

INSIDE

**BANKRUPTCY
FILINGS**

see B Section

FORECLOSURES

see B Section

Legal REVIEW

APPEALS

Skycaps argue deep-pockets defendant should remain part of kickback lawsuit

by **Susan R. Miller**

When nearly 200 Miami International Airport skycaps agreed to settle a federal kickback lawsuit against their employer for nearly \$2.5 million last April, their lawyer made a pragmatic decision not to try to collect on the judgment — yet.

The plaintiffs figured that if they did try to get the money from United Safeguard Agency, the small company would go out of business and they'd have to line up at the unemployment office, says Miami solo lawyer Jorge Diaz-Cueto, who represents the skycaps.

Instead, the skycaps decided to try to make Virginia-based DynAir Services Inc. — a much larger aircraft services company with deeper pockets than United — pay the damages.

On Wednesday, lawyers for the skycaps asked a panel of the 11th U.S. Circuit Court of Appeals sitting in Miami to overturn Senior U.S. District Court Judge Shelby Highsmith's decision last April that granted a defense mo-



Jorge Diaz-Cueto, left, and J. Alfredo De Armas, lawyers for Miami skycaps.

See Skycaps, Page A12

SKYCAPS

from page A10

tion to drop DynAir from the lawsuit. The defense argued, and Highsmith agreed, that the two were not joint employers as the plaintiff's claimed, and therefore had no liability.

In their appeal, however, the skycaps contend that DynAir, which subcontracted with United Safeguard to provide skycap services at MIA, shared responsibility with United for the now-discarded policy requiring them to pay millions of dollars in kickbacks over a six-year period to keep their jobs.

Lawyers for United and DynAir contend that the money the skycaps paid — \$5 at the start of each shift for domestic flights and \$10 per shift for international flights — was a legally permissible tip pool similar to those used by servers in restaurants.

(In July 1999, DynAir was acquired by Swissport International Ltd., and in August 2000 all of DynAir's operations took on the Swissport name. Swissport operates at more than 130 airports in 23 countries.)

Below minimum wage

The federal lawsuit alleged violations of the U.S. Fair Labor Standards Act. It claimed that the skycap's employer violated the act because, although the skycaps were paid the \$2.13 per hour minimum wage set for employees who receive

tips, their pay fell below the minimum when the kickbacks to their employers were factored in. That payment policy was terminated after the Miami-Dade County Commission approved a nonbinding resolution condemning the practice in 1999.

On Wednesday, appellate lawyers for the skycaps argued that United and DynAir should have been considered joint employers. They claimed that not only did the skycaps wear DynAir uniforms and identification tags, but that it was DynAir, not United, that held the airport permit to provide skycap services. They also alleged that the permit required DynAir to remain liable for the skycaps' actions and performance, and that it was DynAir's managers who supervised the skycaps.

Without DynAir, they argued, United would cease to function because it would lack a permit and access to the airport. And, they contended, without the skycaps provided by United, DynAir would have no one to render the services.

"How can [DynAir] say we provide skycap services, but we employ no skycaps?" asked the skycap's appellate lawyer, J. Alfredo De Armas, during Wednesday's oral arguments before a three-judge panel consisting of Senior Judge Paul Roney, Judge Susan Black, and Judge Jane Restani, a visiting judge from the U.S. Court of International Trade in New York.

"The insignia, [airport] permit, the uniforms — all are evidence of control," added De Armas, a partner at Alvarez Armas & Boron in Coral Gables.

But lawyers for DynAir — which employs nearly 1,000 people at MIA and provides a wide range of services including ramp loading, airplane cabin cleaning, refueling, janitorial and cargo services — disagreed. They asserted that United has provided skycaps services at MIA to other airlines, including Virgin Airways, Iberia and Air France, using permits other than the one granted DynAir. They also point to the fact that United also provides security services and passenger escort services using a permit separate from DynAir.

No common ownership

Lawyers for DynAir say there is no joint employment because there is no common ownership interest. They point to the fact that DynAir and United each have their own management teams, human resources departments, telephone numbers, bank accounts, policies and procedures. While lawyers for DynAir acknowledged that some of the skycaps' uniforms bear the DynAir logo, they said the skycaps are not required to wear them, and many do not.

"DynAir exercises absolutely no control whatsoever, and in no way,

whether directly or indirectly, controls the work of [United] skycaps providing services to airlines that are not clients of DynAir," wrote Jose Diaz, of counsel at Gunster Yoakley in Miami, which represents DynAir.

During Wednesday's oral arguments, Diaz co-counsel, Virginia Herrero Pagliery, added that DynAir was "in no way involved in deciding how many [skycaps] were hired, who was hired, or where they worked," and that the company "in no way was involved in setting up the management structure. DynAir does not hire, fire or discipline skycaps," she said.

In addition to the federal action, another lawsuit filed by the skycaps is pending in Miami-Dade Circuit Court before Judge Amy Steele Donner. That suit includes state tort and contract claims against United and DynAir, including allegations of conversion.

The circuit court suit has not yet been set for trial. Earlier this month, however, lawyers for the skycaps won an important legal ruling. Donner granted a motion by the plaintiffs allowing them to seek punitive damages against DynAir on their conversion allegation.

In her ruling, Donner wrote that the plaintiffs provided enough evidence to show "gross negligence, fault and reckless disregard" by DynAir to warrant punitive damages. ♦