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## Passenger's slip-and-fall claim vs. JetBlue time-barred

*Statute of limitations not equitably tolled by airline's conduct*

By: Eric T. Berkman November 4, 2022



The Montreal Convention's two-year statute of limitations could not be equitably tolled to preserve a negligence claim brought by a JetBlue passenger over injuries he allegedly suffered in a trip and fall while disembarking a flight from Aruba, a U.S. District Court judge has ruled.

The plaintiff passenger argued that JetBlue should be equitably estopped from raising the two-year statute of limitations for suits over injuries stemming from international flights because the airline's conduct indicated that Massachusetts' three-year statute of limitations would govern the dispute.

Specifically, the plaintiff pointed to the fact that JetBlue engaged in settlement negotiations and made offers to the plaintiff more than two years after the incident and that JetBlue's insurer never advised plaintiff's counsel that the applicable statute of limitations had expired.

But Judge Allison D. Burroughs rejected that argument, finding that the statute of limitations under the Montreal Convention, which governs all claims arising from international air travel, is not subject to equitable tolling, and that even if it was, it would not apply here.

"Plaintiff has not pointed to any affirmative conduct on the part of JetBlue or its insurance adjuster that caused him to delay filing the suit," Burroughs wrote, quoting [Luar Music Corp. v. Universal Music Grp., Inc.](#), a 2012 decision from the District of Puerto Rico. "Where, as here, the record reflects only ordinary settlement negotiations, allowing plaintiffs to invoke equitable estoppel 'would remove the teeth from statutes of limitation and discourage settlement negotiations.'"

The seven-page decision is [Calautti v. Massachusetts Port Authority, et al.](#), [Lawyers Weekly No. 02-356-22](#).

### **Know the law**

JetBlue's attorney, Steven E. Arnold of Boston, declined to comment. Plaintiff's counsel, Michael M. D'Isola of Boston, did not respond to interview requests.

But Kevin Chrisanthopoulos of Westfield, who represents passengers in aviation tort cases, said "all signs pointed to plaintiff's counsel simply not recognizing the correct statute of limitations under the Montreal Convention."

For example, the complaint was filed in state court on the eve of the three-year anniversary of the accident and made no reference to the Montreal Convention, which indicated to Chrisanthopoulos that counsel assumed it was a three-year statute of limitations.



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*— Anthony Tarricone, Boston*



In fact, he said, with JetBlue's insurer making a settlement offer after the two-year statute of limitations under the Montreal Convention, it is possible the insurance adjuster also was not aware of the applicable statute.

"A practical takeaway would be to execute a tolling agreement with the other side if negotiations are occurring and the statute of limitations is approaching," Chrisanthopoulos added. "However, that is hard to do if you have the wrong statute of limitations. It is difficult to dabble in areas of law you are not familiar with, but if you are going to, research the applicable statute of limitations very early on in the case."

Boston attorney Anthony Tarricone, who also represents plaintiffs in airline cases, agreed.

"The claims here were clearly covered by the convention," he said. "Unfortunately, the two-year limitation and preemptive effect of the convention sometimes are not appreciated and pose a trap for the unwary. I imagine that's what happened here."

Tory A. Weigand of Boston, who represents airlines and their insurers, said the decision is consistent with longstanding precedent that Article 29 of the Montreal Convention (which states that any action for damages stemming from the international carriage of persons, baggage or cargo by air must be brought subject to the conditions and limitations of liability of the convention) and Article 35 (which sets out the two-year statute of limitations for claims brought under the convention) operate together as a statute of repose.

That means that tolling of the statute is not permitted, equitable or otherwise, Weigand said.

“Indeed, the drafting history behind the convention reveals that the drafters considered and rejected a proposal that would have allowed tolling,” Weigand said. “The [1st U.S. Circuit Court of Appeals] has not yet addressed the issue, but there would appear to be no basis to interpret the convention and its history otherwise.”

Christopher Poreda, an aviation lawyer in Westwood, said the decision reinforces that the Montreal Convention — signed by representatives of the executive branch of the federal government and ratified by Congress — preempts any state law that might otherwise apply, and that it provides for no equitable tolling even when the facts of the case might warrant equitable relief.

Accordingly, Poreda said, “plaintiffs’ counsel engaging in an aviation tort case are well advised to become familiar with the convention to make sure that it does not materially alter any litigation strategy [they] might want to pursue, such as when to start negotiating a settlement and the valuation of the case for settlement at each point in litigation.”

### **Extended negotiation**

Plaintiff Domenic Calautti arrived at Logan International Airport in Boston on a JetBlue flight from Aruba on April 14, 2019.

To allow passengers to disembark, JetBlue and defendant MassPort, which operates the

airport, docked the aircraft on the jetway.

While docking, the defendants apparently left a gap between the aircraft and the jetway and did not warn the plaintiff of the gap.

While disembarking, the plaintiff tripped and fell, allegedly as a result of the gap, and sustained bodily injury.

On April 12, 2022, almost three years after the incident, the plaintiff filed a negligence action against the defendants in Suffolk Superior Court, which JetBlue subsequently removed to federal court on both diversity grounds and on federal preemption grounds under the Montreal Convention.

Between the time of the accident and the filing of suit, the plaintiff and JetBlue engaged in settlement negotiations.

They apparently did so beyond April 14, 2021, the date that the two-year statute of limitations in Article 29 of the Montreal Convention would have expired.

JetBlue made its first settlement offer to the plaintiff on April 30, 2021, which the plaintiff apparently rejected.

Settlement communications then apparently continued into March 2022, when plaintiff's counsel asked for JetBlue's "top offer." The request was met with an increased offer.

### **Calautti v. Massachusetts Port Authority, et al.**

**THE ISSUE:** Could the Montreal Convention's two-year statute of limitations be equitably tolled to preserve a negligence claim brought by an airline passenger over injuries he allegedly suffered in a trip and fall while disembarking a flight?

**DECISION:** No (U.S. District Court)

**LAWYERS:** Michael M. D'Isola of the Law Offices of Jeffrey S. Glassman, Boston (plaintiff)

Steven E. Arnold of Boston (defense)

Meanwhile, JetBlue's insurer apparently never advised plaintiff's counsel that the statute of limitations under the Montreal Convention had expired nearly a year earlier.

After JetBlue removed the plaintiff's claim to U.S. District Court in June 2022, it moved to dismiss the claim as time-barred by the convention's two-year statute.

The plaintiff argued in opposition that JetBlue should be equitably estopped from raising the defense, contending that its own conduct suggested Massachusetts' three-year statute of limitations would govern the dispute.

### **Time-barred**

Burroughs ruled in JetBlue's favor.

First, she emphasized that the Montreal Convention governed the plaintiff's rights and remedies, preempting any otherwise applicable local law claims.

As to the plaintiff's equitable tolling argument, Burroughs pointed out that mere settlement negotiations were insufficient to gain the benefit of the doctrine.

Rather, she said, the plaintiff needed to show that, in negotiating, JetBlue made representations it knew or should have known would induce the plaintiff in filing suit in reliance on such representations.

"No such facts exist here," Burroughs said. "There was no mention of the statute of limitations in the communications between the parties, and there is no evidence that JetBlue misled Plaintiff about its intentions to settle, and it actually did agree to settle the matter for an amount suggested by Plaintiff in April 2022."

The judge also stated that it was not the duty of JetBlue's insurer to explicitly warn the plaintiff of the applicable statute of limitations and that silence on the subject did not constitute any "mutual understanding" that the statute did not apply.

"Nothing precluded Plaintiff's counsel from suspending settlement negotiations and filing suit," Burroughs observed, quoting the 1st Circuit's 1996 *Kelley v. N.L.R.B.*

**decision.** "Courts will not employ equitable estoppel to 'cure the defects in [a plaintiff's] settlement strategy' where there is 'no evidence in the record that [defendant] engaged in deceptive conduct or unfairly led [plaintiff] to believe that it intended to settle.'"

Finally, Burroughs noted that to the extent that the plaintiff asked the court to invoke equitable tolling in the first place, federal precedent indicates that Article 35's time limitation is not subject to tolling.