

Rubin, Hay & Gould, P.C.

Travel Law Update

JANUARY 2006

Highlights of Rubin, Hay and Gould's 2005 Decisions

FLORIDA SUPREME COURT UPHOLDS ARBITRATION AGREEMENTS SIGNED BY PARENTS FOR TRAVEL BY MINORS

In a decision with implications for businesses throughout the travel industry, in July 2005, the Florida Supreme Court held that a parent may bind a child to an agreement to arbitrate claims signed by the parent as a condition to travel arranged by a tour operator.

The case, *Shea v. Global Travel Marketing, Inc.*, arose out of a wrongful death lawsuit filed by the estate of a twelve year old child who was killed during a safari in Africa. The defendant, who was represented by Rodney E. Gould and Brad A. Compston of Rubin, Hay & Gould, moved to compel arbitration of the claim based on a contractual

agreement to arbitrate all claims arising out of the safari that was signed by the child's mother before their departure on the trip.

After the trial court granted the tour operator's motion to compel arbitration, the plaintiff appealed. The plaintiff argued that parents lack the authority to waive the rights of their children, including the right to a jury trial, and that arbitration of claims by children was impermissible because Florida courts have an overriding authority to protect the rights and interest of minors.

The Court of Appeals sided with the plaintiff, finding that, while public

policy concerns might support enforcement of such an agreement to arbitrate in the context of medical care, insurance or "participation in commonplace child oriented community or school supported activities . . . commercial travel opportunities are not in that category."

However, the Florida Supreme Court reversed.

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RODNEY E. GOULD



BRAD A. COMPSTON

TRAVEL AGENTS DO NOT GUARANTEE THE QUALITY OF SERVICES THEY RECOMMEND TO THEIR CUSTOMERS

In *Carfagno v. Travel Works, Ltd.*, a case defended by Craig S. Harwood of Rubin, Hay & Gould, P.C. in Pennsylvania, the defendant, a local travel agent, successfully obtained summary judgment dismissing all claims against it and avoiding trial.

The plaintiffs purchased a Radisson Seven Seas Cruises luxury cruise through the defendant travel agency. Following the trip, the plaintiffs sued the travel agency for breach of contract and negligence because, among other things, they

did not enjoy the cruise, did not enjoy activities on the cruise, the cruise was not geared to their age group, the dining arrangements and quality were poor and the seas were rough.

The plaintiffs sought to hold their travel agent liable on theories that it was negligent in not knowing these things when it recommended the trip and that it made misstatements about the trip, including that the seas would be smooth, that the cruise ship was the "Four Seasons of cruise lines," and that the trip would be

"the cruise of a lifetime."

The travel agent moved for summary judgment, arguing that it did not guarantee satisfaction, that its representations and recommendations were consistent with its knowledge and experience, and that any statements made to the

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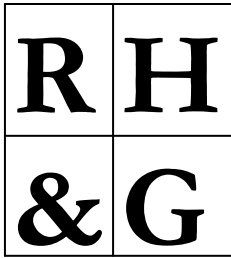
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Other Notable Cases

COURT REFUSES TO ENFORCE FORUM SELECTION CLAUSE WHERE NOTICE TO PASSENGERS WAS INADEQUATE

Forum selection clauses in travel contracts, which allow customers to sue only in the place where the travel agent, tour operator, cruise line, etc. is located, are widely enforced by federal and state courts nationwide. A case recently decided by the Massachusetts Court of Appeals, Casavant v. Norwegian Cruise Line, Ltd., however, illustrates a few of the pitfalls that may allow a plaintiff to defeat a forum selection clause if companies do not use care in the way they implement such clauses.

In Casavant, the plaintiffs received cruise tickets containing the forum selection clause approximately two weeks before their departure and a few days before the September 11 terrorist attacks. After September 11, the plaintiffs canceled their cruise and later sued to recover the penalties imposed by the cruise line as a result of the last

minute cancellation. The cruise line filed a motion to dismiss based on the forum selection clause, which required that litigation be filed in Dade County, Florida.

The Court of Appeals, however, refused to enforce the forum selection clause. Its decision focused on several problems with the defendant's practices related to use of the clause in its customer contacts. First, the court noted that the cruise line had not given the plaintiffs notice of the clause until long after they booked and paid for the trip. In addition, by the time the plaintiffs received notice of the forum clause, cancellation penalties were already in effect, meaning that "the means and manner of the delivery of the terms of the contract did not fairly allow the Casavants the option of rejecting the contract with impunity." The court also found that by canceling

the trip shortly after receiving the ticket contract, the plaintiffs effectively rejected the contract and therefore did not become bound by the forum selection clause.

Had this been a more typical case, for example the plaintiffs participate in a trip or cruise and then sue upon their return home, the Court may have found that the plaintiffs accepted the contract and were therefore bound by the forum selection clause.

In any event, the Casavant decision emphasizes the need for businesses to review carefully forum selection clauses and other contract provisions to ensure that they are clear and conspicuous as required by the case law and that their procedures for delivering documents containing the contract terms to customers are designed to maximize the likelihood of defeating a challenge in court.

"THE CASAVANT DECISION EMPHASIZES THE NEED FOR BUSINESSES TO REVIEW CAREFULLY FORUM SELECTION CLAUSES AND OTHER TRAVEL CONTRACT PROVISIONS."

LAWSUIT RAISES QUESTIONS ABOUT STATUS OF TOUR OPERATOR'S EMPLOYEES

A lawsuit settled during 2005 left unresolved several legal questions that may affect many employers in the travel industry. The case, Stokes v. Saga International Holidays, Ltd., which was originally filed in California before being transferred to the federal District Court of Massachusetts, was a class action lawsuit filed on behalf of present and former tour guides of Saga International Holidays.

The plaintiffs alleged that Saga had violated the Fair Labor Standards Act by failing to pay its tour directors overtime. The plaintiffs sought to recover overtime pay for tours conducted within the United States to which they and other tour directors were allegedly entitled. Among other things, the plaintiffs sought compensation for

time spent preparing for tours, preparing post-tour reports and similar documentation, as well as for additional time spent during tours doing things like eating dinner with trip participants, responding to requests, assisting with problems or emergencies and performing other functions typically required of a tour director beyond simply guiding the trip.

Saga asserted that it was not required to pay overtime for these functions because the tour directors were "exempt employees" under the FSLA's administrative and artistic professional exemptions. The merits of this defense were never decided by the court, however, and the court later approved the class sought by the plaintiffs on their FSLA claims. Thereafter the parties agreed, with court approval, to a settle-

ment of the plaintiffs' claims by which the defendant was required to pay \$365,000 in damages and attorney's fees.

Tour operators and other businesses should take note of this case because the disputed compensation practices of the defendant may be similar to those employed by many within the travel and tourism industry. The viability of the claims made by the plaintiff remain unresolved. Thus, similar allegations are a possible source of litigation against other travel businesses that employ similar practices. Indeed, even if tour guides and directors are ultimately found to be exempt employees under the FSLA exemption as Saga argued, any litigation required to resolve the issue would likely be costly and time consuming for the defendant.

ARBITRATION AGREEMENTS ENFORCEABLE (CONT. FROM PAGE 1)

It held that there was no reasonable or reliable basis for courts to distinguish between travel and other activities engaged in by children and that it was inappropriate for the courts to make value judgments about the various worth of different activities, noting that “travel’s beneficial effects on the young are well known.” The Court concluded that “just as the mother in this case had the authority to enter into a contract for herself and her minor child to travel to Africa for a safari, she also had the authority to agree to arbitrate claims on his behalf arising from that contract.”

This decision was an important victory for tour operators, travel agents, cruise lines, and virtually any other travel business that works with children and families since it clarifies the ability of parents to waive or modify the rights of their children. A contrary ruling, declaring these agreements invalid, would have had a significant impact on travel businesses which routinely use such agreements, requiring them to reexamine every aspect of their business, from the services they

offer to families to insurance coverage for their operations.

Many issues remain unresolved, however. The decision of the Florida Supreme Court, while influential, is not binding in any other state. Thus, the enforceability of tour operators’ agreements to arbitrate the claims of minors remains unclear in most other states, which have not yet addressed the issue.

In addition, the Florida Supreme Court distinguished agreements to arbitrate, which relate to the forum for hearing a claim, from releases and waivers of substantive rights.

The enforceability of releases of liability and similar agreements waiving substantive rights of mi-

nors was not addressed by the Florida Court, nor has it been addressed by courts in most other states.

In those states that have considered the issue, courts are split concerning the best rule. States such as Colorado and Washington have declared releases signed by parents unenforceable against minors, while states such as Ohio and Massachusetts enforce them.

Given the uncertainty that still surrounds agreements for travel involving children, companies should take a close look at their business practices and customer contracts with an eye to whether they maximize available protection from liability and lawsuits.

TOUR OPERATOR PREVAILS ON MERITS IN ARBITRATION OF RELATED CASE

In a separate case, the defendant in *Shea* was also sued by the deceased child’s mother, who also participated in the safari. The suit argued that the tour operator was negligent and sought emotional distress damages. In an arbitration on the merits of the plaintiff’s claim, during which the defendant was again represented by Rubin, Hay & Gould, P.C., the arbitrator, after hearing the testimony of numerous witnesses, including many from Africa, ruled that the tour operator was not liable on any claim.

“THE ENFORCEABILITY OF AGREEMENTS TO ARBITRATE AGAINST MINORS REMAINS UNCLEAR IN MOST OTHER STATES, WHICH HAVE NOT YET ADDRESSED THE ISSUE.”

TRAVEL AGENT AWARDED SUMMARY JUDGMENT (CONT. FROM PAGE 1)

plaintiffs were the travel agent’s opinion and could not give rise to liability. The trial court agreed with the travel agent, and granted the motion for summary judgment.

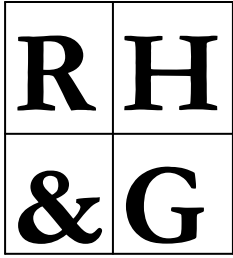
While these types of lawsuits often seem baseless to the travel agent, tour operator or other travel business being sued, they are often difficult to dispose of before trial. Summary judgment

is granted only where there are *no* disputed material facts and a party is entitled to judgment as a matter of law. Consequently, many courts and judges are reluctant to grant summary judgment and thereby end a case, preferring to err on the side of caution and encourage settlement or to allow a jury to decide the matter.

To maximize the chances of summary judgment and a rela-

tively quick and inexpensive resolution to a case, defendants should begin laying the groundwork for summary judgment from the outset of a lawsuit, including by identifying key factual issues in the case and likely material factual disputes, developing strategies for eliminating factual disputes and narrowing the issues that a court must decide, and structuring discovery to favor summary judgment.

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WHO WE ARE:

Established in 1978, RUBIN, HAY & GOULD, P.C. provides legal services in the areas of tax and estate planning, business, real estate, and litigation in state and federal courts throughout the country.

Our Travel Law Group represents tour operators, travel agents, cruise lines, study-abroad programs, the travel offices of college alumni associations, and other members of the travel industry in a wide variety of matters. Through local counsel throughout the country and in Canada, we defend tort, contract, employee, and other claims in state, provincial, and federal courts. The cases originate in this country and across the globe—anywhere our clients do business, such as safaris in Africa, motorcoach tours in Europe, bicycling trips in Italy, student travel programs in South America, and cruises in the Caribbean or Mediterranean.

Our experience in travel law allows us to offer counseling to our travel industry clients tailored to their specific needs, including advice on such matters as insurance issues, contracts with suppliers; descriptions and terms and conditions in brochures and fliers, disclaimers of liability, release and assumption of risk documents, employee contracts, employee relations, and dealings with government regulators.

RUBIN, HAY & GOULD NEWS:

Rodney E. Gould recently took and passed the California bar exam, and he was admitted to the California bar in December 2005. He is also a member of the bars of Massachusetts, New York, Pennsylvania, the District of Columbia, the United States Supreme Court and numerous federal district and circuit court bars throughout the country.

Melissa B. Paradis joined Rubin, Hay & Gould in November, 2005 as an associate in the litigation department. She graduated from Boston University School of Law in May 2005, where she was Note Editor of the International Law Journal. She recently passed the Massachusetts bar exam and was admitted to the Massachusetts bar in December 2005.

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