenger's claim for abuse of process because American and its employees did not follow up their legal actions against her. A claim for intentional infliction of emotional distress failed because the carrier's behavior was not so objectively unreasonable that severe emotional distress would result. Moreover, a claim for negligent infliction of emotional distress also failed because there was no evidence that the passenger's alleged distress resulted from the negligent breach of a duty owed her.


## CALIFORNIA FEDERAL COURT REJECTS THREE DVT CLAIMS

A U.S. District Judge for the Central District of California rejected three separate deep vein thrombosis (DVT) claims on September 5, 2003 *(Blotteaux v. Qantas Airways Limited, Damon v. Air Pacific, Cortez v. Ansett Australia*). Three passengers brought personal injury actions against air carriers claiming they developed DVT during international flights. The flights at issue were from Auckland, New Zealand to Los Angeles, Chicago to Los Angeles, and Los Angeles to Nadi, Fiji. The judge ruled that the passengers failed to demonstrate that their injuries were caused by "accidents" within the meaning of the Warsaw Convention. Under the Convention, an "accident" is an unexpected or unusual event or happening that is external to the passenger.

The three passengers, represented by the same attorney in separate cases, claimed that the carriers' failure to warn them of the risks of DVT constituted an accident. In each case, though, the court found that the carriers' in-flight magazines contained information and on-board exercises to help passengers adjust to long-distance international flights. The court further ruled that merely sitting aboard a long flight was not an accident for the purposes of the Convention and found that no evidence was presented that the passengers' injuries had been caused by an accident within the meaning of the Convention.

## CLAIM THAT AIRLINE REFUSED TO PROVIDE PASSENGER WITH FIRST CLASS SEAT PREEMPTED BY FEDERAL LAW

The Texas Supreme Court in *Delta Air Lines, Inc. v. Black* (September 11, 2003) ruled that a state law breach of contract claim stemming from an air carrier's alleged refusal to provide a passenger with a first-class seat on one of its flights was preempted by the Airline Deregulation Act of 1978.

On June 23, 1995, Robert Black purchased two Delta airline tickets for travel from Dallas/Fort Worth to Las Vegas leaving that afternoon and returning on June 25. The invoice from Black's travel agent showed two first-class reservations for Black and his wife. Although the invoice assigned Black first-class seats for both directions, his wife had an assigned seat only for the return flight. Black's travel agent and manager of Smith Travel & Limousine, Melissa Shinn, suggested that Black ask the Delta gate agent if he and his wife could sit together in first class for the Dallas to Las Vegas flight.

Upon arrival at the departure gate, Black requested adjacent seats in first class. The gate agent said that he would "see what [he] could do." As other passengers boarded the plane, a Delta gate supervisor, Al Perez, appeared and informed Black that he and his wife did not have two confirmed first-class seats for the flight. While Delta had a confirmed first-class seat for Mr. Black, it only had a confirmed coach seat for his wife, whom Delta placed on a priority waiting list for first class. Perez told Black that, unless a first class passenger relinquished a seat, Black's wife would be seated in coach for the three-hour flight from Dallas to Las Vegas. This would not, however, affect her first-class seat for the return flight. At Black's request, Perez spoke by telephone with Shinn. Shinn told Perez that her computer showed two confirmed first-class seats from Dallas to Las Vegas. Delta's computers, however, did not show a confirmed first class seat for Black's wife.

Unable to provide Black's wife with first-class accommodations, Delta offered several alternatives: (1) the Blacks could sit in coach on their scheduled flight, (2) they could fly separately on the scheduled flight, one in coach and one in first class, (3) they could fly first class on a later flight to Los Angeles and then connect to Las Vegas, or (4) they could take a direct flight later that day to Las Vegas with confirmed first-class seats. Each of these alternatives included free travel vouchers, which Black asserts could be used only for coach seats. Black declined Delta's offers. Instead, the Blacks drove to Love Field airport and chartered a private jet to and from Las Vegas at a cost of $13,150, which included the aircrew's expenses in Las Vegas for two days.

Black sued Delta for breach of contract and intentional and negligent misrepresentation, and sued Perez for misrepresentation only. The Airline Deregulation Act of 1978 (ADA) provides that states

"may not enact or enforce a law ... related to a price, route, or service of an air carrier ...." 49 U.S.C. §41713(b)(1). This case concerned the scope of this preemption provision, specifically, its application to state breach of contract and misrepresentation claims challenging an airline's ticketing and boarding procedures. The trial court rendered summary judgment in favor of Delta and its gate supervisor, Al Perez, without specifying the grounds. A Texas court of appeals reversed, holding that the ADA did not preempt Black's claims, and remanded the case for trial. The Texas Supreme Court granted Perez and Delta's petition for review to decide whether the ADA preempts a passenger's state law claims for an airline's alleged failure to honor a confirmed first-class seat.

The Texas Supreme Court ruled that to trigger preemption, a claim must relate to airline rates, routes, or services, and must constitute the enactment or enforcement of a state law, rule, regulation, standard, or other provision. Because the claim involved seating and boarding procedures, it was inextricably linked to the contract of carriage between the passenger and the carrier and had a definite connection with, or reference to, airline services. Thus, the claim was "related to" the services an airline provides its customers. In addition, the claim constituted enactment or enforcement of a state law within the meaning of ADA's preemption clause because it could be adjudicated only by reference to federal regulations that expressly address airline boarding procedures. The passenger's reliance on a federal regulation allowing those who are denied boarding to decline compensation and seek damages in a court of law was misplaced because the carrier had offered the passenger a coach seat and, thus, boarding of the flight was not involuntarily denied. Finally, the passenger's misrepresentation and fraud claims also were preempted because they were directly related to airline services and indistinguishable from state statutory consumer protection actions barred under U.S. Supreme Court precedent. Accordingly, judgment for the passenger was reversed.



## What is the Current U.S. Dollar Value of an SDR?

The SDR is an international reserve asset, created by the IMF in 1969 to supplement the existing official reserves of member countries. SDRs are allocated to member countries in proportion to their IMF quotas. The SDR also serves as the unit of account of the IMF and some other international organizations. Its value is based on a basket of key international currencies.

The value of the SDR was initially defined as equivalent to 0.888671 grams of fine gold-which, at the time, was also equivalent to one U.S. dollar. After the collapse of the Bretton Woods system in 1973, however, the SDR was redefined as a basket of currencies, today consisting of the euro, Japanese yen, pound sterling, and U.S. dollar. The U.S. dollar-value of the SDR is posted daily on the IMF's website. It is calculated as the sum of specific amounts of the four currencies valued in U.S. dollars, on the basis of exchange rates quoted at noon each day in the London market.

For the current U.S. Dollar value of the SDR, go to the IMF's "SDR Valuation" web page at www.imf.org/external/np/tre/sdr/basket.htm.

## MICHIGAN STATE COURT RULES FLIGHT CANCELLATION CLAIM PRE-EMPTED BY AIRLINE DEREGULATION ACT

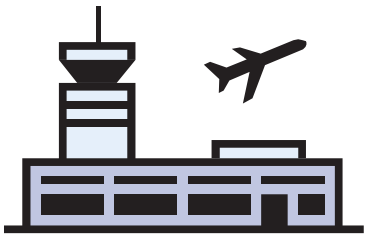
A Michigan state appeals court, in *Nali v. Northwest Airlines, Inc.* (September 18, 2003) ruled that claims brought by a passenger against an airline arising from the carrier's cancellation of the passenger's flight due to mechanical problems were preempted by the Airline Deregulation Act of 1978 ("ADA"). ADA preempts all state laws or regulations that are related to a price, route, or service of an air carrier.

Plaintiff and his son purchased round trip tickets for a trip from Detroit to Miami. When plaintiff and his son arrived at the Miami airport for their return flight, they were informed that the flight had been cancelled due to mechanical problems. They were given the option of flying to Detroit on a Continental Airlines flight via a connecting flight in Cleveland, Ohio, or flying to Detroit on defendant's carrier the next day. Plaintiff and his son flew to Cleveland, and then on to Detroit. After arriving in Detroit, plaintiff requested travel vouchers for transportation to his home. When his request was denied plaintiff caused a disturbance, and was escorted from the airport by the police. Plaintiff later received reimbursement for taxicab fare to his home.

Plaintiff filed suit in the United States District Court for the Eastern District of Michigan alleging breach of contract, misrepresentation, negligence, and violation of the Michigan Consumer Protection Act ("MCPA"). The federal court dismissed the action for lack of subject-matter jurisdiction on the ground that the amount in controversy did not exceed $75,000.

Plaintiff then filed suit in a Michigan state court alleging breach of contract, misrepresentation, negligence, infliction of mental and emotional distress, and violation of the MCPA. The airline moved for summary disposition arguing that plaintiff's state law claims of misrepresentation, negligence, and violation of the MCPA were preempted by ADA. The trial court granted defendant's motion and dismissed the case with prejudice.

The *Nali* court on appeal reasoned that while the ADA does not preempt tort claims based on physical injuries, the passenger's claims were directly connected to the transportation of passengers and the maintenance of aircraft, which are core services of an airline. Likewise, ADA preempted the passenger's claim against the carrier brought under a state consumer protection statute because it was based on the same set of facts as the tort claims.



## OVERHEAD BIN ACCIDENT CLAIM DISMISSED AFTER FEDERAL STANDARD OF CARE APPLIED

A Pennsylvania federal district court, in *Allen v. American Airlines, Inc.* (September 24, 2003) dismissed a negligence action by a passenger who claimed he was injured by a laptop computer bag that fell from an overhead luggage bin. The bag fell after another passenger disregarded a lit seatbelt sign and opened the bin immediately prior to disembarkation. The court, relying on a 1999 Third Circuit Court of Appeals decision in *Abdullah v. American Airlines, Inc.,* ruled that the passenger properly based his claim on a federal standard of care as prescribed by the Federal Aviation Act of 1958. A federal aviation regulation provides that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another. Though that regulation was not particularly specific, the court said it provided a federal standard of care that is generally applicable to the passenger's claim.

The *Allen* court decided that the regulation was reserved only for egregious misconduct, and the passenger identified no act or omission by the carrier that was sufficiently grave or endangering to have violated the regulation. The court concluded: "Defendant has not breached its statutory duty not to operate an aircraft recklessly or carelessly, as nothing supposedly performed, permitted, or ignored by Defendant equates or even approaches the grave, highly endangering actions previously found to have breached §91.13(a)."

The court further found that American's alleged negligence was not the proximate cause of the passenger's injuries. The passenger argued that the airline was negligent because it failed to prevent the other passenger from opening the bin prematurely, failed to pack its overhead compartments safely, and failed to issue a pre-disembarkation warning. The court disagreed, finding that the illuminated seatbelt sign satisfied American's duty, if any, to instruct passengers to remain seated, and there was no evidence of a problem with the overhead compartment or its loading.

## WHICH COUNTRIES ARE HIGH CONTRACTING PARTIES TO THE WARSAW CONVENTION?

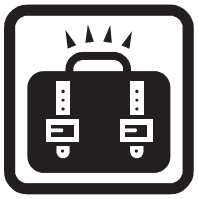
Authoritative sources to identify High Contracting Parties to the Warsaw Convention are available online. The U.S. Department of State's 2003 *Treaties in Force lists* "states who are parties" on page 342: www.state.gov/documents/organization/24228.pdf. ICAO's web site lists contracting parties along with pertinent dates at www.icao.int/icao/en/leb/wc-hp.htm.

## CATERER OWES NO DUTY TO FLIGHT ATTENDANT ONCE SERVING CART PLACED ON AIRCRAFT

In *Moore v. Sky Chefs, Inc.* (Oct 23, 2003), the U.S. Sixth Circuit Court of Appeals held that an airline catering firm was not liable for the alleged failure of its employees to lock an aircraft serving cart that rolled free and injured a Northwest Airlines flight attendant during takeoff. The flight attendant claimed that the caterer breached its contract with Northwest and was negligent for not locking the cart.

The caterer's contract did require it to comply with "all applicable laws," but the Sixth Circuit said that the provision was most sensibly read to cover laws that, by their terms, applied to caterers. Because the federal regulations requiring safe stowage of serving carts applied to air carriers (and not their vendors), the contractual provision did not support the flight attendant's claim. Moreover, a provision of the contract requiring the caterer to inspect serving carts prior to loading them on aircraft did not shift responsibility to the firm for ensuring that the carts were locked before takeoff.

The *Moore* court also ruled that the caterer had no common law duty to lock the serving cart after loading it on the aircraft. The flight attendant had argued that the caterer was negligent because it had reason to know that flight attendants would be injured if it failed to lock the carts. The Sixth Circuit disagreed, deciding that the caterer's duty under its contract with Northwest ended once the carts were placed on the aircraft. At that point the caterer would have had every reason to believe that the airline would perform its duty of locking the carts before the flight.



## AIRLINE PREVAILS ON "ALL NECESSARY MEASURES" DEFENSE UNDER IATA INTERCARRIER AGREEMENT

A federal magistrate judge for the Northern District of California, in *Kwon v. Singapore Airlines* (August 26, 2003), ruled that injuries suffered by a Singapore Airlines passenger when another passenger stepped on his foot while attempting to stow a bag in an overhead bin resulted from an "accident" within the meaning of the Warsaw Convention. The court explained that the plaintiff did not expect when he boarded the aircraft that another passenger would step on his foot and that the other passenger's conduct was external to the plaintiff. Under the Convention, an "accident" is an unexpected or unusual event that is external to the passenger.

Neither the airline's failure to assist the other passenger in stowing the bag nor its failure to prevent the other passenger from bringing an oversized bag aboard the flight were accidents under the Convention in the absence of evidence that a flight attendant saw and ignored the incident. Plus, any evidence as to the bag's weight or size was speculative.

The court did rule in favor of the airline on the issue of the limitation of liability under the Convention where the airline had taken "all necessary measures" to prevent the injuries. While the incident constituted an "accident", the airline had regulations governing boarding procedures and the size and weight of carry-on bags, as well as a training program for its flight attendants. The passenger presented no evidence that the airline had failed to comply with its own procedures and regulations, or that it could have taken any other reasonable measures.

Accordingly, the airline's liability was capped at 100,000 SDRs. (Article 20(1) of the Warsaw Convention provides that the carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures. Under the IATA Intercarrier Agreement a passenger claimant is entitled to provable damages up to 100,000 SDRs on the basis of strict liability. The claimant can recover provable damages in excess of 100,000 SDRs if the carrier fails to establish that it took all necessary measures to avoid the damage, or that it was impossible to take such measures.

# Upcoming Airline Liability Events

38th Annual SMU Air Law Symposium
Addison, Texas
February 26 - 27, 2004
www.smu.edu/lra/als/

2004 Aviation Insurance Association Conference
Las Vegas, Nevada
May 1 - 4, 2004
www.aiaweb.org

IATA Legal Symposium 2004
Seville, Spain
February 8 - 10, 2004
www.iata.org

IATA Airline Insurance Rendez-vous 2004
Munich, Germany
March 8 - 9, 2004
www.iata.org

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