Recent Passenger Cruise Line Issues

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There have been several new developments both in case law and in practice that I would like to address. As many of you know, since the U.S. Supreme Court rendered its decision in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), upholding the Florida forum selection clause in the passenger cruise ticket, the cruise lines have added more and more terms and conditions in the tickets that restrict the rights of the passengers. I would like to discuss some of these attempts with an emphasis on recent case law construing those attempts together with some other relevant "hot topics."

I. Carnival Corporation v. Carlisle – Vicarious Liability of Cruise Line for Medical Malpractice of Ship's Doctor

First, I would like to discuss the cruise lines' efforts to reinforce their position that the ship's doctor is an independent contractor. The majority rule over the years has been that a ship's doctor is an independent contractor and the cruise lines are not vicariously liable for the doctor's malpractice. In a case that may have far reaching impact, the Florida Supreme Court held oral argument on September 27, 2005 in the case of Carnival Corporation v. Carlisle, 864 So. 2d 1 (Fla. 3rd DCA 2003), Florida Supreme Court Case No. SC04-393. In case any of you are interested in reading the briefs submitted in the case, you can download the briefs from the Supreme Court of Florida's website. The website address is www.floridasupremecourt.org.

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For those of you unfamiliar with the Carlisle case, the facts are as follows: Elizabeth Carlisle, a fourteen year old girl took a cruise in March, 1997 with her parents aboard Carnival's ship the M/S Ecstasy. From even before the time the cruise left port, Elizabeth was experiencing abdominal pain. Once the vessel left port and the ship's infirmary was open, Elizabeth went to see the ship's doctor. The doctor failed to examine Elizabeth and simply diagnosed her with the flu and gave her antibiotics. The following day she returned to the doctor who reassured her that she simply had the flu. She went back to the doctor one more time but he insisted that she just had the flu. As her symptomology did not improve, the Carlisle's decided to leave the cruise early and return home. Upon their return home to Michigan, they immediately went to the hospital where Elizabeth was diagnosed with a ruptured appendix. Due to the rupture and subsequent infection, Elizabeth was rendered sterile. See, in general, Carlisle, 864 So. 2d at 2-3 and Florida Supreme Court Briefs, Statements of Fact, filed by the parties.

The trial judge entered summary judgment for Carnival based upon a line of cases headlined by Barbetta v. S/S Bermuda Star, 848 F.2d 1364 (5th Cir. 1988) that stand for the majority rule that a cruise line is not vicariously liable for the medical malpractice of the ship's doctor. The Third District Court of Appeals in Miami, Florida, reversed the trial judge and held that times have changed to the extent that the Barbetta line of cases is no longer good law. See Carlisle, 864 So. 2d at 7. In a well reasoned opinion, the Third District Court of Appeals concluded that the minority rule as set forth in the case of Nietes v. American President Lines, Ltd., 188 F. Supp. 219 (N.D. Cal. 1959) was more legally sound given the modern realities of the cruise line industry. Id. at 5. "In Nietes, the cruise line was held vicariously liable for the negligence of the ship's doctor who was a member of the crew." Id. at 3. The appellate court pointed out that the doctor was considered an officer of the ship, wore a uniform, was subject to Carnival's guidelines, was contractually indemnified by Carnival up to $1 million with regard to claims asserted against him in the scope of his employment, and Carnival had absolute control over the defense and handling of such claims against the doctor. Id. at 2.

The Third District Court of Appeals went on to state that the majority rule set forth in the Barbetta line of cases was based on the cruise lines' alleged lack of control over the doctor-patient relationship and the lack of control over the doctor in his practice of medicine because a ship is not a floating hospital. Id. at 3. The appellate court rejected that premise given the current realities of cruising that leave sick passengers without any meaningful choice in the selection of a medical provider while on a cruise. Id. at 4. The Court further pointed out that although the cruise lines are not legally required to have doctors aboard, the practical reality of the cruise industry and cruise ships, which are capable of taking thousands of passengers on a cruise at sea for days, all but require the presence of a doctor. Id. at 6. Lastly, the Court also pointed out the contradiction of the case law holding the cruise line vicariously liable for the doctor's malpractice against a crewmember and the Barbetta rule that reached the opposite result for passengers. Id. at 7.

The Court also rejected the attempt by Carnival to exculpate itself from vicarious liability through the ticket contract. The ticket given to the Carlisles had the following clause:

> "If the vessel carries a physician, nurse, masseuse, barber, hair dresser or manicurist, it is done solely for the convenience of the guest and any such person in dealing with the guest is not and shall not be considered in any respect whatsoever, as the employee, servant, or agent of the carrier and the carrier shall not be liable for any act or omission of such person or those under his order or assisting him with respect to treatment, advice or care of any kind given to any guest."
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> Id. at 2-3.

The Carlisle Court rejected the enforceability of that clause on the basis of 46 App. U.S.C.A. §183c which invalidates certain disclaimers of liability. Id. at 8. Because the appellate court held that the doctor was an actual agent of Carnival, 46 App. U.S.C.A. §183c prohibits such an exculpatory clause. The Carlisle Court ruled that the "cruise line's duty of reasonable care under the circumstances includes the duty of the ship's

doctor to adhere to the standard of care of a reasonable ship's doctor under the circumstances." Id.

Now the Carlisle case is the hands of the Florida Supreme Court. Interestingly, the primary argument put forth by Carnival in its brief to the Florida Supreme Court which it had not raised below is the argument of uniformity. See Carnival's Initial Brief at pages 6-18. Carnival emphasizes that the Barbetta majority line of cases is the established maritime law and that Nietes is the only case, a district court case no less, to go against such law. Carnival argues that the Third District Court of Appeals did not have the authority to reject Barbetta because it went against uniform maritime law. For its second argument, Carnival argued that the Third District Court of Appeals was wrong when it held that Carnival could be vicariously liable for the malpractice of its doctor because Carnival did not have the required control over the doctor's practice of medicine. See Carnival's Initial Brief at pages 18-23. Lastly, Carnival argued that should the appellate court's decision stand, such a change in the law will have a significant negative impact on the cruise industry and Florida's economy and its citizens and thus is a matter of great public importance that requires the intervention of the Florida Supreme Court. See Carnival's Initial Brief at pages 23-25.

In response to the primary argument put forth by Carnival regarding uniformity, the plaintiff's attorneys argued that since there is no controlling United States Supreme Court nor Florida Supreme Court decision on the issue, the appellate court was free to choose between the "majority" rule and the "minority" rule. See Answer Brief of Respondent Darce Carlisle at pages 11-22. Citing that the Barbetta line of cases has been strongly criticized by legal scholars over the years and emphasizing the modern changes of the cruise industry, the Plaintiff argued that the time had come for the minority rule to become accepted law on the issue.

In response to Carnival's other two arguments, the Plaintiff understandably argued that the appellate court's assessment of the agency status of the doctor was correct given the numerous examples of the agency relationship including officer status

and the extent of Carnival's control over the doctor's practice. See Answer Brief of Respondent Darce Carlisle at pages 22-30. Finally, the Plaintiff argues that the issue is not one of great public importance to necessitate the Florida Supreme Court's discretionary jurisdiction. She points out that although the cruise industry has a large impact on Florida, the actual number of passengers and cases involving the medical malpractice of the ship's doctor is quite small. See Answer Brief of Respondent Darce Carlise at pages 35-38.

What the Florida Supreme Court will do with this case is unknown. However, should the Florida Supreme Court exercise jurisdiction (which it most probably will given the fact that it held oral argument) and issue a ruling, it appears likely that such a ruling will most likely be appealed to the United States Supreme Court for further and final review.

Since the Third District Court of Appeals issued its opinion in Carlisle, two other Courts have issued rulings in favor of that opinion. The first was a decision by Judge King in the Federal District Court for the Southern District of Florida in Huntley v. Carnival Corp., 307 F. Supp. 2d 1372 (S.D. Fla. 2004). Pointing out that there was no Eleventh Circuit opinion addressing the issue, Judge King approved of the Third District Court of Appeals decision in Carlisle which he deemed a "thorough and well-reasoned opinion." Id. at 1374. He also cited to the decision of Fairley v. Royal Cruise Line, Ltd., 1993 AMC 1633 (S.D. Fla. 1993) in support of his ruling. The other Court to follow Carlisle is the First District Appellate Court of Illinois in Mack v. Royal Caribbean Cruises, Ltd., 2005 WL 2679436 (Ill. App. 1 Dist. 2005). This unpublished decision which came out on October 20, 2005, discussed the vicarious liability issue at length, and agreed with the "well-reasoned approach of Nietes, Huntley, Fairley and Carlisle." Id. at 8.

II. Doe v. Celebrity Cruises, Inc.- Vicarious Liability of Cruise Line for Sexual Assault of Passenger by a Crewmember

The next issue involves the vicarious liability of cruise lines with regard to passenger sexual assault. The Eleventh Circuit Court of Appeals decided Doe v. Celebrity Cruises, Inc., 394 F.3d 891 (11th Cir. 2004) after the Fall Meeting last year in which it held that the cruise lines are vicariously liable for sexual assaults committed by their crewmembers.

In July, 1999, the Plaintiff, Jane Doe, took a one week cruise aboard the M/V Zenith from New York City to Bermuda. Id. at 893. During the cruise, Doe reported that she had been raped by a crewmember while ashore at a port-of call. Id.

The case proceeded to jury trial and the jury found for the Plaintiff. On appeal, the main issue was "what standard of care governs when a cruise line's crew member sexually batters a passenger." Id. at 893. The Defendant argued for the negligence standard of reasonable care under the circumstances while the Plaintiff maintained that the standard is one of strict liability.

The Eleventh Circuit began its examination of the issue by conducting its own review of whether there was admiralty jurisdiction over the claim. Id. at 899-902. The court cited to the recent U.S. Supreme Court case of Norfolk Southern Railway Co. v. Kirby, ___ U.S. ___, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004), which held that in order for the Court to apply admiralty law, a court *must* have admiralty jurisdiction. Doe at 899. The Plaintiff's alleged sexual assault and battery occurred while she and the crewmember were ashore in Bermuda at a scheduled port of call. Noting that a maritime tort claim must satisfy two conditions: 1) location and 2) connection with maritime activity, the Eleventh Circuit quickly dispensed with the connectivity requirement because of the involvement of the crewmember, the ship's security personnel, and the ship's medical staff. Id. at 900. Addressing the "location" pre-condition to admiralty jurisdiction, the court ruled that even with the landside location of the tort, admiralty jurisdiction existed because the stop in Bermuda was a regular port of

call stop for the ship and was an integral part of the on-going cruise. Id. at 901. Furthermore, the sexual battery upon the plaintiff occurred very close to the docked ship, within walking and sight distance. Id. Also, the relationship between the plaintiff and the crewmember began aboard the ship as he was her waiter during the cruise. Id. Lastly, the court noted the importance of uniformity and the need to apply a single standard of care throughout the cruise rather than standards of care that would depend on the law of the port of call where the tort occurred. The Eleventh Circuit concluded by stating "[w]e see no reason that cruise lines' liability to their passengers while at a regularly-scheduled port-of-call and in a crew member's company should vary from port to port, especially given the potentially disruptive impact on maritime commerce. Id. at 902.

The Eleventh Circuit then proceeded to analyze the standard of care that cruise lines owe to their passengers for intentional torts committed by their crewmembers. The court began by reviewing three U.S. Supreme Court decisions: New Jersey Steam-Boat Co. v. Brockett, 121 U.S. 637 (1887), New Orleans & N.E.R. Co. v. Jopes, 142 U.S. 18 (1891), and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959). Id. at 904. Addressing the undisputed fact that a cruise line is a common carrier, the court noted that in Jopes, the Supreme Court stated that a more stringent rule of liability applies to the employer and that the employer is held liable even though the assault at issue was wanton and willful and committed outside the scope of employment. Id. at 906. This rule is premised on the special implied duty of protection and safe transport that a common carrier owes through its employees to its passengers, and not because the act is incident to a duty within the scope of the crewmember's employment. Id. at 907. It is a special, non-delegable duty owed by he carrier to the passenger. Id.

The Eleventh Circuit rejected the Defendant's argument that Kermarec overruled the Jopes decision. The Kermarec decision stands for the broad proposition that a shipowner owes a duty of reasonable care towards those lawfully aboard the vessel who are not crewmembers. Kermarec, 358 U.S. at 630. However, the Doe court

pointed out that the Kermarec case involved a garden variety negligence case and did not involve an assault or intentional tort by a crewmember on a passenger. Doe, 394 F.3d at 908. The Kermarec case did not even mention the Jopes or Brockett decisions. Id. at 908-909. The Doe court, therefore, rejected the cruise lines' negligence/scope of employment argument for crewmember assaults on passengers. Id. at 912.

The Doe court held that (1) the cruise lines owe a non-delegable duty to protect their passengers from crew member assaults and thereby safely transport their cruise passengers; (2) that the Brockett and Jopes decisions are binding precedent; and (3) that the reasonable care standard does not apply to a crew member's sexual assault on a passenger. Id. at 913.

The Doe court went on to reject the defendant's next argument that the common carrier-passenger relationship was severed when the plaintiff and crewmember left the ship because the crewmember was "off duty." Id. at 914. Since the cruise line expressly permits social interaction of the crew with the passengers and, in fact, encourages it to generate tips for the crew, the court reasoned that the carrier-passenger relationship existed throughout the cruise even when the crewmembers was not doing the tasks of his specific job. Id.

III. Spector v. Norwegian Cruise Line Ltd. – The ADA "may" Apply to Cruise Ships

In the Young Lawyer's Committee Meeting at last year's Fall Meeting we discussed the Fifth Circuit Court of Appeal's decision in Spector v. Norwegian Cruise Line, Ltd., 356 F.3d 641 (5th Cir. 2004). That case was accepted upon writ of certiarori to the U.S. Supreme Court because of the conflict with the decision from the Eleventh Circuit Court of Appeal's decision in Stevens v. Premier Cruises, Inc., 215 F. 3d 1237 (11th Cir. 2004). The Supreme Court issued its 6-3 decision on June 6, 2005. The opinion was written by Justice Kennedy and there were numerous concurring opinions and a dissenting opinion written by Justice Scalia to which Justice O'Connor and Chief Justice Rehnquist joined.

As many of you will recall, the Spector case involved the question of whether Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §12181 *et seq.* applies to foreign flag cruise ships in United States waters. The Eleventh Circuit held that it did, but the Fifth Circuit in Spector decided the opposite.

The Supreme Court began its analysis by noting that Norwegian Cruise Line Ltd. (NCL) is a Bermuda corporation with its principal place of business in Miami, Florida. Spector v. Norwegian Cruise Line Ltd., 545 U.S. ____ (slip op., at 2) (2005). NCL operates foreign flagged cruise ships that depart from and return to ports in the United States. Id. The Petitioners were disabled individuals and their travel companions who traveled on two NCL ships in 1998 and 1999 out of the port of Houston, Texas.

The Supreme Court noted that the Fifth Circuit held that general statutes (such as the ADA) do not apply to foreign flag vessels in United States territory absent clear congressional intent. Id. at 4. Title III of the ADA prohibits discrimination against the disabled in public accommodations and public transportation services. Id. at 5. Although the ADA definitions of "public accommodations" and "public transportation services" do not expressly mention cruise ships, the Supreme Court noted that cruise ships clearly come within both definitions under "conventional principles of interpretation." Id. at 6. The Supreme Court then proceeded to reject the "broad clear statement" rule adopted by the Fifth Circuit because such a rule would have to apply to every facet of the business and operations of a cruise ship which would be inconsistent with the case law and principles of statutory construction. Id. Instead, the Supreme Court favored the "narrow clear statement" rule: "Absent a clear statement of congressional intent, general statutes may not apply to foreign flag vessels insofar as they regulate matters that involve only the internal order and discipline of the vessel, rather than the peace of the port." Id. at 7-8. Accordingly, the Supreme Court found that Congress intended no interference with matters that concern only the internal operations of the ship. Id. at 8. But Congress did intend its statutes to apply to entities

in U.S. territory that affect American citizens or affect the peace and tranquility of the U.S. Id.

The Supreme Court reinforced the purpose of the ADA: to provide broad protection of the disabled. Id. at 9. However, if the ADA imposes duties that interfere with the internal affairs of the cruise ships, then the lack of a clear congressional statement can mean that those applications are precluded. Id.

The difficulty of this decision is trying to decipher what constitutes the "internal affairs" of a cruise ship. The Supreme Court pointed out the following allegations from the Complaint that would not be considered "internal affairs": charging higher fares or surcharges for disabled passengers; maintaining evacuation programs and equipment in inaccessible locations for disabled passengers; requiring disabled passengers to waive any potential medical liability and to travel with a companion; and the reservation of the right to remove a disabled individual from the ship whose presence endangers the comfort of other passengers. Id. at 10-11. However, those allegations regarding the physical barriers aboard the ship such as coamings and certain room designs, could be considered internal affairs of the ship because they would require a permanent and significant alteration of the ship. Id. at 11.

Since Title III already requires that barrier removal be "readily achievable", structural changes such as these would not be mandated under the ADA. Id. at 12. Moreover, the ADA requirements do not apply if the modifications needed to correct a barrier would pose a risk to other passengers. Id. at 13. A case-by-case application of the internal affairs clear statement rule was thereby adopted by the Supreme Court as it viewed such an approach to be consistent with prior case law and the ADA. Id. at 15.

IV. The "New" Forum Selection Clauses

Another issue that is bound to come up in the trial courts and for appellate review in the near future is the use of new forum selection clauses in the cruise tickets that

mandate that actions be filed not only courts in Miami (or Broward County), Florida, but specifically in *federal court* in Miami (or Broward County), Florida. So far, the author is aware of at least three cruise lines that have changed their forum selection clauses in the last year or so. They include Carnival Cruise Line ("Carnival"), Costa Cruise Line ("Costa"), and Norwegian Cruise Line ("NCL"). To the best of the undersigned's knowledge, Royal Caribbean Cruise Line has not made such a change, yet.

Carnival's new clause reads:

> 15. It is agreed by and between the Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.

Costa's clause reads:

> (19) Choice of Forum; No Arrest
>
> (a) For cruises which depart from, return to, or make any port call at a United States port, all controversies, disputes, suits, and matters of any kind whatsoever against CARRIER or any controversies, disputes and matters of any kind arising out of, concerned with or incident to the voyage or this Passage Contract, may be instituted only in the courts of Broward County, Florida, and any other action against CARRIER shall be considered void. Any and all disputes regarding the interpretation or enforceability of this Contract shall be resolved according to the General Maritime Law of the United States. For voyages which do not depart from, return to, or make any port call at a United States port, all such suits shall be instituted only in the courts of Italy.
>
> (b) For cruises which depart from, return to, or make any port call at a United States port, Passenger further agrees that any suit against Carrier shall be filed exclusively in the United States District Court for the Southern District of Florida located in Broward County, Florida, and that any such suit shall be based exclusively upon the admiralty jurisdiction of the United States District Court.
>
> (c) Regardless whether or not Passenger's voyage departs from, returns to, or makes any port call at a United States port, Passenger hereby

waives any right to arrest or otherwise detain the Vessel in any jurisdiction.

And, NCL's clause reads:

22. Except as otherwise specified herein, this contract shall be governed in all respects by the General Maritime Law of the United States and, only when not inconsistent with the provisions of this Contract or U.S. maritime law, the laws of the State of Florida. It is hereby agreed that any and all claims, disputes or controversies whatsoever arising from, related to, or in connection with this Contract or the transportation furnished hereunder shall be commenced, filed and litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A., to the exclusion of the Courts of any other country, state, city or county.

The issues that are expected to arise out of these new clauses involve primarily the right to a jury trial. Most, if not all, passenger claims are governed by the general maritime law that allow jurisdiction in the federal courts under admiralty. But, if the passenger is forced to file suit in federal court under the court's admiralty jurisdiction he/she may lose the right to a jury trial. Although the passengers may assert diversity jurisdiction to keep their right to a jury trial if they are not Florida residents and their claims exceed $75,000, what will happen to those passengers who are Florida residents or otherwise cannot meet the requirements of diversity jurisdiction? This will affect those passengers' substantive rights and may violate the "savings to suitors" clause and 46 App. U.S.C.A. §183c. Also, the Costa clause above specifically requires that passengers proceed solely under the Court's admiralty jurisdiction.

In addition, do the new forum selection clauses, in general, impermissibly allow the cruise lines to limit the possible forum to only one court of law? What will be the reaction of the Federal Court in the Southern District of Florida to all the new slip and fall cases filed in their Court? If you are a plaintiff attorney do you risk filing suit in state court to fight the clause? Do you file suit in both courts? You will recall that there still is a one year time for suit clause in all of the tickets, so that fact has to be considered

when you choose a forum. These are just a few issues regarding these types of clauses that will most likely be litigated in the coming years.

V. Discovery - Cruise Ship Accident Reports

The last cruise passenger topic that I would like to discuss is a recent order by District Judge Jordan from the Federal District Court for the Southern District of Florida that may have far reaching implications. In the case of Jones v. Carnival Corporation, Case No. 04-20407-CIV-JORDAN, Federal District Judge Jordan overruled the objections filed by Carnival to Magistrate Judge Brown's order requiring Carnival to produce its accident report.[2] After a passenger has an accident on board a ship, most cruise lines have a security officer conduct an investigation of the accident, take photographs, and create a written accident report. For years the cruise lines have asserted objections to the production of that report and photographs on the basis of the work product doctrine, i.e., that the report is prepared in anticipation of litigation. The cruise lines have also objected on the basis of the relatively new "self-critical analysis privilege."

Federal District Judge Jordan overruled the objections made by Carnival and ordered the production of the accident report and photographs. He stated in his Order that the report (which he reviewed *in camera*) resembled a routine recording of objective facts including the circumstances of the accident and Carnival's remedial response. The report was created as a matter of normal routine by the security officer and was not prepared in response to a threat of a lawsuit, at the direction of an attorney, insurer or superior. Accordingly, the Judge ruled that the report was not prepared in anticipation of litigation.

In addition, the court refused to recognize the "self-critical analysis privilege" on the basis that the Eleventh Circuit Court of Appeals has not recognized such a privilege.

[2] The Order is dated September 27, 2005 and can be found online on the Pacer system. However, if anyone would like a copy of the Order, please contact the author who would be happy to provide a copy of the Order.

However, even if such a privilege applied, the court ruled it would not protect the report because such a privilege only protects subjective impressions and opinions in the report, not objective facts. Upon review of the report, the court stated that it contained only a recitation of objective facts.

Obviously, for Plaintiffs, the ability to obtain the accident reports and photographs taken by the ship's security officer as part of those reports could greatly aid their case and/or reduce the possible defenses raised by the cruise lines. Only time will tell if Judge Jordan's Order is just the beginning or simply an aberration. Stay tuned.