

***MAYER, BROWN, ROWE & MAW'S
SUPREME COURT DOCKET REPORT
OCTOBER TERM, 2002 – NUMBER 13***

Today the Supreme Court granted certiorari in one case of potential interest to the business community. Amicus briefs in support of the petitioner are due on Friday, July 11, 2003, and amicus briefs in support of the respondents are due on Friday, August 15, 2003. Any questions about this case should be directed to Miriam Nemetz (202-263-3253) or Robert Bronston (202-263-3244) in our Washington office.

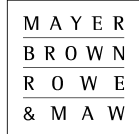
Warsaw Convention — Air Carrier's Liability for Aggravation of Passenger's Pre-existing Medical Condition. The Supreme Court granted certiorari in *Olympic Airways v. Husain*, No. 02-1348, to determine whether conduct that aggravates an aircraft passenger's pre-existing medical condition during the course of a normal flight constitutes an "accident" under Article 17 of the Warsaw Convention, subjecting the air carrier to liability for the passenger's subsequent injury or death.

Dr. Abid M. Hanson, his wife, Rubina Husain, and three children traveled from Athens to New York on Olympic Airways in 1998. Because Hanson was asthmatic, his family requested seats in the non-smoking section. Hanson and his family were seated in a non-smoking row only three rows ahead of the smoking section. Before and during the flight, Husain approached an Olympic Airways flight attendant and requested a change in seats for health reasons; she responded that the flight was "totally full" and refused to help Hanson find another seat. Hanson experienced breathing problems as smoke from the smoking section migrated to his row during the flight. Despite the efforts of an allergist who was traveling with Hanson and his family, Hanson died.

Husain, her children, and Hanson's estate brought a wrongful death suit against Olympic Airways under Article 17 of the Warsaw Convention, which governs an air carrier's liability for harm to international air travelers. Article 17 provides that the carrier is liable for death or injury to a passenger caused by an "accident" on board the aircraft. In *Air France v. Saks*, 470 U.S. 392 (1985), the Supreme Court defined "accident" as "an unexpected or unusual event or happening that is external to the passenger," *id.* at 405, and further explained that an injury is not the result of an "accident" if it "indisputably results from the passenger's own internal reaction to the usual, normal, and expected operation of the aircraft." *Id.* at 406. After a bench trial, the district court ruled for the plaintiffs, finding that the flight attendant's "failure to respond appropriately to Ms. Husain's requests and her failure to comply with the applicable standards of care were both 'unexpected' and 'unusual'" and thus constituted an "accident" under Article 17. 116 F. Supp. 2d 1121, 1135 (N.D. Cal. 2000).

The Ninth Circuit affirmed. 316 F.3d 829 (2002). The court of appeals observed that both the Third Circuit in *Abramson v. Japan Airlines Co.*, 739 F.2d 130 (1984), and the Eleventh

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Circuit in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515 (1997), concluded that aggravation of a passenger's pre-existing injury during a routine flight did not constitute an "accident" subjecting the carrier to liability. 316 F.3d at 836-837. Distinguishing those cases on the ground that the flight attendant knew of the immediate risk to Hanson yet failed to act, the court of appeals ruled that "the failure to act in the face of a known, serious risk satisfies the meaning of 'accident' within Article 17 so long as reasonable alternatives exist that would substantially minimize the risk and implementing these alternatives would not unreasonably interfere with the normal, expected operation of the airplane." *Id.* at 837.

This case is of obvious interest to all airlines that are subject to the Warsaw Convention, particularly in light of recent increases in health-related passenger litigation.

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