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Potential COVID-19 Liability Facing Air Carriers

The aviation industry is facing a myriad of issues as a result of the current COVID-19 pandemic, including potential air carrier liability for claims by passengers and others under a variety of scenarios and pursuant to applicable standards, laws, and treaties. Air carriers must take precautionary steps to understand their potential liability and be prepared to defend their response to protect passenger health and safety.

One main concern for air carriers is the potential liability if a passenger is exposed to COVID-19 on an aircraft, or even fears exposure. Understanding this issue and others will involve an analysis under a complex scheme of federal, state, and international laws, regulations, guidelines, and treaties. Claims could arise from many different scenarios, including, by way of example, the following:

- failure to warn passengers of the risk of contracting COVID-19 during a flight;
- failure to deny boarding of a passenger who exhibits COVID-19 symptoms, or to check passengers for COVID-19 symptoms prior to allowing boarding;
- failure to track down, contact, and notify fellow passengers after a passenger on a flight is diagnosed with COVID-19;
- failure to reasonably address an infected passenger situation during a flight, by medical assistance, isolating the passenger, or otherwise;
- failure to properly clean an aircraft following confirmed COVID-19 transport; and
- failure to have an adequate cabin ventilation system.

Generally, a negligence standard is applied to airlines. The touchstone of a negligence claim is reasonableness. Therefore, as an example, for passengers asserting claims against airlines for contracting COVID-19, or even fear of infection due to exposure to others infected with the virus, airline liability will presumably depend on an analysis of whether the airline knew or should have known that a passenger or crew member posed a health risk; whether the airline took reasonable steps to protect passenger health and safety; and/or whether the airline's response was reasonable once on notice of the risk. Playing into this analysis is the fact that there is a heightened duty of care for air carriers either under state or federal law. *See e.g.* Cal. Civ. Code Section 2100; *Griffith v. United Air Lines, Inc.,*

203 A.2d 796, 799 (Pa. 1964). *See also* the general "catch all" federal standard of care, 14 C.F.R. Section 91.13(a) ("No person may operate an aircraft in a careless of reckless manner so as to endanger the life or property of another."). Further, certain circumstances result in "strict liability" for air carriers, such as pursuant to the Montreal Convention. This client alert will review the various standards, laws, and treaties that will play a key role as the COVID-19 pandemic unfolds with respect to potential air carrier liability.

APPLICABLE LAWS/TREATIES/STANDARDS

Montreal Convention (the Successor Treaty to the Warsaw Convention)

The Montreal Convention (formally, Convention for Unification of Certain Rules for International Carriage by Air 1999) is a multilateral treaty adopted by a meeting of International Civil Aviation Organization ("ICAO") member states in 1999. Its goal is to establish uniform rules applicable to international carriage of passengers, baggage, and cargo. The treaty governs international air carrier liability for member countries, and limits air carrier liability for a passenger's "death or bodily injury" if there is an "accident" that "caused the death or injury" to a passenger, when the death or injury took place on board the aircraft, or in the course of any of the operations of embarking or disembarking. *See* Article 17(1). When applicable, the Convention limits air carrier liability. As of December 2019, the new limit of liability for passenger bodily injury/death claims is 128,821 SDRs (as of December 31, 2019, one SDR = 1.38 USD).

One key requirement for the Convention to apply is that there be an "accident"—the definition of which involves a question of whether the injury or death was 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." *See Air France v. Saks,* 470 U.S. 392 (1985); *DeMarines v. KLM Royal Dutch Airlines,* 580 F.2d 1193, 1197-98 (3d Cir. 1978) ("Absent testimony indicating that the plane's cabin pressure change was the result of some 'unusual or unexpected happening,' we have grave doubts that a finding that an accident occurred in this case is legally supportable."); *Sprayregen v. Am. Airlines, Inc.,* 570 F.Supp. 16 (S.D.N.Y. 1983) (airline had no duty to warn passengers of the danger of flying with a head cold); *Marshall v. Western Air Lines, Inc.,* 813 P.2d 1269 (Wash. Ct. App. 1991) (court held that even if the airline had a duty to warn its passengers of the possibility of ear injury, there was no evidence that a warning in advance of the flight would have prevented the plaintiff's injury). An interesting question then arises as to whether COVID-19 scenarios involve an "accident" (as opposed to something internal to the passenger such as a heart attack or asthma attack, which have been found not to be an "accident" under the Convention), or if the circumstances are even "unusual or unexpected" given the current pandemic.

Another issue is that the Convention has generally been held to ***not*** allow a passenger to recover for purely emotional distress/injury—*i.e.,* emotional distress/injury that is not caused by or associated with a physical injury. *See Eastern Airlines, Inc. v. Floyd,* 499 U.S. 530 (1991). Courts have generally held that recovery for mental injuries is only permitted if they are the direct result of bodily injuries sustained during the accident. *See Ehrlich v. American Airlines, Inc.,* 360 F.3d 366, 400 (2d Cir. 2004) ("[A] carrier may be held liable under Article 17 for mental injuries only if they are caused by bodily injuries."); *Bassam v. American Airlines, Inc.,* 287 F. App'x 309, 317 (5th Cir. 2008) ("As directed by the Montreal Convention, in looking to existing judicial precedent, courts have held that emotional injuries are not recoverable under Article 17 of the Montreal Convention or Warsaw Convention unless they were caused by physical injuries.").

However, in a problematic case, the Sixth Circuit recently addressed this topic in *Doe v. Etihad Airways,* P.J.S.C., 870 F.3d 406 (6th Cir. 2017). In *Doe,* the passenger on an international flight pricked her finger with a hypodermic needle that was in the seatback pocket; she sought to recover damages for the mental anguish and emotional distress caused by her fear of exposure to various diseases, including HIV, from the needle. *Id.* at 409. The district court granted partial summary judgment in favor of the airline stating that Doe's damages "were *not* caused by Doe's *bodily injury* (the small hole in her finger) but by the nature of the instrumentality of that injury (the needle)." *Id.* (emphasis in original). On appeal, the Sixth Circuit opined that "[t]he plain text of the Montreal Convention allows Doe to recover all her 'damage sustained' from the

incident, which includes damages for both physical injury and accompanying emotional or mental harm." *Id.* The court interpreted the Convention's language in Article 17 of "in case of" not as "caused by," but rather to mean "if there is" or "in the event of." *Id.* at 413. This textual interpretation leads to the conclusion that if an accident takes place, mental anguish is recoverable, "so long as it results from an accident that also caused bodily injury, even though the mental anguish might not flow from such bodily injury." *Id.* at 417. This conclusion opens the door for expanded air carrier liability as a result of what is interpreted to be an "accident" under some possible COVID-19 scenarios.

However, the Convention does allow for some air carrier defenses that may be relevant to a COVID-19 claim, including:

- **Comparative Negligence:** *See* Article 20. This defense may come into play if the air carrier proves that the injury or death was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation.
- **Lack of Negligence:** *See* Article 21. The damage causing death or injury to passengers was "not due to the negligence or other wrongful act or omission of the carrier or its servants or agents." *See* Article 21.
- **Third-Party Fault:** *See* Article 22(2). The damage was solely due to the negligence or other wrongful act or omission of a third party." This defense also could easily come into play if a passenger's COVID-19 virus-related injury or death results from another infected passenger's negligence/fault.

The Chicago Convention – Convention of International Civil Aviation, 7 December 1944, 61 Stat. 1180, 15 U.N.T.S. 295 (Dec. 7, 1944), Art. 14.

The Chicago Convention established ICAO, which oversees international air travel. This treaty regulates foreign air carrier operations in U.S. airspace, and incorporates and requires such foreign air carriers to comply with ICAO standards. The Chicago Convention has nineteen Annexes that have standards and recommended practices ("SARPs") monitored by ICAO. Certain parts of the Annexes require its member states to put measures in place to prevent the spread of communicable diseases by air transportation. *See id.* at Annex 9, 14, 15.

Annex 9, titled "Facilitation," provides a frame of reference for planners and managers of airport and airline operations, describing obligations for the industry. Among other scenarios, Annex 9 specifies the methods and procedures for carrying out airline operations when faced with a communicable disease. Annex 14 addresses the information that must be provided by an airport with respect to facilities, airspace, lighting, and safety. Annex 14 sets forth precisely what information is to be provided, how it is to be determined, how it is to be reported, and to whom it is to be reported. Annex 15 ensures the flow of information necessary for the safety, regularity and efficiency of international air navigation.

WHAT ORGANIZATIONS HAVE OR ARE PROMULGATING REGULATIONS/GUIDELINES?

A few organizations are at the forefront of efforts to contain the spread of COVID-19 through air transportation.

Center for Disease Control and Prevention ("CDC")

The CDC is a federal agency under the Department of Health and Human Services. Its main goal is to protect the public health through disease control and prevention, most critically regarding infectious diseases, such as COVID-19. The CDC has issued guidelines for airlines regarding potentially infected passengers (who potentially must be reported to the CDC), including passengers who exhibit certain specified symptoms. These reporting requirements raise certain privacy issues, as addressed below.

World Health Organization ("WHO")

WHO is a United Nations agency playing a critical role in efforts to manage and contain the COVID-19 outbreak. In 2007, WHO put in place international health regulations ("IHR") aimed at coordinating detection, response, and investigation of contagious diseases, such as COVID-19. The IHRs also include procedures addressing public health emergencies such as COVID-19.

International Civil Aviation Organization

ICAO functions in a coordinating and facilitating role in terms of gathering aviation-related information from organizations such as the CDC and the International Air Transportation Association ("IATA"), and disseminating that information to its member states. Member states are also encouraged to adhere to WHO recommendations and

guidance. ICAO also puts in place and administers SARPs, which are technical specifications adopted by ICAO with which member states are to comply. SARPs are contained in Annexes to the Chicago Convention, and include mandatory preventive measures regarding the spread of communicable diseases by air transportation. *See* Chicago Convention, Article 14. Specifically, Article 14 of the Chicago Convention obliges Contracting States "to take effective measures to prevent the spread by means of air navigation of cholera, typhus (epidemic), smallpox, yellow fever, plague, and such other communicable diseases as the Contracting States shall from time to time decide to designate."

Chapter 8 of Annex 9 to the Chicago Convention deals with "Facilitation Provisions Covering Specific Subjects." Included are SARPs related to dealing with communicable diseases. In general, Standard 8.12 establishes that "Contracting States shall comply with the pertinent provisions of the *International Health Regulations* (2005) of the World Health Organization." More specifically, Standard 8.16 requires that "[a] Contracting State [ ] shall establish a national aviation plan in preparation for an outbreak on a communicable disease posing a public health risk or public health emergency of international concern" (see Guidelines below). Those standards establish obligations for the Contracting States rather than the airline. However, Standard 8.15 requires that "[t]he pilot-in-command of an aircraft shall ensure that a suspected communicable disease is reported promptly to air traffic control, in order to facilitate provision for the presence of any special medical personnel and equipment necessary for the management of public health risks on arrival." The Standard notes that a communicable disease can be suspected if the person has a temperature of 38-Celsius/100-Fahrenheit or greater; or suffers from certain signs or symptoms such as appearing obviously unwell, persistent coughing, impaired breathing, persistent diarrhea, persistent vomiting, skin rash, bruising, or bleeding without previous injury, or confusion of recent onset.

There is also a "tracing" component of Standard 8.15.1, which states, "When a public health threat has been identified, and when the public health authorities of a Contracting State require information concerning passengers' and/or crews' travel itineraries or contact information for the purposes of tracing persons who may have been exposed to a communicable disease, that Contracting State should accept the "Public Health Passenger Locator Form" reproduced in Appendix 13 as the sole document for this purpose. This implicates passenger privacy issues (see below).

In addition to the SARPs, the ICAO has published "Guidelines for States Concerning the Management of Communicable Disease Posing a Serious Public Health Risk." The Guidelines include direction on airport closures and flight restrictions, both which should not be considered except in the most exceptional of circumstances. In addition, the Guidelines provide instruction on Airline Preparedness; however, the Guidelines note that "[i]t is not the role of airline staff or handling agents to have prime responsibility for screening and managing travelers who may have a communicable disease: this is usually a public health responsibility[.]" The airlines should (1) establish general guidelines for passenger agents who may be faced with a suspected case of communicable disease, relevant to airline operations, at the airport; and (2) cooperate with airport and public health authorities on logistics, *e.g.,* dealing with a sick traveler.

In addition, the ICAO Guidelines also address air carrier in-flight preparedness for illness by establishing: (1) a system enabling cabin crew to identify travelers suspected of having a communicable disease; (2) a system of managing travelers who are suspected of having a communicable disease; and (3) procedures for informing air traffic control that a case of a communicable disease is on board, so that the public health authority at the destination can be advised appropriated in a timely manner (ICAO Annex 9, 8.16, and Appendix 1). Finally, the ICAO Guidelines recommend policies related to aircraft maintenance (removal of re-circulated air filters, venting of vacuum waste tanks, and removing bird debris); aircraft cleaning (appropriate protective equipment, surfaces to be cleaned, cleaning agents/disinfectants, and disposal); cargo and baggage handling (handlers should wash their hands frequently and co-operate with public health authorities); and that air carriers should establish methods to continue operating with greatly reduced staff numbers.

U.S. LAWS AND REGULATIONS

Parts 70 and 71 of the Code of Federal Regulations

These sections of the U.S. Code address control of communicable disease, with monetary sanctions for non-compliance. The aim of these regulations is to control the spread of communicable diseases from foreign countries to the United States, mainly via reporting requirements: *i.e.,* air carriers must report illnesses taking place during domestic flights and during international flights before arrival in the United States Under 42 Code of Federal Regulations parts 70 and 71, the federal government has the power to quarantine to prevent the spread of communicable diseases. Specifically under Executive Order 13674, signed by President Obama in 2014, the qualifying diseases was expanded using a broader formulation, including "severe acute respiratory syndromes," which would certainly cover COVID-19.

Specific to airlines, §70.11 requires that the "pilot in command of an aircraft operated by an airline who is conducting a commercial passenger flight in interstate traffic under a regular schedule shall report as soon as practicable to the Director the occurrence onboard of any deaths or the presence of ill persons among passengers or crew and take such measures as the Director may direct to prevent the potential spread of the communicable disease, provided that such measures do not affect the airworthiness of the aircraft or the safety of flight operations." *See* 42 C.F.R. §70.11(a). In addition, §71.21 requires, "[t]he commander of an aircraft destined for a U.S. airport shall report immediately to the quarantine station at or nearest the airport at which the aircraft will arrive, the occurrence, on board, of any death or ill person among passengers or crew." §71.21(b).

Violations of these reporting requirements result in harsh financial penalties. Individuals who fail to report "are subject to a fine of no more than $100,000 if the violation does not result in a death or one year in jail, or both, or a fine of no more than $250,000 if the violation results in a death or one year in jail, or both, or as otherwise provided by law." §70.18(a). Meanwhile, air carriers can be subject to similar sanctions for failing to report, including "a fine of no more than $200,000 per event if the violation does not result in a death or $500,000 per event if the violation results in a death or as otherwise provided by law." §70.18(b).

14 C.F.R. Section 129.5

This section of the U.S. Code requires foreign air carriers operating in the United States and foreign air carriers operating U.S.-registered aircraft solely outside the United States to comply with certain Chicago Convention Annexes.

Air Carrier Access Act ("ACAA")

The ACAA prohibits discrimination against handicapped individuals in providing air transportation by an air carrier in the U.S. *See* 49 U.S.C.A. Section 41705(a) (2003). With respect to refusing air transportation to a passenger on the basis that a passenger has a communicable disease or other medical condition, 14 C.F.R. Section 382.21(a) provides:

1. You must not do any of the following things on the basis that a passenger has a communicable disease or infection, unless you determine that the passenger's condition poses a direct threat:
   1) Refuse to provide transportation to the passenger;
   2) Delay the passenger's transportation (*e.g.,* require the passenger to take a later flight);
   3) Impose on the passenger any condition, restriction, or requirement not imposed on other passengers; or
   4) Require the passenger to provide a medical certificate.

This FAR states that in assessing whether the passenger's condition poses a direct threat, the air carrier must apply the provisions of Section 382.19(c)(1) – (2).

Denied Boarding Claims

Air carriers are required to comply with certain federal Department of Transportation ("DOT") regulations with respect to "bumping" or denying boarding to a passenger. *See* 14 C.F.R. Section 250.1 *et seq*. The DOT regulations in this section are specific to an "oversold flight," and require the airline to "ensure that the smallest practicable number of persons holding confirmed reserved space on that flight are denied boarding involuntarily." §250.2a.

If, in the wake of COVID-19, passengers utilize part 250 to establish a claim for being "bumped" from a flight, these DOT regulations do not provide for a federal private right of action by the passenger against the air carrier based upon the regulations; rather, there are certain remedies available to the passenger under the regulations. §250.5. However, the passenger has the option to receive compensation under the regulations, or pursue a state contract law action, not both. *Weiss v. El Al Israel Airlines, Ltd.,* 433 F.Supp.2d 361, 370 (S.D.N.Y. 2006), *aff'd* 309 Fed. Appx. 483 (2d Cir. 2009); *Thierry v. Delta Airlines* No. 94–0004, 1994 WL 88069, at *1 (E.D.Pa. Mar. 17, 1994); *Kalick v. Northwest Airlines Corp.,* Civ. A. No. 08-2972, 2009 WL 2448522, at *4 (D.N.J. Aug. 7, 2009).

In cases where a passenger brings a state contract law claim, he or she may recover for his or her actual compensatory damages; however, any claim for punitive damages is preempted by the Airline Deregulation Act of 1978 (see below).

Privacy Issues

Federal regulations require airlines to collect or solicit certain passenger information as a prerequisite for air travel. Specifically, 14 C.F.R. §243.7(a) requires that each airline collect the full name for each passenger—and boarding will be denied to any passenger who has not provided the same. Further, §243.7(a) indicates that the airline should solicit a telephone number of contact from each passenger, and maintain a record of the information collected. *See* §243.7(a)(2)-(3). This contact information collected is to be kept strictly confidential, and may be released "only to the U.S. Department of State, the National Transportation Safety Board [("NTSB")] (upon NTSB's request), and the U.S. Department of Transportation pursuant to oversight of this part." §243.9(c). Finally, the regulations state that the airline should only use the contact information "for notification of family members or listed contacts following an aviation disaster." §243.9(d).

Absent directions from the Department of State, NTSB, or DOT, arguably, air carriers must keep passenger contact information strictly confidential. However, as discussed above, the various rules or proposed rules that require air carriers to gather and report certain passenger information so that public health authorities can track down people exposed to a contagious virus such as COVID-19 raise privacy issues that have been a source of contention over the years. Historically, air carriers have not collected and provided passenger data for a variety of reasons, including privacy concerns and undue burden. The COVID-19 pandemic has resulted in renewed efforts to put in place U.S. legislation requiring air carriers to collect a minimum of five pieces of information before boarding a passenger (name, home address and address where they will be staying, e-mail address, phone number, and emergency contact information). There are ongoing efforts to include in proposed legislation a requirement that air carriers must collect and share such information with public health authorities. Air carriers are diligently working with the CDC and government officials to come up with a solution that the CDC could use to solicit more detailed contact information from passengers.

Recent Federal Aviation Administration ("FAA") Guidelines Regarding Flight Crews

The FAA recently issued guidelines that flight crews are recommended to follow, including the following:

- Travel and stay at lodging only with other crew members.
- Travel as a group in transportation provided by the air carrier when going from airport to hotel.
- Avoid contact with ground personnel and the public upon landing.
- Avoid time in public areas, minimize going out into the general population and practice social distancing.
- Avoid crowds and out circumstances involving a large number of people.
- Self-monitor health and report any suspected health problems.

PREEMPTION OF STATE LAW BY FEDERAL LAW AND INTERNATIONAL TREATIES

Aviation historically has been within the purview of the federal government. As a result, any analysis of potential air carrier liability will involve federal preemption or international treaty questions.

- **The Montreal Convention/Warsaw Convention:** Where the Montreal or Warsaw Convention applies, the Convention exclusively governs all claims within its scope and pre-empts any state law claim. *See El Al Israel Airlines, Ltd v Tseng,* 525 US 155 (1999).

- **The Field of Air Safety Federal Preemption:** Although there is a split of authority regarding federal preemption, and the extent of that preemption, generally, the Federal Aviation Regulations ("FARS") establish the applicable standard of care in the field of air safety, and thus preempt the entire field from state regulation. *See e.g. Abdullah v. American Airlines,* 181 F.3d 363, 367 (3d Cir. 1999). Therefore, assuming no treaty applies that would supersede U.S. law, the duty of care of an air carrier during the course of air transportation with respect to COVID-19 issues should predominantly be governed by federal law.
- **Airline Deregulation Act ("ADA") Preemption:** The ADA expressly preempts state law regarding a "price, route, or service" of an air carrier. *Morales v. Trans World Airlines, Inc.* 504 U.S. 374, 422 (1992); *see also Gary v. Air Group, Inc.,* 397 F.3d 183, 187 (3d Cir. 2005); *Kalick v. Northwest Airlines Corp.,* Civ. A. No. 08-2972, 2009 WL 2448522, at *4 (D.N.J. Aug. 7, 2009); *but see Taj Mahal Travel, Inc. v. Delta Airlines, Inc.,* 164 F.3d 186 (3d Cir. 1998). Accordingly, the ADA will be another source of federal preemption with respect to duties and breaches of duty arising in connection with an air carrier's prices, routes or services. Further, any demand for punitive damages in state court tort suits involving an air carrier's "prices, routes or services" should be held to be preempted by the ADA, and not recoverable. *See Kalick,* 2009 WL 2448522, at *5-6; *West v. Northwest Airlines,* 995 F.2d 148, 152 (9th Cir. 1993); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia,* 73 F.3d 1423, 1432 n.8 (7th Cir 1996).

CONCLUSION

The legal and regulatory scheme governing the air carriers is in a constant state of flux as the COVID-19 pandemic progresses. Not only is there a myriad of factual and legal scenarios that may arise, but similar to food poisoning cases, there could be an uphill battle to prove that any given person's COVID-19 virus was contracted because of an air carrier's actions, as opposed to the person contracting it in another fashion. It remains to be seen if air carriers will face claims from passengers and other as a result of the COVID-19 pandemic, but in the meantime, air carriers are facing a delicate and difficult balance between passenger rights and passenger safety, and must take precautionary steps and be prepared to show that their actions were reasonable under the circumstances.

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