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NY State Appellate Court Sides with Airlines, Dismisses Tarmac Delay-Related Claims

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The Second Department in Biscone v. JetBlue Airways Corporation *recently dismissed airline passengers' tort claims against an airline based on the failure to provide food, water and facilities during an 11-hour tarmac delay, on the basis that federal law preempts most private causes of action relating to the provision of air carrier services. While airlines still may face enforcement actions and incur civil penalties, the Second Department's decision signals that New York state courts are following the majority of federal courts that have broadly interpreted the degree to which federal aviation laws preempt state law claims. Given that most delay-related private lawsuits are multimillion-dollar class actions, this decision is a positive development for domestic and international air carriers that operate flights in the United States.*

This decision clarifies the scope of airlines' potential civil liability to passengers for the inconveniences associated with lengthy tarmac delays.

Background: 11-Hour Tarmac Delay Triggers Putative Class Action Claim

On December 26, 2012, a New York state appellate court unanimously upheld the dismissal of a $4.8 million putative class action brought on behalf of passengers stranded on the tarmac of John F. Kennedy International Airport for 11 hours in February 2007 due to inclement weather.[1] The putative class, which was not certified prior to dismissal, brought common law claims against JetBlue Airways Corporation ("JetBlue") for false imprisonment, intentional infliction of emotional distress, fraud and deceit, negligence, and breach of contract based on the alleged failure of JetBlue employees to provide food, water, clean air, and toilets during the delay, as well as the employees' allegedly false and intimidating statements about the anticipated departure time and the availability of alternate flights. The named plaintiff alleged that she

[1] *Biscone v. JetBlue Airways Corp.*, No. 2010-11745, 2012 WL 6684688 (N.Y. App. Div. Dec. 26, 2012).

had suffered emotional distress and physical injury as a result of her confinement, in addition to lost business opportunities.

JetBlue moved to dismiss on the basis that the Airline Deregulation Act ("ADA") and the Federal Aviation Act ("FAA"), respectively, expressly and impliedly preempted the state law claims of the putative class. The ADA expressly bars states from enacting laws "related to a price, route, or service of an air carrier that may provide air transportation."[2] JetBlue argued that the supply of food, water, and other necessities during extended tarmac delays constituted a "service" within the meaning of the statute, and thus that the claims were preempted.

The Decision: The Appellate Division Finds Most of the Claims Preempted by Federal Law

In granting JetBlue's motion, the Second Department applied a three-part test borrowed from federal court. The test, first articulated by U.S. Supreme Court Justice Sonia Sotomayor during her tenure in the Southern District of New York, asks (1) whether the conduct giving rise to the claim involves an airline service; (2) if it does, whether the claim "affects the airline service directly or tenuously, remotely, or peripherally"; and (3) if the effect is direct, whether "the underlying tortious conduct was reasonably necessary to the provision of the service."[3]

The court concluded that the provision of "food, water, clean air, and toilet facilities, as well as the ability to deplane after a prolonged period on the tarmac," directly related to the service of an aircraft, and that JetBlue's alleged misconduct – failing to supply provisions, making false statements about the anticipated departure time, and refusing to deplane passengers – was reasonably necessary to provide that service. Accordingly, the ADA expressly preempted the claims for fraud and deceit, false imprisonment, and intentional infliction of emotional distress.

Not precluded, however, were the claims for negligence and breach of contract. The court concluded that Congress did not intend to preempt tort claims based on physical injury, and thus the named plaintiff was allowed to proceed with her negligence claim, which was premised on shoulder pain caused by prolonged confinement in her seat.[4] The court also affirmed without discussion the lower court's decision to allow the breach of contract claim, which was based on JetBlue's alleged failure to refund ticket prices, to proceed.[5]

The Legal Landscape: Most Passenger Delay Claims Have Failed in Both New York State and Federal Courts

The Second Department's view that the ADA precludes passengers from bringing private causes of action related to extended tarmac delays is consistent with Second Circuit authority finding that the ADA precludes the New York state legislature from enacting laws requiring airlines to provide food, water and restrooms during ground delays.[6] In *Air Transport Association of America, Inc. v. Cuomo*, the primary airline industry trade organization challenged the New York State Passenger Bill of Rights, which required airlines to supply food, water, electricity, and restrooms for ground delays exceeding three hours. The Second Circuit had "little difficulty" concluding that the Bill of Rights related to air carrier services and was thus expressly preempted by the ADA. Other New York federal courts have gone even farther and found

[2] Airline Deregulation Act, 49 U.S.C. § 41713(b)(1) (1978).

[3] *Biscone*, 2012 WL 6684688, at *10 (citing *Rombom v. United Air Lines, Inc.*, 867 F. Supp. 214, 221 (S.D.N.Y. 1994)).

[4] *Biscone*, 2012 WL 6684688, at *12.

[5] The Supreme Court had reasoned that the ADA's preemption provision did not apply to breach of contract claims "because contract law concerns private agreements between private individuals," and not state action. Order of October 12, 2010, *Biscone v. JetBlue Airways Corp*., No. 700140/2010, at 6 (N.Y. Sup. Ct.) (internal citation omitted).

[6] *Air Transp. Assoc. of Am., Inc. v. Cuomo*, 520 F.3d 218 (2nd Cir. 2008).

that not only are delay-related claims expressly preempted by the ADA, but such claims are also impliedly preempted by the comprehensive air safety regulatory regime enacted under the Federal Aviation Act.[7]

Tarmac delay-related claims thus appear to face a dim future in both New York state and federal court. The implications of *Biscone*, however, extend beyond claims based on the specific conduct at issue in that case – the supply of food and water during a lengthy tarmac delay – to passengers' claims based on a wide range of airline misconduct. In dismissing the claims against JetBlue, the Second Department broadly interpreted the term "service" in the ADA as "extend[ing] beyond prices, schedules, origins, and destinations" to include a wide range of conduct.[8] The majority of federal circuit courts, including the Second Circuit, endorse a similar view and have held that "service" under the ADA includes anything related "to the provision or anticipated provision of labor from the airline to its passengers and encompasses matters such as boarding procedures, baggage handling, and food and drink – matters incidental to and distinct from the actual transportation of passengers."[9]

Not Off the Hook: A Narrow Band of Delay Claims Survive

Even the Second Department's broad interpretation of the ADA's preemption clause, however, is not without limit. Claims based on physical injury, as opposed to emotional or pecuniary loss, are not preempted, which is why the *Biscone* plaintiff's negligence claim survived dismissal. Claims based on "outrageous conduct" – for example, a flight attendant who uses excessive force against an unruly passenger – also survive, on the theory that the conduct is too far removed from the provision of the service to be preempted.[10] And, of course, certain contract-related claims will survive, such as the *Biscone* plaintiff's claim that JetBlue had violated its contractual obligation to refund canceled ticket purchases.[11]

Moreover, although post-*Biscone* airline passengers will certainly face challenges in New York state courts, airlines are not necessarily off the hook when it comes to lengthy tarmac delays. Airlines will still be subject to enforcement actions by the U.S. Department of Transportation ("DOT"), and face potentially stiff civil penalties. In 2012, DOT levied nearly $400,000 in fines against three foreign air carriers for violations of its tarmac delay rules.[12] For example, Pakistan International Airlines Corporation was fined $150,000 for a tarmac delay that lasted less than five hours after the flight was diverted to an alternate airport due to inclement weather.[13] Pakistan Airlines' failure to provide passengers an opportunity to disembark within four hours was complicated not only by bad weather at the diversion airport, but also by immigration and customs-related considerations. Similarly, DOT fined Air India Limited $80,000 simply for failing to post its tarmac delay contingency plan to its website.[14]

[7] *Joseph v. JetBlue Airways Corp.*, No. 5:11-CV-1387 TJM/ATB, 2012 WL 1204070 (N.D.N.Y. Apr. 11, 2012) (dismissing as preempted plaintiffs' claims against an airline for unfair and deceptive business practices, breach of the implied covenant of good faith, false imprisonment, and negligence, stemming from lengthy tarmac delay in October 2011).

[8] *Biscone*, 2012 WL 6684688, at *9 (quoting Cuomo, 520 F.3d at 223).

[9] *Biscone*, 2012 WL 6684688, at *9; see *also Hodges v. Delta Airlines, Inc.,* 44 F.3d 334, 336 (5th Cir. 1995); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423, 1433 (7th Cir. 1996); *Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998); *Branche v. Airtran Airways, Inc.,* 342 F.3d 1248, 1256–57 (11th Cir. 2003). But see *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.,* 164 F.3d 186, 193–95 (3rd Cir. 1998); *Charas v. Trans World Airlines, Inc.,* 160 F.3d 1259, 1261 (9th Cir. 1999).

[10] See *Biscone*, 2012 WL 6684688, at *10; see *also Rombom*, 867 F. Supp. at 222–23.

[11] Contract claims that relate to the provision of services during delays – particularly when the claim is premised on an implied as opposed to express covenant in the contract – may be seen as an attempt to do an end run around the preemption clause and may not fare well, however.

[12] Under DOT's tarmac delay regime, foreign carriers, among other things, (i) may not allow an aircraft to remain on a U.S. airport tarmac for more than four hours without giving passengers the opportunity to deplane; (ii) must submit monthly reports detailing all tarmac delays lasting three hours or more; and (iii) must adopt and make publicly available contingency plans addressing carriers' procedures for dealing with lengthy tarmac delays. See 14 CFR Parts 244 and 259.

[13] Order 2012-9-21, Docket OST-2012-0002 (Sept. 19, 2012).

[14] Order 2012-5-4, Docket OST-2012-0002 (May 3, 2012).

Biscone also raises a forum-related issue of which international air carriers should take particular note. Early in the proceedings, JetBlue attempted to remove the matter to federal court on the ground that the complaint alleged claims under the Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention"), over which the federal courts have original jurisdiction. A district court in the Eastern District of New York disagreed on the basis that the named plaintiff was a domestic traveler and thus did not have a claim under the Montreal Convention. While the Court acknowledged that other class members might be international travelers with claims under the Convention, the Court found that it could not consider those claims in assessing subject-matter jurisdiction because the class had not yet been certified. International airlines should thus be prepared to find themselves in New York state court when defending against pre-certification class actions brought by domestic travelers.

One More Step: Motion for Leave to Appeal Is Pending

With *Biscone*, the New York state court system has weighed in on an issue that has been heavily litigated in the federal courts, as well as at the U.S. Supreme Court: what is the meaning of "service" in the ADA preemption clause? The Second Department has sided with the majority of federal circuits in concluding that the term "service" should be broadly interpreted as relating to any type of labor provided by an airline to its passengers, including offering refreshments during a tarmac delay. While a broad interpretation of "service" limits the avenues available for passenger claims, there is also a silver lining for passengers in the *Biscone* decision: if delay claims were not preempted, it could cause airlines unnecessarily to cancel flights in order to limit the risk of class action claims. A motion for leave to appeal the Second Department's decision is currently pending before the New York Court of Appeals. If New York's highest state court decides to hear the appeal, the scope of airlines' liability for delay-related private causes of action may again be in question, but until that time, one thing is clear: airline passengers face an uphill battle in state courts with respect to claims based on airlines' conduct during lengthy tarmac-related delays.

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