Deep vein thrombosis (“DVT”) sometimes known as “economy class syndrome,” has been the subject of significant litigation worldwide in the last several years. Despite the frequency of DVT litigation, a clear picture of how courts in the United States will approach these claims has yet to emerge. In particular, two recent decisions send conflicting signals about the future of DVT claims. One of these cases involves preemption of state law claims, while the other involves claims arising under Article 17 of the Warsaw Convention. Olympic Airways v. Husain, 124 S. Ct. 1221 (2004) (addressing Article 17 and the definition of “accident”), Witty v. Delta Air Lines, Inc., No. 03-30654, 2004 U.S. App. LEXIS 7103 (5th Cir. Apr. 13, 2004) (addressing DVT and preemption issues). Each of these cases and their potential impact on DVT claims is discussed below.

I. Preemption in Domestic Cases and the Witty Decision

In Witty, the United States Court of Appeals for the Fifth Circuit provided strong ammunition to air carriers seeking to avoid DVT liability on domestic flights. The Witty case involved a negligence claim brought by Milton B. Witty against Delta Air Lines, Inc. In this case, Witty alleged that Delta was negligent in failing to warn of the risks of DVT, in failing to provide adequate legroom to passengers, and in failing to allow passengers to exercise their legs. On April 13th of this year, the Fifth Circuit rendered judgment for Delta Air Lines, concluding that federal law and regulations preempted Witty’s negligence claims.
Specifically, the appellate court found the preemption provision of the Airline Deregulation Act preempted Witty’s claim that more legroom should have been provided. The Deregulation Act’s preemption provision specifically precludes—among other things—states from enacting or enforcing laws related to prices charged by air carriers for transportation.

Since requiring more legroom would necessarily reduce the number of seats on the aircraft, such a requirement would impose a standard “relating to a price” under § 41713(b)(1), and is accordingly preempted by the ADA. Section 41713(b)(1) not only preempts the direct regulation of prices by states, but also preempts indirect regulation “relating to” prices that have “the forbidden significant effect” on such prices. While the state regulation of leg room might not relate to prices as obviously as the state regulation of fare advertising at issue in Morales, the economic effect on prices would in our view be significant, perhaps much more so than the advertising rules at issue in Morales.

Witty’s remaining claims – for negligent failure to warn of the risks of DVT, and failure to allow passengers to exercise their legs – were dismissed based on field and conflict preemption. The court held that the FAA, which has published regulations and an advisory circular “setting out in detail the oral briefings . . . which flight attendants or other flight personnel must give passengers, as well as the information that must be included in passenger safety briefing cards,” occupies the field of aviation safety regulation. Slip op. at 9. The court also found more than just a theoretical conflict. It posited that any state law-required warnings that suggest that passengers should move about the cabin to prevent DVT would necessarily conflict with the prevailing FAA recommendation (as found on the FAA’s web site) that passengers remain in their seats with their seat belts fastened. Slip op at 10. Without deciding whether it is the state cause of action or—as was held in Abdullah v. American Airlines, Inc., 181 F.3d 363, 376 (3d Cir. 1999)—the state standard of care that is preempted, the court
concluded that Delta could not be held liable for failing to give a warning that was not required by federal regulations.

The *Witty* case suggests that DVT claims against air carriers by passengers on domestic flights may not be viable. It remains to be seen, however, whether other Circuits will follow the preemption analysis performed by the Fifth Circuit panel in *Witty* and, for that matter, whether the Supreme Court will eventually consider the question and resolve it differently.

Significantly, the conclusions of the *Witty* court rely heavily on the fact that the FAA has expressed a preference for having passengers remain in their seats during the flight. The next plaintiff to raise a DVT claim could attempt to avoid many of Witty’s preemption problems by arguing that the carrier was negligent for failing to instruct on methods—such as certain exercises—to avoid DVT that could be accomplished without leaving one’s seat.

**II. The Supreme Court’s New Gloss on the “Accident” Requirement of the Warsaw Convention**

In contrast to *Witty*, the *Husain* opinion, recently issued by the United States Supreme Court, provides significant help to plaintiffs seeking to impose DVT liability of air carriers for claims arising on flights governed by the Warsaw and/or Montreal Conventions.¹

In the context of international flights, one of the most significant issues in DVT cases is whether the circumstances allegedly leading to DVT constitute an “accident,” as that term is used in the Warsaw and Montreal Conventions. The Supreme Court has not addressed this issue directly.

¹ The Montreal Convention of 1999 has replaced the Warsaw Convention. There does not, however, appear to be any substantive difference between these two conventions as respects the “accident” requirement.
The Supreme Court has, however, previously held that the term “accident,” for purposes of the Warsaw Convention, means an “unexpected or unusual event or happening that is external to the passenger.” *Air France v. Saks*, 470 U.S. 392, 405 (1985) (involving a plaintiff who allegedly suffered hearing loss as a result of normal changes in cabin pressure). In *Saks*, the Supreme Court held that “when the injury indisputably results from the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft, it has not been caused by an accident, and Article 17 of the Warsaw Convention cannot apply.” *Id.* at 406.

Relying on *Saks*, air carriers have argued that DVT is not an “accident” because it results from “the passenger’s own internal reaction to the usual, normal, and expected operation of the aircraft.” *Id.* To date, however, the lower courts have divided on whether the circumstances allegedly leading to DVT meet the “accident” requirement. *See*, e.g., *Louie v. British Airways, Ltd.*, No. A01-0329 CV (JKS), 2003 U.S. Dist. LEXIS 24750 (D. Alaska Nov. 17, 2003); *Blansett v. Continental Airlines, Inc.*, 246 F. Supp. 2d 596, 601 (S.D. Tex. 2002) (appeal argued in September of 2003, with a decision reportedly awaiting the Supreme Court’s decision in *Husain*).

In *Olympic Airways v. Husain*, 124 S. Ct. 1221 (2004), the Supreme Court revisited the issue of what constitutes an “accident” for purposes of air carrier liability under the Warsaw Convention in a way that is potentially significantly to DVT claims.

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2 Interestingly, air carriers and claimants have recently reversed their positions on this issue. Prior to the Supreme Court’s decision in *El Al Israel Airlines, Ltd. V. Tseng*, 525 U.S. 155 (1999), holding that the Warsaw Convention provided the exclusive cause of action for injury during international air carriage, airlines frequently argued for a broad definition of “accident” in order to include more claims under the ambit of the Warsaw Convention and thereby, take advantage of the convention’s limitations on liability. Now, carriers frequently argue for a narrow definition of “accident” in order to avoid liability under the convention. Claimants, on the other hand, seeking unlimited potential for recovery, previously argued for a narrow definition of “accident.” Now, of course, claimants are likely to argue for a broad definition of “accident” in order to obtain jurisdiction under the convention. *See Louie v. British Airways, Ltd.*, No. A01-0329 CV (JKS), 2003 U.S. Dist. LEXIS 24750 (D. Alaska 2003).
The Husain case involved the death of Dr. Abid Hanson on the last leg of a round trip flight from San Francisco to Cairo. Dr. Hanson had a history of anaphylactic reactions triggered by secondhand smoke. As a result, on the preceding legs of Dr. Hanson’s flight, he requested and received seating away from the smoking section of the aircraft. After being seated on the final leg of his return flight from Athens to San Francisco, Dr. Hanson realized he was only three rows from the smoking section. Dr. Hanson’s wife, Ms. Rubina Husain, asked that Dr. Hanson be reseated but was told by a flight attendant, Ms. Leptourgou, that he could not be reseated because the plane was full. The flight, in fact, was not full. After takeoff, Ms. Husain again requested reseating for her husband. This time, she was told by Ms. Leptourgou that Dr. Hanson could switch seats with another passenger but that the crew would not assist. The Husain opinion is unclear as to whether Dr. Hanson attempted to switch seats without crew assistance. About two hours into the flight, however, smoking noticeably increased, and Dr. Hanson moved toward the front of the plane for “fresh air.” Dr. Hanson was leaning against a chair in the galley area when he began to suffer a serious anaphylactic reaction to smoke in the aircraft. Tragically, Dr. Hanson died during the flight allegedly as a result of his reaction to secondhand smoke.

Ms. Husain filed suit against Olympic Airways and argued that Ms. Leptourgou’s failure to reseat Dr. Hanson consisted an “accident” within the meaning of Article 17 of the Warsaw Convention. The District Court, the Ninth Circuit, and the Supreme Court all agreed with plaintiff’s contention, with the Supreme Court holding that:

Article 17 is satisfied when the carrier’s unusual and unexpected refusal to assist a passenger is a link in a chain of causation resulting in a passenger’s pre-existing medical condition being aggravated by exposure to a normal condition in the aircraft cabin.

Husain, 124 S. Ct. at 1221.
The *Husain* holding clears a significant path for circumventing the limitations of *Saks*. Under the *Saks* regime, an individual’s internal reaction to the normal operation of the aircraft was not considered an accident. In some sense, this is precisely the situation that was presented in *Husain*. Passenger exposure to smoke was part of the normal operation of the Olympic Airways flight on which Dr. Hanson died. It was Dr. Hanson’s entirely internal anaphylactic reaction to the smoke that directly caused his death. *Husain*, however, introduces a new element to the *Saks* analysis – asking whether the airline took any action or failed to take any action in the causal chain of events leading to the passenger’s injury that could be considered an unexpected or unusual event or happening external to the passenger. If so, the claimant will have a strong argument, at least in the U.S., for liability under the Warsaw or Montreal Conventions.

To be sure, *Husain* leaves a number of important questions relatively unexplored, including how one is to determine when an action or inaction is considered “unexpected or unusual” and the degree to which inaction can fall within the definition of an “accident.” The *Husain* Court has, however, created precisely the type of exception that has the potential to swallow the *Saks* rule. It now appears that when bringing a claim for injury on an international flight – which is the direct result of a claimant’s internal body functions – a claimant, in the U.S., need only demonstrate that unexpected action or inaction by the air carrier contributed in some way to the ultimate injury. It is not hard to imagine how this might impact DVT claims.

For example, an individual might advise an air carrier prior to boarding that he or she has circulatory problems making him or her prone to DVT if not allowed to switch to a seat with more legroom. Alternatively, an individual might argue that the failure to warn of DVT or the failure to instruct on methods to avoid DVT constitute the type of “unexpected or unusual” happening for
which liability was allowed in Husain. In either instance, the Husain opinion suggests that these types of allegations may allow a claimant to avoid Sak’s limitation and state a viable claim.

III. Conclusion

Despite the frequency of DVT litigation, U.S. Courts have yet to develop a clear, coherent approach to DVT claims. In one sense, Witty and Husain move in opposite directions – Witty makes claims more difficult in domestic cases while Husain charts a court around a significant hurdle in cases involving international travel. Moreover, both cases leave significant issues to be resolved. Given these circumstances, the only thing that can be said with certainty is that DVT litigation is not a thing of the past.