CARLTON FIELDS
ATTORNEYS AT LAW

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A REVIEW OF RECENT U.S. AIRLINE LIABILITY COURT ACTIVITY

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THREE COURTS, THREE CLAIMS FOR DELAY ON INTERNATIONAL FLIGHTS, THREE DIFFERENT RESULTS

U.S. courts continue to struggle with how to treat claims for "delay" in the course of international air transportation where the Warsaw Convention ordinarily governs. In *Lee v. American Airlines, Inc.* (November 17, 2004), a Texas federal court addressed claims brought by 29 plaintiffs for damages caused by the cancellation of their flight from New York to London in 2001. The flight was supposed to depart at 6:35 p.m. but was cancelled at 1:10 a.m. due to maintenance problems on two different aircraft. The only issue to be considered on the airline's motion for summary judgment was whether the airline took all necessary measures to avoid the damage caused by the delay. Plaintiffs argued the airline did not because it: 1) failed to begin repairs on the first aircraft in a timely manner; 2) failed to secure alternate transportation for plaintiffs that evening; 3) failed to have a reasonable number of spare aircraft available; and 4) failed to disclose to passengers that the delay was caused by an out-of-service aircraft.

The *Lee* court, ruling against the airline in part, decided there was conflicting evidence on whether the first aircraft was declared out-of-service three hours or a half an hour before the flight was scheduled to depart with the inference being that the airline unreasonably delayed commencing repairs. The court ruled that the airline acted reasonably when it attempted to repair the alternate aircraft and in attempting to secure another crew for it instead of immediately transferring all passengers to another airline's flight. Despite the airline's argument that whether the airline gave accurate information to the passengers about the reason for the delay and how long it would be was not relevant to the "all necessary measures" issue, the court decided otherwise. The passengers, it ruled, could have avoided the damage caused by the delay had they been provided that information by switching flights. Finally the court ruled that plaintiffs failed to present evidence that it was unreasonable for the airline to hold only 1% of its fleet in reserve.

In another "delay" case under the Warsaw Convention, a federal court in Connecticut in *Ikekpeazu v. Air France* (December 6, 2004) ruled in favor of

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the airline on a claim for emotional damages. A "busy surgeon" booked a flight to return to the U.S. from Nigeria. He was denied boarding due to a "security problem" in 2002 and an airline employee instructed him to report to the American Embassy in Lagos, an eight-hour trip. There, he was told there was no problem with his passport. He returned to the airport, boarded the airline's aircraft without incident and, six days after his scheduled departure, arrived at his destination. He claimed he was forced to cancel all surgeries, procedures and consultations that had been scheduled for the upcoming week. The airline moved to dismiss. The court ruled that plaintiff's allegations of financial injury resulting from the delay in his return to practice provided a basis for a claim under Article 19 of the Warsaw Convention, but that his claims for emotional distress were not compensable under Article 17.

A New York federal court in *Paradis v. Ghana Airways Limited* (November 22, 2004) granted the airline's motion to dismiss a claim arising from a canceled 2004 flight from Sierra Leone to New York. Without deciding precisely which treaty applied, the court ruled that the plaintiff's state law breach of contract claim was preempted by either the Warsaw Convention or the Montreal Convention (of 1999). Plaintiff also claimed non-performance, that is, this was not a case of "delay" but instead a failure to carry. The court held that a passenger cannot convert a mere delay into contractual non-performance by choosing to obtain a more punctual conveyance (plaintiff switched carriers so the airline did not have the opportunity to fulfill its contractual obligation) because "failure to provide a substitute airplane within several hours of cancellation is not a failure to exercise 'best efforts to carry the passenger with reasonable dispatch'" as set forth in the contract of carriage.

CARLTON FIELDS ESTABLISHES DIVERSITY FELLOWSHIP

Carlton Fields has selected third-year Stetson University College of Law student Gregory Redmon as the first recipient of the Carlton Fields Diversity Fellowship Program at Stetson Law.

The program is designed to provide access to large-firm practice for one student each academic semester that has experienced socioeconomic or cultural barriers to legal education. Redmon will work about 200 hours during the spring semester with the nationally renowned law firm and receive a $5,000 stipend.

"The program will provide our students with invaluable experience and the opportunity to develop relationships with the firm and its members," said Dean Darby Dickerson.

The student's work is expected to be split between pro bono clients and other clients of the firm.

"I view the Carlton Fields Diversity Fellowship as a tremendous opportunity for me to learn and grow professionally from exposure to a venerable and forward-thinking law firm," Redmon said. "My goal is to confirm the best hopes that Carlton Fields has for the future of its diversity program at Stetson University College of Law, and other law schools throughout the nation. During my fellowship, I look forward to continuing the tradition of excellence for which Stetson students are known."

The program is designed for students, regardless of race, color, national origin, religion, sex, disability, age, sexual orientation, marital status or veteran status, who have faced challenges and are interested in serving as a fellow with the firm.

The Diversity Committee at Carlton Fields made the selection with the assistance of Stetson's Office of the

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Career Services, who created a committee to narrow the selection to a list of three to five candidates. Students were asked to demonstrate, in the form of a 500-word essay, that they have experienced socioeconomic or cultural barriers during their pursuit of a legal education.

Located in major business centers in Florida and the Southeast, Carlton Fields offers a full range of legal services in more than 30 areas of law. Established in Tampa, Fla., in 1901, the firm maintains offices in Atlanta, Miami, Orlando, St. Petersburg, Tallahassee, Tampa and West Palm Beach. Additional information is available on the firm's web site located at www.carltonfields.com.

PLAINTIFFS ALLEGE EMOTIONAL DISTRESS AND BREACH OF CONTRACT AGAINST AIRLINES AND SECURITY SERVICE FOR ALLOWING ERRATIC, THREATENING PASSENGER TO BOARD WHO YELLED "GET BACK! WORLD TRADE CENTER! AMERICANS! NEW YORK CITY!"

Two passengers, a husband and wife, sued Delta Air Lines, Atlantic Coast Airlines and Globe Security Services for the emotional distress they experienced on a post-September 11 flight from Indianapolis to New York. An Indiana appellate court ruled that they could proceed with their claim, affirming the denial of the defendants' motions for summary judgment in *Delta Air Lines v. Cook* (October 19, 2004).

On February 8, 2002, the Cooks arrived at the Indianapolis International Airport and proceeded to the designated gate for Delta flight number 6116, which was a direct flight to New York City operated by ACA. As the Cooks sat at the gate, waiting to board the plane, Mr. Cook observed a man run toward the gate and stop abruptly. That man, later identified as Frederic Girard, a French national traveling alone, then obtained a cash refund for one of the two tickets he had purchased for flight number 6116. Girard "exhibited erratic behavior," such as shifting from one foot to another and "constantly taking off his sunglasses and jacket and putting them back on." In addition, Girard's eyes were red, bloodshot, and glassy, and his face was red. Mr. Cook believed that Girard was either intoxicated or mentally unfit.

Girard was the last passenger to board the plane prior to departure, and he "was unruly in the manner in which he boarded." Girard "ran quickly and jumped up the steps leading into the plane like a gymnast. He sprung into the plane and attempted to sit in a seat nearest the cockpit. He was ordered to the back of the plane by . . . [flight attendant] Mark Dickerhoff[.]" Girard's boarding pass indicated that he was to sit in the eighth row, but Dickerhoff instructed him to sit in the last row, row twelve. Prior to take-off, Girard's erratic behavior continued, and he pressed the attendant call button and light switch above his head repeatedly. Also prior to take-off, Mr. Cook approached Dickerhoff and expressed his concern that Girard was a "security threat." Dickerhoff told Mr. Cook that Girard was a "possible security threat" and that he had ordered Girard to sit in the rear of the plane "so he could keep an eye on him."

As the plane taxied toward the runway, Girard disregarded Dickerhoff's instructions to remain seated with his seatbelt fastened. Then, after take-off, Girard lit a cigarette, despite having been warned that smoking was prohibited on board. Dickerhoff instructed Girard to extinguish his cigarette, but Girard retained his cigarettes and lighter. At that point, Mr. Cook approached three male passengers on board and

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asked for their assistance in "protecting the flight if [Girard's] behavior grew worse." Girard's behavior "continued to be erratic, furtive, and unruly." He began moving around the plane, sitting in different vacant seats. When Girard walked up the aisle toward the cockpit, Mr. Cook stood up in the aisle to block his way and instructed Girard to sit down. Girard complied, but he lit another cigarette once he was seated in the back row. Dickerhoff confronted Girard, telling him to extinguish the cigarette, and Girard demonstrated "even more aggressive behavior." Girard stood up and began yelling "Get back! Get back!"

Mr. Cook then enlisted the help of the other male passengers to help him block the aisle, and they approached Girard at the rear of the plane. Mr. Cook told Dickerhoff that he and the other men "were there to back him up." When one of the passengers asked Girard to sit down, Girard responded by showing an "evil grin" and stomping his feet on the floor. Girard then shouted, "Get back! World Trade Center! Americans! New York City!" And Girard began muttering in French. Eventually, two Delta employees on board approached Girard and said something to him in French, which led to Girard taking his seat. The pilot diverted the flight to land in Cleveland, where police officers met the plane and arrested Girard. The flight then left Cleveland and flew to New York City as planned.

The court held that the Cooks' state law claims that the safety of the flight was jeopardized by the airline's permitting a visibly deranged man to board were not preempted by the federal Airline Deregulation Act. Moreover, state law claims for emotional distress were permitted because, under Indiana law, the Cooks were sufficiently and directly involved in the incident even though there was no physical impact: "This incident occurred in the aftermath of the attacks on the World Trade Center and the more recent attempt by a foreign national to ignite explosive material in his shoe aboard a flight. We cannot say, as a matter of law, that their claimed emotional injuries are not 'serious in nature and of a kind and extent normally expected to occur in a reasonable person' under similar circumstances."

JET BRIDGE ACCIDENT BRIEFS

Scroggs v. American Airlines, Inc. (November 30, 2004): A passenger fell on the metal hinge of a jet bridge while boarding. The airline moved for summary judgment. A Texas appellate court ruled that the plaintiff presented more than a scintilla of evidence regarding whether the airline had actual or constructive knowledge of the jet bridge's alleged dangerous condition (*e.g.*, other passengers had fallen, no handrails, jet bridge was purchased in 1972 and had never been refurbished). There also was evidence that the condition of the jet bridge caused the injuries: expert testimony on the slope and slipperiness of the plate. Finally there was evidence of plaintiff's injuries: A doctor's report that plaintiff developed increased panic attacks, depression because of her fall and fracturing her foot.

Pritchard v. Northwest Airlines, Inc. (September 15, 2004): Plaintiff claimed the airline had negligently allowed snow to collect on the Kansas City jet bridge leading to its airplane, causing plaintiff to fall and sustain injuries that were exacerbated by her foot's becoming stuck in a gap between the jet bridge and the airplane. The U.S. Court of Appeals for the Sixth Circuit affirmed entry of summary judgment for the airline, ruling that the plaintiffs failed to present evidence that the airline's negligence caused the slippery condition though they argued that the snow blew into the jet bridge because the jet bridge was docked too far away from the plane to provide proper protection. The evidence showed, however, that snow could enter the jet bridge even when it was properly docked and the canopy properly lowered because the airline's regulations required there to be a gap between the jet bridge and the airplane.

AON EXPERT SAYS AVIATION INDUSTRY SHOULD REVISIT THE INTRODUCTION OF THE 747

With the recent introduction of the 555-passenger Airbus A380 aircraft, an Aon aviation expert says the world's aviation industry must now look to the past to accommodate what may be its future.

Wayne Wignes, president of Aon's Aviation Group, says the A380, with a tail assembly nearly 80 feet high and a fuselage measuring nearly 240 feet, poses significant insurance challenges for the airlines. He predicts insurance liability limits will rise for the entire industry, regardless of whether a given airline places an order for the A380. "An airline doesn't have to own the aircraft to be affected by the increased liability limits," he says. "There will likely be a need for an alternative capital market for this airplane. Airlines will probably have to carry $3 billion in liability limits to indemnify themselves. That pushes the edge of the financial capabilities of the traditional aviation insurance market, which usually works with liability limits in the $1.5 to $1.75 billion range. That is simply a bridge too far for a small community with finite resources. So the airlines will have to depart from their traditional approaches."

Wignes says that is what happened some 35 years ago when Pan Am introduced the 747. In 1969 a new financial model was developed to accommodate the liability demands posed by the jumbo jet. Wignes suggests the industry should refer to that model as the basis for creating a new financial facility.

The introduction of the Airbus also poses some equally daunting operational challenges. "Some taxiways simply aren't long enough," Wignes says. "In other cases, airport gates may have to be spaced farther apart to contend with an airplane with a 262-foot long wingspan."

CARLTON FIELDS OFFERS SEMINARS

The Aviation Practice Group of Carlton Fields offers in-house seminars on a variety of subjects of interest to aviation liability professionals. The most popular current topics include The Montreal Convention of 1999 and the "Warsaw System"; denied passenger boarding/passenger ejectment; defending turbulence claims; and evaluating and settling wrongful death claims for catastrophic losses. Continuing insurance and/or legal education credits ordinarily are available. To request an in-house seminar, please call (800) 486-0140, extension 6231 or e-mail: skydocket@carltonfields.com.

CATERER HAD NO DUTY TO FLIGHT ATTENDANT TO LOCK A SERVING CART AFTER BRINGING IT ON AN AIRCRAFT

A flight attendant was injured during a flight due to a brake not being set on a serving cart that the caterer loaded on the plane. A Michigan appellate court in *Naranjo v. Sky Chefs, Inc.* (October 19, 2004) held that the caterer had no such duty under the facts of the case. Plaintiff alleged in her complaint that the caterer placed multiple beverage carts in the main cabin galley of a Northwest flight on which she was working as a flight attendant. The galley of the airplane is configured with "slots" for about four rows of beverage carts "stacked side by side" to fit under the counters on each of the galley's two sides. One row could accommodate one full cart or two beverage carts. If two beverage carts were in a row, one would be directly behind the other and could not be seen without removing the front cart.

About fifteen to twenty minutes into the flight, plaintiff pulled out a front beverage cart and the rear cart followed the front cart out of the compartment, allegedly because its brake was not set. Because of the added weight of the rear cart, plaintiff could not stop it from coming out and was pinned to the opposite galley latch, which struck plaintiff in the back. Plaintiff could not push the carts off herself because of their heavy weight. She then called to another flight attendant who came to her assistance. Plaintiff claimed that the caterer owed her a duty to load the carts onto the airplane in such a manner so that the carts would be secure and not come rolling out. Plaintiff claimed that the caterer negligently placed one of the rear beverage carts in the main cabin galley in an unsecured state and that, as a result, suffered various injuries when she was struck by the front beverage cart which was propelled by the weight of the rear cart rolling forward.

The court held that there was no duty to set the cart's brakes under the contract between the caterer and the airline. It also held that the caterer did not assume any such duty. There was no evidence the caterer was required or expected to do anything more than place beverage carts under the galley counters. The caterer had no reason to foresee that the flight attendant would not perform her duty under FAA regulations to ensure the carts were secure before the flight was airborne.

AIRLINE BREACHED NO DUTY TO PASSENGER WHO WAS REMOVED FROM WHEELCHAIR ON ARRIVAL AT THE CURBSIDE PASSENGER PICK-UP AREA

Plaintiff fell and was injured after he was required to leave a wheelchair provided by the airline at the curbside passenger pick-up area. He did not protest at the time and was able to ambulate for short distances. The New York appellate court in *Feder v. Tower Air* (November 9, 2004) held that plaintiff failed to show that any purported negligence was the cause of the passenger's fall and injuries: "The bare assertion that the premature removal from the wheelchair started the chain of events which led to his fall and injury, is far too attenuated here, in view of the myriad possible causes for his falling. Without some evidence as to what caused the fall, a nexus cannot be made between the purported negligence and resulting injury."

INFANT WITHOUT PASSPORT DENIED BOARDING ON FLIGHT TO FRANCE; NO BREACH OF CONTRACT OR NEGLIGENT MISREPRESENTATION CLAIM ALLOWED

An airline denied boarding to an infant on a New York to Nice, France flight because he did not have a passport or other valid travel documentation. His father claimed an agent said a birth certificate would suffice and that the real reason the child was denied boarding was that the flight was overbooked. The family obtained proper travel documentation and flew to Nice the next day on another airline. They claimed their trip to France was cut short and they missed a party that had been scheduled so that their family in France could meet their daughter and new son.

A New York federal court in *Levy v. Delta Air Lines* (September 30, 2004) held that the airline's tariff and contract of carriage provided that it was the responsibility of the passengers to have the necessary travel documentation. Despite the plaintiffs' claim that the airline negligently misrepresented that a birth certificate was sufficient, they had no right to rely on the agent and they showed no injury: "There was a one-day delay, causing the Levys to miss a party with their relatives and friends. There is no indication whatever of any injury for which there can be recovery of damages." The plaintiffs also complained about an invasion of privacy when flight attendants photographed their children. The court ruled that the claim was not governed by the Warsaw Convention but that under New York law there was no cause of action because the airline's lawyer represented that there was no commercial use of the photographs.

AIRLINE NOT REQUIRED TO PROVIDE SUBTITLES IN MOVIES FOR DEAF PASSENGERS

A Texas federal court ruled that the Air Carrier Access Act does not require airlines to provide subtitles in their in-flight entertainment movies and safety films. In *Bynum v. American Airlines* (August 31, 2004) the court said "[m]ovie watching in flight is not a right. Airlines help distract flyers from the tedium of flight through magazines, movies, music, and beverages. Differentially able people experience all of these things differently. This is true of looking out the window, too. They all – able and unable, old and young – get from A to B, and that is the function of airlines and aircraft. Nobody pays $437 and flies two-and-one-half hours to Chicago to see the in-flight movie.

The plaintiff also argued that showing movies or safety films transforms the airplane into a movie theater, making it a public accommodation of the kind that federal law compels to include facilities for the disabled. The court disagreed: "An airplane is transportation, not entertainment. Showing in-flight movies does not convert aircraft into 'places of exhibition.' The movies, like magazines, are ancillary to the aircraft's purpose." To conclude, the court said: "Neither the facts nor law support Bynum's claim. He has suffered no injury. He cannot identify law that supports him. Although he is truly disabled, his suit mocks the law and the needs of the disabled as well as wastes the resources of the taxpayers and the airline's consumers, who must pay for this foolishness. The airlines will prevail, and Bynum will take nothing."

UPCOMING AIRLINE LIABILITY EVENTS

39th Annual SMU Air Law Symposium
February 24 – 25, 2005
Dallas, Texas
www.smu.edu/lra/ALS

Women in Aviation International
16th Annual International Women in Aviation Conference
March 10 – 12, 2005
Dallas, Texas
www.wai.org/conference/2005

AIA 2005 Annual Conference
April 30 – May 3, 2005
New Orleans, Louisiana
www.aiaweb.org

Information

For more information about this issue of *Sky Docket*, to receive it via e-mail, or for more information about Carlton Fields' Aviation Practice Group, contact Carlton Fields' Aviation Practice Group by **telephone:** (800) 486-0140, extension 6231 or (305) 539-7231; by email: skydocket@carltonfields.com; by **mail:** 4000 International Place, 100 Southeast Second Street, Miami, Florida 33131; or visit Carlton Fields' interactive **web site** at www.carltonfields.com.

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