DEEP VEIN THROMBOSIS (DVT) CLAIMS AGAINST AIRLINES UNDER DOMESTIC AND WARSAW CONVENTION TRAVEL

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I. INTRODUCTION

This paper will address airline passenger claims for injuries caused by Deep Vein Thrombosis (DVT)[1] allegedly sustained as a result of the effects of air travel. The claimants in domestic cases allege (1) that seating configurations are dangerous and defective so as to create a risk of developing DVT through prolonged and cramped seating, (2) seats on aircraft are defectively designed so as to create a DVT risk, and (3) the airlines have departed from industry standards by negligently failing to warn about DVT risks and how to avoid them. The cases state causes of action sounding in (1) negligence, (2) breach of a common carrier's duty of the highest degree of care, (3) product liability, and (4) breach of warranty.

In Warsaw Convention cases, claimants allege that DVT injuries and the failure to warn constitute an "accident" within the meaning of Article 17 of the Warsaw Convention.[2]

Airlines in domestic cases contend, for purposes of motions to dismiss, that DVT is a naturally occurring condition unrelated to air travel, that claims of defective seating configuration or defectively designed seats are preempted by the Airline Deregulation Act of 1978 (ADA)[3], (the Federal law relating to price, routes and service of an air carrier), and that failure to warn claims are preempted by the Federal Aviation Act of 1958 (FAA)[4] which directs the Administrator of the Federal Aviation to promulgate air safety standards and regulations.[5]

As to Warsaw claims, the airlines argue that even if DVT is a naturally occurring consequence of air travel it does not constitute an "accident" under Article 17. As regards the failure to warn, even if industry standards were violated, the FAA does not require warnings. In addition, the warnings necessary to avoid DVT are inconsistent with other safety warnings. Thus, the failure to warn is not an Article 17 "accident".

II. A BRIEF EXPLANATION OF DVT

DVT occurs when blood pools and coagulates in the deep veins of the leg thereby forming clots (thrombus). This occurs due to reduced blood flow which results from immobilization secondary to major surgery, long car or airplane trips, cancer, heart attacks, stroke, congestive heart failure, certain medications, and a variety of other factors.

The danger occurs when the clots break free from the wall of the veins (they are then called emboli) and travel to other areas of the body. This causes blockages in blood vessels. The most serious consequence is pulmonary embolism, in which the arteries in the lungs are obstructed. The

patient can sustain brain damage due to decreased blood and air flow. In the worst 10-20% of cases the patient will literally suffocate and die. Other organs, such as the heart, are also threatened by the infiltration of emboli.

For further information visit www.nlm.nih.gov/medlineplus/ency/article/00156.htm or caseintake@amfs.com.

III. THE LAW OF DOMESTIC DVT CASES

A. Plaintiff Claims and Defense Arguments

As mentioned above, plaintiffs claim negligence, strict liability, and breach of warranty based on seat design, seating configuration and failure to warn. They rely upon state common law (or perhaps statutory) causes of action relating to common carriers, simple negligence, and breach of warranty (implied warranty of safe travel). Plaintiffs attempt to hold liable the airline for design of the seats even though the airline is not in the business of seat design.[6]

The defense argument is relatively simple: all state court claims are preempted by federal law. This position is really the only realistic way that most state claims can be disposed of in a motion to dismiss or a motion for summary judgment. If the defendant is unsuccessful in arguing preemption, it is highly likely that most judges would let the case go to the jury.

B. Preemption at a Glance

The Supreme Court of the United States has recognized three methods by which Congress can exercise its preemptive power. First, Congress can preempt state law by enacting an "express provision for preemption" in any congressional Act (express preemption). *Crosby v. Nat'l Foreign Trade Council,* 530 US 363, 372 (2000). Next, Congress can impliedly preempt state law if a "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for state to supplement it"(field preemption). *Cipollone v. Liggett Group,Inc.*, 505 US 504, 516 (1992) (internal quotation marks and citations omitted). Accordingly, implied field preemption will be found if the federal regulation of a field is pervasive, if, "under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting a federal law. *Crosby*, 530 US at 373 (alternations in original) (quotations and citations omitted). Finally, even if Congress has not intended to occupy a given field, "state law is naturally preempted to the extent of any conflict with a federal statute" (conflict preemption). *Id.* at 372 (citing *Hines v. Davidowiz,* 312 US 52, 66-67 (1941)). Conflict preemption may be found if it is impossible for a private party to comply with both state and federal law. *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 US 132, 142-43 (1963)).

C. Case Law on Preemption of State DVT Claims

In *Witty v. Delta Airlines, Inc.,* 366 F.3d 380 (5th Cir. 2004), a plaintiff took a mid-continental flight within the United States and subsequently developed DVT. Plaintiff argued improper seating configuration and failure to warn. Defective design was not mentioned. Delta moved to dismiss, arguing all of plaintiff's claims were preempted by federal law. The district court denied Delta's motion and the Fifth Circuit unanimously reversed.

First, the panel held that the plaintiff's defective seating configuration claim was preempted by the Airline Deregulation Act of 1978 (ADA) which expressly preempts all state laws "having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1). The panel stated that the ADA "not only preempts direct regulation by states of [airline] prices, but also preempts indirect regulation relating to prices that have 'the forbidden significant effect' on such prices." *Witty*, 366 F.3d at 383 (emphasis added) (quoting *Morales v. Trans World Airlines, Inc.*, 504 US 374, 385, 388 (1992)). The panel reasoned that exposing Delta to monetary liability for providing inadequate leg room would necessarily require Delta to reconfigure its seating by way of decreasing the number of seats on the aircraft (fewer seats means more leg room). If at 383. Requiring Delta to decrease the number of seats available on the aircraft would in turn cause Delta to increase the prices charged for the remaining seats in order to maintain profit levels. Id. Thus, the "effect" of the state tort law would be an increase in Delta's pricing.

Witty held that plaintiff's claim for defective seating configuration constituted indirect state regulation of Delta that would, according to the *Witty* panel, "inexorably relate to prices charged by [Delta], and thus the claim was expressly preempted by the ADA. *Id.* at 383.

The Fifth Circuit held that the failure to warn claim was subject to implied field preemption by the Federal Aviation Act of 1958 (FAA), 49 U.S.C. § 44701, which affirmatively directs the Administrator of the Federal Aviation Administration to promulgate air safety standards and regulations. *Witty*, 366 F3d at 384. Specifically, the Fifth Circuit focused on the large "number of federal regulations governing the warnings and instructions which must be given to airline passengers." Id. (emphasis added). This would include preflight warnings.

The Fifth Circuit held that Congress intended to occupy the entire field of air safety, and thus "federal regulatory requirements for passenger safety warnings and instructions are exclusive and preempt all state standards and requirements." *Id* at 385. According to the Fifth Circuit, any claim for failure to warn "must be based on a violation of federally mandated warnings." *Id*. (emphasis added). Because the federally mandated warnings do not require air carriers to warn passengers about the risk of DVT or methods of preventing the condition, Delta could not be held liable for failing to give such warnings; any state law to the contrary is impliedly preempted by the FAA. *Id.*

On March 11, 2005 the United States District Court for the Northern District of California decided a joint motion to dismiss filed by all airline defendants in *In Re: Multi District Litigation styled Deep Vein Thrombosis Litigation*, MDL Docket No. 04-1606VRW. Ten domestic cases were decided by United States District Chief Judge Vaughn Walker. In granting the motion Judge Walker followed the *Witty* reasoning as set forth by the Fifth Circuit. The Judge rejected plaintiffs' argument that DVT and indeed all personal injury cases against airlines were not intended to be preempted by the ADA or the FAA. Plaintiffs focused on some language written by Judge O'Connor in *American Airlines v. Wolens,* 513 US 219, 238 (1995). In fact, Judge O'Connor was saying that some cases against airlines are simply a matter of state tort law (e.g. trip and calls, luggage falling from overhead bins, handling of handicapped passengers) and that a case-by-case analysis is necessary.

Plaintiffs also argued that the Ninth Circuit, in *Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259 (9th Cir. 1998) held that all personal injury claims are exempt from ADA preemption. Judge Walker rejected this argument, stating that the Ninth Circuit clearly endorsed a case-by-case analysis. If there is only a "peripheral" relationship between an airlines' actions and "price, routes or service" ADA 49 U.S.C. § 41719(b)(1) then the field is not preempted. Judge Walker held that seating configuration is well within the preempted area. The effect of seating configuration on airline prices is direct and significant. (See also *Morales v. Trans World Airlines, Inc.,* 50 US 374 (1992) which dealt with preemption of a state's attempt to restrict airline advertising).

As regards the failure to warn claim and FAA preemption Judge Walker again followed *Witty*. After citing language from several Supreme Court cases as well as cases from the Ninth, Third, Second, Seventh and Fifth Circuits, Judge Walker concluded that the desire to "create and enforce one unified system of flight rules" militated in favor of finding that the FAA preempts any failure to warn claim in regard to DVT. The Judge referenced pre and in-flight warnings mandated by the FAA and regulations promulgated thereunder. See, e.g. 14 CFR § 121.57(a) and (b); 14 CFR § 25.791 and 14 CFR § 121.585(d).

Judge Walker also pointed out that state law failure to warn suits would lead to non-uniformity; each time a jury found in favor of plaintiff an airline would have to change its warnings. State verdicts may be inconsistent as to content and timing of warnings. There would be 50 different standards of care.

Judge Walker concluded at p. 26:

> Such mass confusion and non-uniformity are exactly what Congress wanted to prevent when it enacted the FAA and placed the power to prescribe pre-flight warnings regulations to the FAA Administrator. Accordingly, in order to achieve the purpose of the FAA, a personal injury claim based upon an airline's failure to warn must be premised on the airline's failure to give a federally mandated warning; state laws requiring supplemental warnings are preempted. It is undisputed that FAA regulations do not require airlines to warn

> passengers about the risk of DVT or methods for preventing this condition. Thus, airline defendants cannot be liable failing to warn non-Warsaw plaintiffs of this alleged risk

Finally, Judge Walker addressed defective seat design, a claim not urged by the plaintiff in *Witty*. Citing several of the cases utilized to support the failure to warn holding, the Court held that claims based upon defective seat design are within the implied preemptive scope of the FAA. The Judge also relied upon several federal regulations governing seat design, seat structure, integrity and strength. (See, e.g. 14 CFR § 25.785, and 23.562. 14 CFR § 25.785 states that all seat designs "must be approved" by the Federal Aviation Administration. The Court found this to be dispositive.

Judge Walker again mentioned the potential for non-uniformity based on conflicting state results.

All motions to dismiss were granted for the airline defendants. Appeals are pending.

IV. THE LAW OF DVT CASES UNDER THE WARSAW CONVENTION

Article 17 of the Warsaw Convention ("Article 17") governs the liability imposed on airlines for injuries which occur to passengers on international flights, including domestic legs thereof. *Air France v. Saks*, 470 U.S. 392, 394 (1985). Article 17 dictates that to pursue a bodily injury action against an airline for injuries which occurred on an international flight, the passenger must demonstrate that an "accident" was the cause of his or her injuries. *Id.* at 396. Article 17 provides in pertinent part:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any operations of embarking or disembarking.

Id. at 397.

Saks, supra, is the leading case on the definition of an accident.

In *Saks*, the Supreme Court reviewed French law to interpret the meaning of an "accident" under Article 17 because the Warsaw Convention was written and based on French law.[7] Through this review, the Court determined that an "accident" is defined as "*an unexpected or unusual event or happening that is external to the passenger*." (Emphasis added.).[8] Further, to qualify as an unexpected or unusual event or external happening, the accident must be completely distinct from "the passenger's [own internal reaction to the usual, normal and expected operation of the aircraft."][9] Thus, the accident actually has to cause the injury rather than the accident being the injury.[10]

Claimants argue that (1) the failure of airlines to properly warn about DVT risks and how to prevent them, (in violation of industry standards) and (2) the failure of the aircraft to have proper seating configurations, as well as the presence of defective seats both of which lead to DVT, constitute an accident under Warsaw.

A. Failure to Warn

In support of these claims, plaintiffs cite *Olympic Airways v. Husain*, 540 U.S. 644 (2004).[11] Plaintiffs argue that an air carrier's failure to act with respect to a passenger's "internal reaction" to normal flight conditions can constitute an "accident" for purposes of Warsaw liability. In *Husain*, the Supreme Court held that an airline's failure to relocate a passenger who was experiencing what turned out to be a fatal adverse reaction to second-smoke in the cabin constituted an "accident" for purposes of the Warsaw Convention. *Id*. at 649. The Court distinguished between the passenger's internal reaction to otherwise-normal cabin conditions on the one hand and affirmative conduct by the flight crew on the other. See, *Id.* at 653. ("We do not doubt that the presence of ambient cigarette smoke in the aircraft's cabin . . .might have been 'normal' at the time of the flight in question. But [the carrier's position] neglects the reality that there are often multiple interrelated factual events that combine to cause any given injury.").

The Court seemed to indicate that a failure on the part of air carrier personnel to conform their conduct to industry standards or the carrier's own policies can, given the proper facts, constitute an "unusual or unexpected" event for purposes of a Warsaw Convention claim:

> [W]e note that the [air carrier] did not challenge in the Court of Appeals the District Court's finding that the flight attendant's conduct . . . was unusual or unexpected in light of the relevant industry standard or [the carrier's] own company policy . . . Consequently, we need not dispositively determine whether the flight attendant's conduct qualified as "unusual or unexpected" under *Saks*, but may assume that it was for purposes of this opinion.

Id. at 652-53 (citations omitted). Thus, plaintiffs argue that a failure on the part of a carrier or its employees to conform to relevant industry standards or to the carrier's own policies *can*, if proven to be "unusual or unexpected," constitute an "accident" for purposes of the Warsaw Convention. The claim is that the failure to warn of DVT is such a departure from industry standards

However, the Fifth Circuit in *Blansett v. Continental Airlines*, 379 F.3d 177 (5th Cir. 2001), has expressly rejected such an allegation. The court in *Blansett* squarely addressed and resolved that the failure to warn of DVT does not constitute an "accident" as a matter of law for purposes of Article 17. *Id.* at *13.

In *Blansett*, the plaintiff was traveling aboard a flight from Houston, Texas to London, England, when he allegedly suffered from DVT which resulted in permanent disability. *Id.* at *2. The plaintiffs filed an action against the airline alleging that the airline's failure to "provide DVT

warnings and instructions was an unreasonable deviation from 'industry standards'" and, thus, constituted an "accident" for purposes of Article 17. *Id.* The airline filed a motion to dismiss based upon Fed. R. Civ. P. 12(b)(6) and the district court found that the failure to warn was an "accident" for purposes of Article 17. *Id.* However, as stated above, the Fifth Circuit concluded otherwise and reversed the district court's decision.

It is important to emphasize that the court in *Blansett* began its analysis by assuming that the airline's failure to provide DVT warnings as part of its pre-flight warnings was a departure from the industry's standards, as required in analyzing a motion to dismiss. *Blansett*, 379 F.3d at *8. In its analysis, the *Blansett* court declined to create a *per se* rule that any departure from an "industry standard" constitutes an "accident." *Blansett*, 379 F.3d at *11. Rather, the court applied the rule of law in *Saks* and determined, as a matter of law, the absence of warnings did not constitute an "accident" under Article 17.

The court also found instructive the case of *Witty v. Delta Airlines*, supra. As stated above in *Witty*, the court held "warnings reasonably required to be made by an airline *are those enumerated by the FAA, and no others*" including "industry standards." *See Blansett*, 379 F.3d at *12, n.6 *citing Witty*, 366 F.3d at 385. Also, the court noted in *Witty*, that requiring airlines to make additional warnings other than those prescribed by the FAA would dilute the warnings already in place. *Id.*

Based upon *Saks* and *Witty*, the Fifth Circuit found that it was *not* unexpected or unusual for the airline to fail to provide warnings regarding DVT as they are not required by the FAA. The court concluded that the absence of warnings did not constitute an "accident" within the meaning of Article 17. Thus, the court held:

> Ultimately, no jury may be permitted to find that Continental's failure to warn of DVT constituted an "accident" under [A]rticle 17. Continental's policy was far from unique in 2001 and was fully in accord with the expectations of the FAA.

Id. at *13.

Thus in *Blansett*, the Fifth Circuit that the failure to warn is *not* an unusual or unexpected event and, thus, does not constitute an "accident."

In addition, courts in Australia and England have also have held that the failure to warn passengers about the risks regarding DVT does not constitute an "accident" within the purview of Article 17. *Saks,* supra, held that the opinions of sister signatories to international treaties are to be given considerable weight.[12]

In the England Court of Appeals decision, *In re DVT and Air Travel Group Litigation*, [2003][13] EWCA Civ. 1005, (July 3, 2003), 55 passengers and/or their representatives brought an action against 21 different international carriers contending, among other things, that the failure to

warn such passengers of DVT constituted an "accident" within the meaning of Article 17. In dismissing the appeal, the judges were in agreement that the absence of warnings regarding DVT did not constitute an "accident" for purposes of Article 17. *See Air Travel Group Litigation* at p.1.

Similarly, the highest state court in Victoria, Australia, decided *Povey v. Civil Aviation Safety Authority*, [2002] VSC 580, BC200207836, (Dec. 20, 2002).[14] In *Povey*, the plaintiff alleged that he developed DVT as a result of a British Airways international flight from Kuala Lumpur, Malaysia to Sydney, Australia. In particular, the plaintiff alleged, *inter alia*, that he was not provided with any information or warnings regarding DVT. The Supreme Court of Victoria found that the absence of warnings as pled in his pleadings, did not cause an "accident" within the meaning of Article 17.

Plaintiffs argue that the Fifth Circuit's interpretation of the relevance of FAA regulations in determining the adequacy of an airline's conduct is not shared by the majority of other Circuits. Compare *In Re: Air Disaster at Lockerbie* (2d Cir. 1994), 37 F.3d 804, 815 ("FAA regulations only establish minimum requirements for air carriers. A jury could conceivably find certain circumstances under which an air carrier had committed wilful misconduct [under the Warsaw Convention] even though it followed FAA regulations to the letter."); *Cleveland v. Piper Aircraft Co.* (10th Cir. 1993), 985 F.2d 1438, 1444-45 (FAA regulations establish only minimum requirements, and do not preempt more stringent standards); *Rodriquez v. American Airlines, Inc.* (D. Puerto Rico 1995), 886 F. Supp. 967,972 and cases cited therein (Federal regulation of air industry does not preempt state law standards or remedies); *Sunbird Air Services, Inc. v. Beech Aircraft Corp.* (D. Kan. 1992), 789 F. Supp. 360, 362-63 ("The regulations promulgated by the FAA are merely minimum safety standards").

The most recent pronouncement on the subject of DVT and Warsaw claims is this writer's case of *Amelia A Baxley v. Delta Air Lines,* United States District Court for the Northern District of Ohio, Eastern Division, Case No. 4:04 CV 1600 (Judge John M. Manos). Judge Manos accepted the *Blansett*, *Rodriquez* and *Witty* analysis and concluded that DVT does not constitute a Warsaw "accident." The Court further rejected theargument that airlines must warn of DVT risk and avoidance, relying on concepts of preemption and inconsistent results.[15] Plaintiff dismissed her appeal, so Judge Manos' ruling granting Delta's motion to dismiss is a final order.

B. Is DVT, Standing Alone, a Warsaw Accident?

With regard to the argument that the development of DVT from defective seats or seating configuration, standing alone, is an "accident", the airlines again cite *Saks*, supra. In *Saks*, the Supreme Court of the United States applied this interpretation of an "accident" and found that a passenger's permanent hearing loss which occurred during her flight was not an accident for purposes of Article 17. *Saks*, 470 U.S. at 406. The passenger in *Saks* alleged that Air France was liable for her injuries when she experienced severe pressure and pain in her ear while in flight to Los

Angeles, California from Paris, France causing her to become deaf in her left ear. *Id.* at 395. The Court concluded that the passenger's hearing loss was not an accident for purposes of Article 17 because her injury was an internal event:

> Liability under Article 17 arises *only* if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger, and not where the injury results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft, in which case it has not been caused by an accident under Article 17.

(Emphasis added.); *Id.* at paragraph two of the syllabus.

Similarly, other courts are in accord with the reasoning in *Saks*. In *Scherer v. Pan Am World Airways, Inc*., 54 A.D.2d 636, (N.Y. App. Div. 1976), a passenger developed thrombophlebitis[16] while traveling on an international flight from Tokyo to California. *Id.* at 637. The court determined that there was no "accident" for purposes of Article 17 because the plaintiff was "merely sitting aboard" an international flight when the condition developed. *Id.* Accordingly, the court found in favor of the airline, concluding that there was no "accident" as a matter of law. *Id.*

Plaintiffs may also argue that *Husain v. Olympic Airways*, 124 S. Ct. 1221 (2004) is applicable. However, the Fifth Circuit and Ninth Circuit have distinguished *Husain* from the issues in DVT cases. As mentioned above, in *Husain*, an airline was held liable under Article 17 when a passenger died as a result of an asthma attack after a flight attendant refused specific requests on three occasions to move the sick passenger from his seat which was close to the smoking section. *Husain*, 124 S.Ct. at 1226-1230. The Court in *Husain* determined that the airline was liable for the death, finding that an "accident" had occurred for purposes of Article 17. *Id.*

The Fifth Circuit in *Blansett, supra,* noted that there were instances in which some kinds of inaction could constitute an "accident" for purposes of Article 17. *See Blansett*, *supra*, 379 F.3d at *6. However, the Fifth Circuit pointed out that "[t]he situation in the instant case *differs markedly* from that in *Husain*" because no requests were made of the airline and its staff by the plaintiff to combat his development of DVT. (Emphasis added.); *Id*. at *5.

The Ninth Circuit also distinguished *Husain* in *Rodriguez v. Ansett Australia Ltd.*, No. 02-56473, 2004 U.S. App. LEXIS 18735 at *15 (9th Cir. Sept. 3, 2004).[17] In *Rodriguez*, the plaintiff traveled aboard an Air New Zealand flight from Los Angeles, California to Melbourne, Australia with a layover in Auckland, New Zealand.[18] During the twelve-hour flight, the plaintiff did not leave her seat and thereafter developed DVT. *Id.* In addition to finding that the development of DVT was not an "accident" under Article 17, the Ninth Circuit found that the *Husain* decision had

no application to the situation in *Rodriguez*.[19] The Ninth Circuit determined that the accident in *Husain was not based* upon the plaintiff having an asthma attack but rather the *external event* of the flight attendant repeatedly refusing to reseat a medically distressed passenger. *Id.*

> . . . *Husain* involved a response by the flight crew to the passenger's medical condition. By contrast, in the instant case, there was no response by the flight crew that may or may not have violated industry standards. Rather, the only event was Rodriguez's development of the DVT. *Consequently, there was no event external to the passenger, let alone an unusual or unexpected event. Under Saks, therefore, there was no accident for purposes of Article 17.*

(Emphasis added.); *Id.*

V. AIRLINES WHICH PROVIDE WARNINGS MAY BE LIABLE UNDER THE "ASSUMED DUTY" DOCTRINE

Airlines my be successful in arguing that a failure to warn of DVT risks and how to avoid them are not an "accident" under Warsaw and that they are preempted by FAA regulations in domestic cases. But if an airline affirmatively warns of DVT risks and DVT avoidance, such as in in-flight magazines,[20] does it subject itself to liability under the assumed duty doctrine?[21] This legal concept states that even if a defendant owes no duty to the plaintiff, if the defendant, by affirmative conduct assumes a duty, then it must be discharged with reasonable care.[22] No case has been found which addresses this issue. The anticipated argument by the plaintiff would state the defendant has lost its protection by assuming a duty it did not otherwise have. It remains to be seen if courts will accept such an argument.

VI. CONCLUSION

The law relating to DVT claims, whether based on domestic or international travel, is quite favorable to defendant airlines. Practitioners in this field should remain aware of new case filings as well as further activity on pending cases. As with so many legal concepts, the prevailing winds of change may create new claimant-friendly law.[23]

ENDNOTES

1. Deep vein thrombosis "involves the clotting of blood in the extremities and creates a threat of death or disability if a clot migrates to the lungs or other vital organs." See, *Blansett v. Continental Airlines,* 379 F.3d 177 at *1 (5th Cir. 2004).

2. The Warsaw Convention is formally cited as *the Convention for the Unification of Certain Rules Relating to International Transportation by Air*, Oct. 12, 1049, 49 Stat. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 40105, (collectively "the Warsaw Convention").

3. 49 U.S.C. § 41719(b)(1).

4. 49 U.S.C. § 44701.

5. The Federal Aviation Administration's safety regulations are codified in Title 14 of the Code of Federal Regulations.

6. Many states, such as Ohio, limit liability for defective design to manufacturers, as opposed to users of a product. See, e.g. ORC §§ 2307.71(I) and 2307.75. Check the law of your state or province.

7. 470 U.S. at 400.

8. Id. at 405.

9. Id. at 406.

10. Id. at 398.

11. For a thorough treatment of the case, please see Professor Paul S. Dempsey's article: "*Air Carrier Liability For The Refusal Of A Flight Attendant To Give A Passenger A Better Seat*." The Transportation Lawyer, August 2004, Volume 6 Number 1, pp. 60-64.

12. 470 U.S. at 474.

13. EWCA Civ. 1005, (July 3, 2003).

14. (2002) U.S.C. 580, BC 200207836 (Dec. 20, 2002).

15. A copy of the Court's Opinion is attached as Exhibit "1".

16. A clot of blood forming in a vessel. When a clot breaks loose, it becomes an embolus.

17. Cert. denied. 125 S.Ct. 1665 (March 21, 2005).

18. Id. at *2.

19. Id. at *2.

20. See example attached hereto as Exhibit *2.

21. Check your various state and provincial laws for such a doctrine.

22. See, e.g. *Northwest Airlines, Inc. v. Glenn L. Martin Co.*, 224 F.2d 120 (6th Cir. 1955); *Johnson v. BP Exploration & Oil, Inc.* (1996) 115 Ohio App.3d 266.

23. I acknowledge the assistance of my associate Anna Fister as well as my colleagues Richard G. Grotch, Esq. of Coddington, Hicks & Danforth, Redwood City, California and William F. Ranieri, Sr. Vice President, United States Aviation Underwriters, New York, New York.