

# Rubin, Hay & Gould, P.C.

## Travel Law Update

SEPTEMBER, 2006

### *Notable Decisions of 2006*

#### **PLAINTIFF MUST PURSUE CLAIMS AGAINST TOUR OPERATOR IN COUNTRY WHERE INJURY OCCURRED**

In a recent decision from the United States District Court for the District of Columbia, *Irwin v. World Wildlife Fund, Inc.*, Rubin, Hay & Gould successfully obtained the dismissal of claims filed against its client, the World Wildlife Fund, Inc. ("WWF"), following a boating accident in Gabon.

Based on our arguments, the Court concluded that Gabon was a superior forum for resolution of the matter. The decision appears to be the first time a court in the United States has dismissed a case in favor of the Gabonese legal system.

The plaintiff Nancy R. Irwin, a citizen of the United Kingdom, was seriously injured when a small wooden boat she and her husband were riding in on a lagoon near Gamba, Gabon was struck by another boat. The plaintiffs asserted that their boat trip was

booked through WWF and that WWF was affiliated with the operator of the boat in which they were riding. They sued WWF for negligence in the District of Columbia because it is headquartered there.

WWF, represented by  
(continued on p. 3)



RODNEY E. GOULD



ROBERT C. MUELLER

#### **EMPLOYEE'S STATEMENTS ABOUT THE QUALITY OF MEDICAL CARE WILL NOT SUPPORT CLAIM AGAINST TOUR OPERATOR**

In *Gianocostas v. Riu Hotels, S.A., et al.*, the parents of a twenty year old tour participant brought suit against GWV International ("GWV"), a tour operator represented by Rodney E. Gould, Robert C. Mueller and Melissa B. Paradis of Rubin, Hay & Gould, seeking damages for the wrongful death of their daughter, who died in April 1999 as a result of complications from diabetes.

The plaintiffs alleged that after their daughter

became ill and was hospitalized in the Dominican Republic, an onsite representative of GWV made certain statements to the plaintiffs as to the care their daughter was receiving, which had the effect of delaying their decision to remove their daughter from the Dominican Republic and to transfer her to a medical facility in the United States.

The Court had previously dismissed plaintiffs' claims against GWV for negligent se-

lection of the hotel and its clinic on *forum non conveniens* grounds, leaving only the plaintiffs' negligent misrepresentation claims to be resolved.

In response to GWV's motion for summary judgment, the Court found that the plaintiffs had no state law claim for negligent misrepresentation against GWV. Moreover, it held that even if such a claim existed, GWV was not liable to the plaintiffs as a matter of law.

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#### **CONTACT US:**

205 Newbury Street  
Framingham, MA 01701  
(508) 875-5222  
Fax: (508) 879-6803

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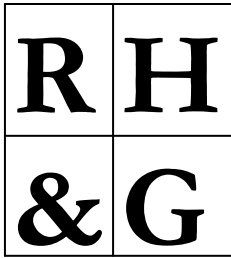
*Plaintiff Must Pursue Claim Against Tour Operator in Country Where Injury Occurred.* 1

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*Small Claims Judgments Reversed on Appeal; Tour Operator Not Responsible for Disruption of Plaintiffs' Vacation by a Hurricane.* 2

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Other Notable Cases

SMALL CLAIMS JUDGMENTS REVERSED ON APPEAL; TOUR OPERATOR NOT RESPONSIBLE FOR DISRUPTION OF PLAINTIFFS' VACATION BY A HURRICANE

Many businesses have experience with decisions in Small Claims Courts which they consider arbitrary and unfair. This is particularly true when the case involves seemingly insubstantial or even frivolous claims by an unhappy customer. A recent decision in an appeal of a small claims decision handled by Rubin, Hay & Gould demonstrates that unfair results can be avoided.

The case, TNT Vacations v. Patenaude, et al., involved claims against the tour operator filed by multiple plaintiffs in Small Claims Court in Vermont after their trips to Cancun, Mexico were interrupted by a hurricane. The plaintiffs asserted that the tour operator should have cancelled and rebooked the trips or should have warned them about the hurricane. The plaintiffs also alleged that the tour operator made false and inaccurate

statements concerning the hurricane.

After the small claims trial and an initial judgment in favor of the plaintiffs, the Vermont Superior Court reversed on appeal and entered judgments in favor of the tour operator on each of the claims. The decision was based on several factors.

The Appellate Court found that "TNT did not and could not guarantee Appellees perfect or even acceptable weather. It owed them no duty in this regard." The Court also found that there was no evidence at trial that TNT possessed or should have known of information indicating that a hurricane was likely to hit Cancun prior to the plaintiffs' departure.

The Court also ruled that a disclaimer contained in the Tour Participant Contract signed by the plaintiffs -- stating in part that TNT was not

responsible for any loss due to weather -- had been incorrectly disregarded by the Small Claims Court.

Finally, it held that evidence that the plaintiffs were offered travel insurance that would have provided reimbursement to the plaintiffs in the event their trips were cancelled proved "that the parties understood that TNT was not guaranteeing the vacation and that it would have no liability for interruption or other problems caused by weather."



BRAD A. COMPSTON

"THE BALANCE OF PUBLIC AND PRIVATE FACTORS IN THIS CASE . . . PERSUADE THE COURT THAT THE MOST APPROPRIATE FORUM FOR THIS CASE IS GABON."

IRWIN V. WORLD WILDLIFE FUND, INC.

An Update From Our Business Litigation Dept.

FOLLOWING TRIAL, DEVELOPER NOT LIABLE FOR INSTALLATION OF ALLEGEDLY IMPROPER SIDING MATERIAL ON HOME

Following a lengthy trial, a real estate developer represented by Richard A. Goren of Rubin, Hay & Gould's business litigation department recently was found not liable on all claims brought against it by a homeowner.

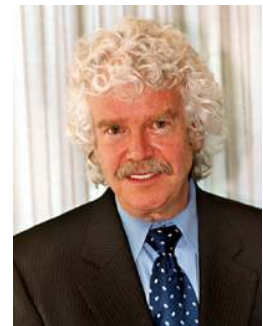
The case, Palmucci v. Berkovich, began when the plaintiffs, who had recently purchased a newly constructed home from the defendant, asserted that the defendant had improperly installed a synthetic stucco siding known as Dryvit rather than natural Portland cement stucco. The homeowners claimed that the material was inferior and the installation

defective. They asserted numerous claims, including breach of contract, breach of warranty, negligent misrepresentation and consumer protection claims that would have exposed the developer to liability for treble damages and attorney's fees.

Following a vigorous defense on the merits, the trial court ruled in favor of Rubin, Hay & Gould's client, finding that the use of Dryvit siding was proper and did not breach the terms of the contract. It also found that the defendant had not attempted to hide the use of Dryvit from the buyers and that expert testimony

showed that the siding installation was not defective.

The result is particularly notable since the use of Dryvit has been the subject of numerous lawsuits nationwide resulting in large verdicts against developers using the product.



RICHARD A. GOREN

**PLAINTIFF MUST PURSUE CLAIMS AGAINST TOUR OPERATOR IN COUNTRY WHERE INJURY OCCURRED (CONTINUED FROM P. 1)**

Rodney E. Gould and Robert C. Mueller of Rubin, Hay & Gould, responded to the suit by filing a *forum non conveniens* motion in which it asserted that Gabon was the better forum for the lawsuit. In support of the motion, Rubin, Hay & Gould offered evidence that Gabon and its legal system was a suitable alternate forum for resolution of the dispute and argued that evidence vital to the resolution of the case was located exclusively in Gabon.

The plaintiffs responded by asserting that medical risks

prevented Irwin from traveling to Gabon, that Gabon's legal system was "subject to government influence" and "corruption," and that some evidence related to the case was located in the United States.

After noting that there is a strong presumption in favor of the plaintiff's choice of forum, the Court nevertheless agreed with WWF's position and granted its motion to dismiss. The Court concluded that Gabon offered an adequate forum for resolution of the case and that all or most of the relevant evidence was located there. It

dismissed concerns about the plaintiff's health and inability to travel based upon WWF's agreement that it would accommodate the plaintiff by arranging for her pretrial testimony to be taken in Scotland. As a result of the Court's decision, should the plaintiffs choose to pursue their claims against WWF, they will be required to go to Gabon to do so.

If you have any questions about the decision, or would like to discuss its implications for similar lawsuits, please feel free to contact Rodney E. Gould or Robert C. Mueller.

"[I]T WOULD HAVE BEEN UNREASONABLE . . . TO RELY ON THE LAY STATEMENTS OF [THE TOUR REPRESENTATIVE] WHEN [THE PLAINTIFFS ] ALSO RECEIVED CONSIDERABLE MEDICAL OPINION . . . FROM THE MEDICAL PROFESSIONALS TENDING HER."

*GIANOCOSTAS V. RIU HOTELS, S.A., ET AL.*

**VERMONT COURT ENFORCES ARBITRATION AGREEMENT IN SMALL CLAIMS CASE**

Rubin, Hay & Gould also successfully obtained the dismissal of a separate group of small claims lawsuits arising out of the same hurricane at issue in *TNT Vacations v. Patenaude* (see article on page 2) on the strength of an arbitration agreement in the company's Tour Participant Contract. The Court's ruling compelling the plaintiffs to seek relief, if at all, only through arbitration in the tour operator's home state of Massachusetts is notable because most courts have refused to enforce arbitration agreements to bar small claims proceedings. The decision is *Matten v. TNT Vacations*.

**EMPLOYEE'S STATEMENTS ABOUT THE QUALITY OF MEDICAL CARE WILL NOT SUPPORT CLAIM AGAINST TOUR OPERATOR (CONTINUED FROM P. 1)**

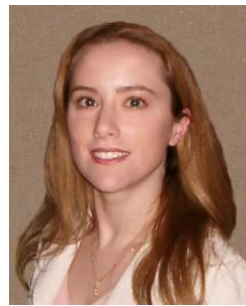
The Court found that statements made by GWV's representative regarding the daughter's care in the hotel clinic and the representative's belief that she would receive satisfactory treatment constituted opinion, not actionable statements of fact: "The degree of competence of the medical providers and the standard of medical care in the Dominican Republic are not matters in respect to which [the tour representative] could have actual knowledge. . . . [The tour representative] was neither a doc-

tor, nor familiar with the condition of diabetes. Therefore, [her] statements to the Gianocostas are not actionable statements. . . ."

The Court also found that the plaintiffs' reliance upon the statements of the representative were unreasonable as a matter of law because the plaintiffs had been in contact with their daughter's endocrinologist and had personally communicated with the doctors at the hotel clinic regarding their daughter's condition.

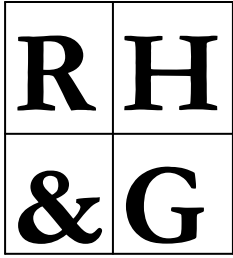
This decision is notable in

that it establishes that tour operators and their employees are not charged with being omniscient, particularly with regard to matters outside of the realm of their expertise.



**MELISSA B. PARADIS**

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**VISIT OUR  
WEBSITE:  
WWW.RHGLAW.COM**

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205 Newbury Street  
Framingham, MA 01701  
(508) 875-5222  
Fax: (508) 879-6803

**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** was recently admitted to the bar of the state of New Hampshire. He is also a member of the bars of Massachusetts, New York, California, Pennsylvania, the District of Columbia, the United States Supreme Court and numerous federal district and circuit court bars throughout the country.

**Rubin, Hay & Gould** is in the process of updating its website. For additional information about the firm and its practice areas, and for additional news and updates, please visit [www.rhglaw.com](http://www.rhglaw.com).

**RUBIN, HAY & GOULD, P.C.**

205 NEWBURY STREET  
FRAMINGHAM, MA 01701