

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ALICE CONWAY,)	
)	
PLAINTIFF)	
)	
v.)	Civil No. 96-207-P-H
)	
UNITED AIR LINES, INC.,)	
)	
DEFENDANT)	

**ORDER ON RECOMMENDED DECISION
OF THE MAGISTRATE JUDGE**

The United States Magistrate Judge filed with the court on May 15, 1997, with copies to counsel, his Recommended Decision on the Defendant's Motion for Summary Judgment. Objections to the Magistrate Judge's Recommended Decision were filed by both the defendant and the plaintiff on May 29 and May 30, 1997, respectively. I have reviewed and considered the Magistrate Judge's recommended decision, together with the entire record; I have made a de novo determination of all matters adjudicated by the Magistrate Judge's recommended decision; and I concur with all of the recommendations of the United States Magistrate Judge with one exception for the reasons set forth in his recommended decision, and with the following modifications and observations.

ABSENCE OF COMPLETE PREEMPTION BY WARSAW CONVENTION

The Circuit caselaw is divided and the Supreme Court and the First Circuit have not spoken on the question whether the Warsaw Convention¹ completely preempts the field of airline liability for injuries occurring on board airplanes. Compare Potter v. Delta Air Lines, Inc., 98 F.3d 881, 884-87 (5th Cir. 1996), and Boehringer-Mannheim Diagnostics, Inc. v. Pan American World Airways, Inc., 737 F.2d 456, 458-60 (5th Cir. 1984), cert. denied, 737 F.2d 1186 (1985), with In re Air Disaster at Lockerbie, Scotland, 928 F.2d 1267, 1273-78 (2d Cir), cert. denied, Rein v. Pan American World Airways, Inc., 502 U.S. 920 (1991), Abramson v. Japan Airlines Co., Ltd., 739 F.2d 130, 133-35 (3d Cir. 1984), cert. denied, 470 U.S. 1059, and reh'g denied, 471 U.S. 1112 (1985), and In re Mexico City Aircrash of Oct. 31, 1979, 708 F.2d 400, 414 n.25 (9th Cir. 1983).

Certainly a case can be made for the Fifth Circuit's conclusion in Potter, 98 F.3d at 885, that the Warsaw drafters were seeking to limit liability for the fledgling international airline industry and that the logical and sensible way to accomplish that was to limit air carrier liability to only the events specified in the Convention and preempt all other liability. On the other hand, the Convention never states that as such; instead, its specific preemption sections seem curiously limited, see Article 24, and it is reasonable to read its language as creating liability that preempts local law only in specific circumstances. Indeed, commentators have pointed out that the Convention explicitly purports to deal with only "certain," not all, the rules of international air travel. See Giumulla, Schmid & Ehlers, Warsaw Convention 14-17 (1997 & Supp. 4 (1994)) (quoting the original title of the Convention in

¹ The text of the Warsaw Convention, 49 Stat. 3000, T.S. No. 876 (1934), can be found at the Note following 49 U.S.C.A. § 40105. The Convention has been modified for international flights with connecting points in the United States by the Montreal Agreement of 1966, reprinted in Goldhirsch, The Warsaw Convention Annotated: A Legal Handbook 317-18 (1988). Specifically, the Montreal Agreement raised the limit of liability to \$75,000 and waived the Article (20)(1) Warsaw defenses.

French: “Convention pour l’unification de certaines règles relatives au Transport Aérien International”). Moreover, the primary concern at the time seems to have been insurance availability in the face of the fear of aircraft crashes with wide scale loss of life—this at a time when aircraft mechanical capacities were still at an early stage and the accident history was far worse than we are used to today. See Lowenfeld & Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-500 (1967). The Convention’s focus on “accidents,” see Article 17, as the area in which to limit liability and preempt local law, therefore, makes some sense, and it is not surprising that the drafters may not have concerned themselves with other kinds of liability that might be associated with air travel.

I therefore concur with the Magistrate Judge that the Warsaw Convention does not preempt all possible claims related to international air travel but instead only preempts those claims covered by the Convention (i.e., “accidents” under Article 17). I also agree that the plaintiff’s claims for injuries to herself in this case do not arise out of “accidents” covered by the Convention, but there remains a genuine issue of material fact with regard to damage to the plaintiff’s wheelchair.

ASSERTION OF THE WARSAW CONVENTION PREEMPTION DEFENSE

I concur with the Magistrate Judge that assertion of a Rule 12(b)(6) defense in the defendant’s Answer is sufficient to preserve the Warsaw Convention preemption issue in this case. See Recommended Decision at 9-10 n.10. The plaintiff has made general allegations of prejudice, but has not shown that she is unfairly prejudiced by the elaboration of the preemption defense at this stage.² This is not, therefore, a case of ambush under Williams v. Ashland Eng’g Co.’s “totality of

² The plaintiff argues that the defendant’s failure to include the Warsaw Convention
(continued...)

the circumstances” test. See Williams, 45 F.3d 588, 593 (1st Cir. 1995). The Motion for Reconsideration of Magistrate Judge Cohen’s denial of the Defendant’s Motion to Amend its Answer is accordingly **MOOT**.

**PREEMPTION BY THE AIR CARRIERS ACCESS ACT (“ACAA”), 49 U.S.C. § 41705,
OR THE AIRLINE DEREGULATION ACT, 49 U.S.C. § 41713(b)(1)**

I consider ACAA preemption to be waived. In its original Reply Memorandum at 6 n.5 the defendant mentioned the issue, but failed to present any argument and instead said that the court need not decide it, apparently confident it would prevail on its Warsaw Convention preemption argument.

Additionally, I am not persuaded that the Ninth Circuit’s latest decision in Gee v. Southwest Airlines, 110 F.3d 1400 (9th Cir. 1997), furnishes any persuasive authority for preemption by the Airline Deregulation Act. The panel opinion in Gee makes clear that it reaches any such conclusion only because of an erroneous earlier panel decision that it cannot overrule on its own but must await an en banc decision. See id. at 1406 (“[W]e remain bound to apply the Harris [v. American Airlines, Inc., 55 F.3d 1422 (9th Cir. 1995),] rationale, however outdated we may find its analysis.”).

² (...continued)

preemption defense in its Answer resulted in the statute of limitations having run for any claim under the Warsaw Convention thereby precluding her from amending her complaint or filing a separate action. See Plf.’s Opp’n to Def.’s Mot. to Amend Answer at 3-4. In fact, the statute of limitations had run by early August, 1996 (two years after the cause of action accrued, see Article 29), and the Answer was not filed until August 23, 1996.

ACAA REGULATION , 14 C.F.R. § 382.21(a)(4)(ii)

Finally, I depart from the Magistrate Judge’s recommended decision on one point. I decline to grant summary judgment in favor of the defendant regarding the alleged violations of 14 C.F.R. § 382.21(a)(4)(ii).³ See Recommended Decision at 25; see also Compl. ¶ 50(d). Judge Cohen ruled that the regulation “applies by its terms only to aircraft ordered after the effective date of the regulations or delivered to the carrier more than two years after that date” and that the plaintiff failed to offer evidence to that effect. Recommended Decision at 25. I find, however, that the regulation applies two years after its effective date to all large carrier-owned airplanes regardless of their order or delivery dates. Specifically, the regulations require that “[e]ach carrier, within two years of the effective date . . . comply with the provisions of paragraph (a)(4) of this section with respect to all aircraft with more than 60 passenger seats” 14 C.F.R § 382.21(b)(2); see also 55 Fed. Reg. 8008, 8022 (Mar. 6, 1990) (“With respect to *existing aircraft*, the rule requires on-board chairs to be provided . . . on request with 48 hours’ advance notice (for aircraft without an accessible lavatory) within two years of the effective date of the rule.”) (emphasis added). The regulation’s effective date was April 5, 1990. 55 Fed. Reg. at 8008. Here, the airplane that transported Alice Conway from Mexico City to Chicago was a Boeing 737-300, Def.’s Second Supplemental Answers to First Set of Interrogs. ¶ 7, and that model has 118 seats. See Diagram of Aircraft attached to Def.’s Answers. Additionally, Ms. Conway stated in her affidavit that she called United Airlines “in early July,

³ The defendant argues that if this case is governed by these regulations, it is only controlled by section 382.39(b)(3), see Def.’s Mem. of Law in Opp’n to Pl.’s Objections to Magistrate Judge’s Recommended Decision at 1-3, a subsequent subpart of the regulation that requires carriers to provide “assistance with the use of the on-board wheelchair to enable the person to move to and from a lavatory[.]” 14 C.F.R. § 382.39(b)(3). While this regulation may be one of several at issue in this case, I reject the defendant’s contention that this subpart relating to services is the *only* part of the regulation that the defendant could have violated.

1994,” more than 48 hours before her flight on August 1, 1994, to request “assistance enplaning and deplaning” and to “be provided with wheelchair assistance on all aircraft in which I was going to fly so that I could use the aircraft bathroom.” *Aff. of Alice Conway* ¶ 3 (Apr. 11, 1997). Accordingly, the United Airlines aircraft on which Alice Conway traveled from Mexico City to Chicago on August 1, 1994, see Def.’s Statement of Undisputed Material Facts ¶ 5, was potentially covered by this regulation, and the defendant is not entitled to summary judgment.

CONCLUSION

It is therefore **ORDERED** that the recommended decision of the Magistrate Judge is hereby **ADOPTED**, with the exception of the recommendation regarding 14 C.F.R. § 382.21(a)(4)(ii). The defendant’s motion is **GRANTED IN PART** and **DENIED IN PART** as follows: **GRANTED** to the extent that the plaintiff seeks permanent injunctive relief, and otherwise **DENIED**. **SO ORDERED**.

DATED THIS 25TH DAY OF AUGUST, 1997.

D. BROCK HORNBY
UNITED STATES CHIEF DISTRICT JUDGE