

Aviation Law Update

By: Andy Payne*

Aviation law is an amalgamation of negligence, products liability, international treaty law, and administrative law. Thus, a comprehensive update in limited space is impractical. Rather, this article will focus on significant recent developments as they specifically relate to aviation.

In most circumstances, when a passenger with an international ticket is injured or killed, their claims are adjudicated within the confines of international treaties. Until 2003, these international passenger claims were governed by the Warsaw Convention. In November 2003, the Warsaw Convention was replaced by the Montreal Convention. The Montreal Convention changed several aspects of international claims. Previously, the Warsaw Convention limited jurisdiction to four possibilities: (1) the carrier's domicile; (2) the carrier's principal place of business; (3) where the carrier has a place of business through which the contract (the purchase of the ticket) was made; or (4) the place of destination. The Montreal Convention added a fifth and important jurisdictional option—the country of the plaintiff's principal and permanent residence at the time of the accident. This change protects U.S. citizens who purchase international tickets abroad with a destination other than the United States

While the Montreal Convention's addition of a fifth jurisdictional option is helpful, the courts continue to struggle with the applicability of forum non conveniens. Under the Warsaw Convention, the Circuits split on the availability of forum non conveniens. *Compare In re: Air Crash Disaster Near New Orleans*, 821 F.2d 1147 (5th Cir. 1987)(*holding FNC is available under Warsaw*) and *Hosaka v. United Airlines*, 305 F.3d 989 (9th Cir. 2002)(*cert. denied*)(*holding that FNC was not available under*

Warsaw). The debate regarding the availability of forum non conveniens under the new Montreal Convention rages on with divergent view of commentators and courts. Currently, there is no final resolution of this important issue. Finally, in a preemptive move to thwart FNC dismissals by U.S. Courts, several foreign countries are passing anti-FNC statutes that work in the following way. U.S. FNC dismissal requires proof that there is an “available and adequate” forum in the foreign jurisdiction. The anti-FNC statutes defeat the “available and adequate” element by divesting jurisdiction if the case is first filed in the United States. Ecuador, Panama, Costa Rica, Guatemala and the Philippines have all adopted such statutes. Still other countries approach the problem not by divesting jurisdiction, but by accepting cases and applying U.S. damages law to international torts.

In addition to effecting the location of litigation, the Montreal Convention, altered the liability and compensation schemes. Faced with appropriate claims, air carriers are absolutely liable for 100,000 “Special Drawing Rights,” which currently is the equivalent of \$148,918.00 USD. Beyond this amount, the carrier has unlimited liability unless it can prove that the plaintiff’s or a third-party’s negligence was the cause of the injury or death. The second tier of liability was a significant change because it shifted the burden of proof from the passenger to the carrier and also changed the basis to make passenger claims within the second tier more viable.

Many aviation lawsuits center upon private flights. The foundation of almost all of these cases is the theories of negligence and products liability. Indeed, most airplane crashes involve product defects, pilot negligence or a combination of both. Recent and broad change to the Texas tort system impact aviation litigation just as those changes

impact other negligence and product liability cases. Although updates to these areas are covered by other articles in this issue, they should be reviewed as an essential component of the aviation law update.

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