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EU 261: Recent U.S. Litigation Developments (March 2016 - Reprint)

Regulation (EC) No. 261/2004 (commonly referred to as EU 261) generally requires (i) carriers of Member States of the European Union, with respect to all their flights, and (ii) other carriers, with respect to their flights departing from an airport located in a Member State, to provide direct compensation to passengers in the case of delay or cancellation.[i] For such passengers, the required compensation ranges from € 250 to € 600 per passenger.[ii] This stands in contrast to the U.S. Department of Transportation's ("DOT") aviation consumer protection requirements, which generally do not impose such requirements on carriers. Rather, DOT requires that the carrier, upon demand, issue a full refund of the unused portions of the ticket in the case of a lengthy delay or flight cancellation. As a consequence, and unless an international treaty provides otherwise, litigants in U.S. courts typically are only able to seek compensation for delays or cancellations on a theory of breach of contract, often without success.

Nevertheless, in recent years, some passengers have taken to pursuing EU 261 claims in U.S. courts. On February 2, 2016, Judge Richard Posner, writing for a panel of the United States Court of Appeals for the Seventh Circuit, affirmed two district court decisions dismissing claims involving EU 261 compensation where the underlying service involved a code-share arrangement.[iii] The two cases, Baumeister v. Deutsche Lufthansa, AG ("Baumeister") and Varasmis v. Iberia, Lineas Aereas de Espana, S.A. Operadora Sociedad Unipersonal ("Varasmis"), followed the Seventh Circuit's April 10, 2015, decision in Volodarskiy, et al., v. Delta Air Lines,[iv] in which the Court ruled that a direct claim for compensation under EU 261 is not actionable in a United States court given that jurisdiction over matters brought under EU 261 is limited to individual EU Member States' enforcement bodies. [v] In the Baumeister and Varasmis cases the appellants' claims were based on breach of contract rather than a direct claim for compensation under EU 261.

In Baumeister, the appellant purchased his ticket from Lufthansa for carriage between Stuttgart, Germany and San Francisco, California with a layover in Munich, Germany. The first leg of the flight, Stuttgart to Munich, was operated by Augsburg Airways under a code-share arrangement, for which the ticket indicated a Lufthansa designator code (LH) for the flight, while the second leg of

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the flight, Munich to San Francisco, was operated by Lufthansa. When Augsburg Airways cancelled the first flight, Lufthansa re-accommodated Mr. Baumeister on an alternate routing, resulting in an arrival to San Francisco 17 hours after his originally scheduled arrival. Mr. Baumeister brought suit against Lufthansa claiming he was entitled to EU 261 compensation as a matter of contract, because Lufthansa's general conditions of carriage, applicable to his ticket, incorporated the terms of EU 261.

The district court dismissed the claim, finding that the express terms of EU 261 require the carrier *operating* the delayed or cancelled flight to compensate the passenger. On appeal, Mr. Baumeister argued that Lufthansa's general conditions of carriage applied those conditions, including the incorporation of EU 261, to flights operated by one of Lufthansa's code-share partners. More specifically, Lufthansa's general conditions of carriage stated, in part, that "LH is responsible for the entirety of the Code Share journey for all obligations to Passengers established in these rules."[vi] The Court, agreeing that the provision obligated Lufthansa to accept certain responsibilities established *in the rules*,[vii] analyzed the general conditions of carriage provision pertaining to EU 261. In that provision, Lufthansa stated that if a flight is cancelled it would "offer assistance and compensation according to the Regulation EC 261/2004."[viii] The Court noted that EU 261 obligates the *operating* carrier to provide compensation,[ix] and, as a consequence, Lufthansa, which was not the operating carrier for the cancelled Stuttgart flight, did not have an obligation under EU 261 to compensate the appellant. Thus, the Court concluded that Lufthansa was not contractually liable under its general conditions of carriage, which committed Lufthansa to provide compensation "according to" EU 261.[x]

In the Varasmis case, the appellants had purchased tickets from American Airlines for travel between Dallas/Fort Worth and Italy, with the outbound and return portions of the ticket each involving a connection in Madrid, Spain. On the return portion of their journey, their flight between Rome, Italy and Madrid, Spain, operated by Iberia under a code-share arrangement with American (for which the AA designator code was shown on the ticket), was delayed, causing the appellants to miss their flight to Dallas/Fort Worth. The resulting re-routing caused the appellants to arrive in Dallas/Fort Worth some 21 hours after they were originally scheduled to arrive.

As the appellants purchased tickets on American, their contract of carriage was with that carrier, which did not incorporate EU 261 into its conditions of carriage. However, Iberia, the operator of the cancelled flight between Rome and Madrid, did incorporate EU 261 into its conditions of carriage. Therefore, the appellants attempted to pursue a breach of contract claim directly with Iberia, arguing that they had a contract with Iberia because American merely acted as the agent of Iberia when it sold seats on the Iberia flight.[xi] To support their position, the appellants invoked a provision in American's conditions of carriage which stated that "American will act as an agent to issue tickets . . . for transportation via other carriers which have interline agreements with American. [Those] carriers may have different terms and conditions applicable to their flights."[xii] Additionally, as this was an international itinerary, the appellants referred to American's international tariff which, in effect, stated that American, when issuing tickets for travel on another carrier, did so only as the other carrier's agent.[xiii]

The Court concluded, as did the district court below, that the provisions cited by the appellants did not create a contract between the appellants and Iberia.[xiv] Furthermore, the Court found that the statements in American's conditions of carriage could not bind Iberia. In so doing, the Court reviewed the underlying code-share agreement submitted by American and Iberia to DOT in connection with their code-share authority. The code-share agreement stated, in relevant part, "neither party is intended to have, and neither of them shall represent to any other person that it has [,] any power, right or authority to bind the other."[xv] The code-share agreement further specified that the conditions of carriage of the "marketing carrier," i.e., the carrier whose designator code appears on the passenger's ticket, will govern the transportation of passengers in the case of code-share operations.[xvi] Consequently, the Court concluded that the appellants did not have a contract with Iberia, but rather American, and the code-share agreement between Iberia and American did not confer enforceable contractual rights against Iberia upon the appellants for purposes of EU 261 compensation.[xvii]

The appellants also attempted to advance an alternate theory of liability, arguing that Iberia, as principal, vested apparent authority in American because American's conditions of carriage referred to the "other" carrier's terms and conditions.[xviii] Looking to Illinois law (the state law applicable to the contract dispute), the Court emphasized that the principal must create an impression of apparent authority and concluded that Iberia did not do so with respect to the code-share arrangement at issue, i.e., Iberia did not create the impression that American was authorized to contractually bind Iberia.[xix]

In the wake of Volodarskiy, the Baumeister and Varasmis decisions continue to set a very high bar for a plaintiff to recover EU 261 damages in a United States court. The decisions will no doubt be relied upon to dismiss breach of contract actions seeking EU 261 compensation and filed against the marketing carrier, i.e., the non-operating carrier, in a code-share arrangements, regardless of whether the marketing carrier's conditions of carriage incorporate the terms of EU 261.

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[i] See Commission Regulation 261/2004 O.J. (L46) Article 1(1)(b) and (c).

[ii] Id at Article 7(1). EU 261 does have exceptions to compensation if an offer of alternate travel is scheduled to arrive within two or three hours of the original arrival time, depending on flight distance, or if the cancellation was caused by "extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken." Id at Article 5(1)(c), Article 5(3), and Article 7(2).

[iii] Hans-Peter Baumeister v. Deutsche Lufthansa, AG, __ F3d__, No. 14-2633 (7th Cir. Feb. 6, 2016) and Varasmis v. Iberia, Lineas Aereas de Espana, S.A. Operadora Sociedad Unipersonal, __ F3d__, No. 14-2414 (7th Cir. Feb. 6, 2016).

[iv] Volodarskiy, et al. v. Delta Airlines, Inc., __ F. 3d __, No. 13-3521 (7th Cir. Apr. 10, 2015). The appellants pursued a direct claim under EU 261, rather than a breach of contract claim, because Delta Air Lines had not incorporated the terms of EU 261 into its international conditions of carriage.

[v] Id at 2.

[vi] Baumeister No. 14-2633 at 4 (quoting Lufthansa's general conditions of carriage).

[vii] Id at 5 (emphasis added).

[viii] Id (quoting Lufthansa's general conditions of carriage).

[ix] Id. Mr. Baumeister did attempt to bring an EU 261 claim in Germany against Lufthansa, but the German authority dismissed the claim as Lufthansa was not the operating carrier. Id at 4. Augsburg Airways had ceased operations, apparently prompting Mr. Baumeister's to attempt to recover EU 261 compensation from Lufthansa. Id. at 2.

[x] The Court noted the appellant's second theory of the case was that Lufthansa was de facto "operating" the Augsburg flight because it was "pulling the strings" of Augsburg Airways. The Court rejected this argument outright because Augsburg Airways was the airline scheduled to operate the flight, was not a subsidiary of Lufthansa, and Lufthansa cannot stand in its place because of the code-share agreement. Id. at 5.

[xi] Varasmis, No. 14-2414 at 6.

[xii] Id (quoting American Airlines' conditions of carriage).

[xiii] Id. at 7.

[xiv] Id.

[xv] Id.

[xvi] Id. The Court also noted that as a condition of approval for the codeshare agreement," the DOT required that the marketing carrier, in this case American, accept responsibility for the entirety of the code-share journey for all obligations established in American's contract of carriage with the passenger. Id. at 8.

[xvii] Id at 8 and 9.

[xviii] Id at 9.

[xix] Id.