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**TOPIC: Terrorism incidents and the legal problems confronting  
the travel agent community as a result thereof.**

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**INTRODUCTION**

The atrocities of September 11th have had a tremendous impact on the travel agent community. While terrorism as it pertains to the travel industry has not been the subject of extensive litigation, the state of the law as it exists today can provide some guidance to the travel agent community in dealing with three issues which inevitably arise in the aftermath of terrorist incidents: cancellation issues, bankruptcy issues, and travel agent liability for personal injury or death resulting from terrorist incidents.

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**I. TRAVEL AGENT RESPONSIBILITY FOR CLIENT CANCELLATIONS AND REQUESTS FOR REFUNDS.**

In this era of heightened tension, travel agents have been faced with a barrage of requests for cancellations made by a traveling public fearful of boarding planes or traveling abroad. Immediately after September 11<sup>th</sup>, many providers of services, such as airlines, cruise lines, and theme parks, relaxed their cancellation penalties and numerous travelers were able to cancel or re-schedule previously non-refundable trips. The largess of the service providers is now coming to an end, but travel agents are still faced with requests to cancel trips by the traveling public. And, of course, any further news of terrorist incidents or airplane crashes will only increase cancellation requests and resulting demands for refunds.

Travel agents should notify clients up-front of applicable cancellation penalties set forth by suppliers of services, whether they be imposed by airlines, cruise lines, or tour operators. This is because travel agents are generally considered to be agents of the traveler for purposes of divulging relevant information pertaining to the booking, and notice to a travel agent concerning cancellation policies or similar provisions, such as would be found in an office brochure obtained from a cruise line, constitutes constructive notice to the traveler. Hodes v. S.N.C. Achille Lauro ed Altri-Gestione, 858

F.2d 905, 912 (3d Cir. 1988), cert. denied, 490 U.S. 1001 (1989); Gomez v. Royal Caribbean Cruise Lines, 964 F. Supp. 47 (D.P.R. 1997). Travel agents should not rely merely on the documents provided by the service suppliers themselves, but should affirmatively take steps to point out the cancellation provisions to their clients, preferably both orally and in writing in a conspicuous location. If this is not done, a client may bring suit against the agency claiming the agency never notified the client of pertinent cancellation penalties and policies.

While, to date, there have been no reported cases concerning a traveler's attempt to obtain a refund on a non-refundable trip because of the traveler's general uneasiness in traveling subsequent to September 11th, in the past courts have generally (but not inevitably) enforced cancellation penalties in favor of the service supplier, provided the penalty constitutes a reasonable estimate of the travel supplier's chances of re-booking the trip and the measure of its probable loss in the event of a cancellation. Turner-Schraeter v. Brighton Travel Bureau, Inc., 258 A.D.2d 393, 685 N.Y.S.2d 692 (N.Y. App. Div., 1st Dep't 1999).

As a result, clients should be advised that, absent special dispensation from a service provider, cancellation provisions are generally held to be valid and enforceable, even in the face of a sudden change in the political landscape. For example, in one

case out of Queens, New York, the traveler, through a travel agent, purchased a pair of round-trip charter air tickets from JFK to Athens, Greece from a tour operator. The tickets were accompanied by a brochure which stated that cancellations made less than 21 days prior to departure would suffer a 100% cancellation penalty. Because of a subsequent "travel advisory" issued by the U.S. State Department warning travelers of lax security at the Athens Airport, the traveler decided to cancel his tickets fifteen days prior to departure, and sued to recover the cost of the tickets. The court upheld the cancellation provision and dismissed the case. Soury v. Tourlite Int'l, Inc., 131 Misc. 2d 502, 500 N.Y.S.2d 925 (N.Y. City Civ. Ct., Queens Co. 1986). In a companion case pending before a different judge in the same court, however, the court found the clause was not enforceable under identical facts. Brandwein v. Tourlite Int'l Airlines, Inc., 132 Misc. 2d 375, 503 N.Y.S.2d 934 (N.Y. City Civ. Ct., Queens Co. 1986). As the Soury and Brandwein cases demonstrate, clients hoping to recover lost monies through litigation are often left at the mercy of a particular judge or jury and their definition of what is reasonable under the circumstances.

Similarly, changed circumstances of a personal nature may not qualify the traveler for special dispensation. Courts have upheld cancellation penalties in cases where one of the travelers

suddenly took ill, Evanoski v. All Around Travel, 682 N.Y.S.2d 342 (Sup. Ct., App. Term, 2nd Dept. 1998), and have even upheld cancellation penalties when the traveler has a statement from his physician stating that travel is medically impossible. Mathews v. Northwest Airlines, Inc., 145 A.D.2d 968, 536 N.Y.S.2d 338 (N.Y. App. Div., 4th Dep't 1988).

As noted in the Evanoski case, courts are not reluctant to enforce these cancellation provisions because, in many instances, the plaintiff clients were advised by their travel agent (at least in fine print) that they had the option to purchase travel insurance that would protect their travel investment in the event of sudden sickness or certain other unanticipated contingencies. As we all know, it is imperative that travel agents discuss or offer insurance protection to their clients for all bookings, preferably by an affirmative written acceptance or rejection of the same. Indeed, this obligation may be required by state law. For example, travel agents in Massachusetts must disclose both the applicable cancellation or refund policy of a supplier of services and the complete terms of any trip cancellation insurance policy, both orally and in writing, prior to accepting payment for bookings. 940 C.M.R. 15.04.

Depending on the insurance package purchased, travelers may be covered for incidents arising from terrorist activity. For example, some policies may offer trip cancellation and

interruption insurance where there has been a delay, cancellation, or interruption of a trip as a result of a terrorist incident taking place in the city to which the traveler was scheduled to arrive within a month of the incident.

## **II. TRAVEL AGENT LIABILITY FOR THE BANKRUPTCY OF SERVICE SUPPLIERS.**

As a result of the fallout from September 11th, combined with the continued recessionary cycle, we can anticipate that additional travel industry service suppliers, including hotels, airlines, and cruise lines, may file for bankruptcy protection and cease operations. The issue for travel agents is the extent to which travel agents are liable for recoupment of costs associated with trips which cannot be completed as booked.

As an initial matter, it is highly likely that a travel agent must return any commission generated from a sale of a travel product if the service supplier subsequently ceases operation and the client is unable to travel. Markland v. Travel Travel Southfield, 810 S.W.2d 81 (Mo. Ct. App. 1991) (affirming judgment against tour operator of amount representing commission on booking); Unger v. Travel Arrangements, Inc., 25 A.D.2d 40, 266 N.Y.S.2d 715 (N.Y. App. Div. 1966) (holding that equitable principles demanded return of a commission after steamship company went bankrupt). Courts often consider retention of a commission in situations such as this to be a form of unjust

enrichment, and usually require that the commission be returned. In such situations, we advise travel agencies to offer up their commission in exchange for a release in the hopes of limiting future exposure and costly future litigation.

Beyond the commission issue, if a travel agent books travelers on a entity which the agent knows to be bankrupt and in the process of ceasing operations at any time prior to departure, a travel agent will most likely be held liable for all monies paid by the traveler for the trip, as well as consequential damages, regardless of whether the agent still retains possession of those funds. For example, in Douglas v. Linda Steele d/b/a The Travel Haus, 816 P.2d 586 (Okla. Ct. App. 1991), a travel agent booked honeymooners on a tour operated by a Hawaiian tour operator. The court found that there was a strong possibility that the travel agent actually knew the tour operator was bankrupt at the time it forwarded the check to the tour operator. In such a situation, the court held that the tour operator was responsible for all funds paid by the travelers.

When the bankruptcy of a service supplier is imminent, and the travel agent is unaware of this fact, the issue often becomes whether the travel agent had a duty affirmatively to inquire into the financial and operational stability of the supplier. Again, the standard courts use is what is reasonable under the circumstances.

Courts generally are loathe to require travel agents, in the absence of any prior knowledge indicating that the supplier may be experiencing financial difficulties which might interfere with normal operations, to conduct an investigation of the financial integrity of service suppliers. For example, in the case of Markland v. Travel Travel Southfield, 810 S.W.2d 81 (Mo. App. Ct. 1991), two couples booked a tour package to St. Croix operated by Eastern Airlines and its tour operator subsidiary. After the plaintiffs arrived in St. Croix, Eastern declared bankruptcy and the hotel declined to honor their vouchers, forcing the plaintiffs to obtain substitute accommodations and additional air fare charges for the return home. The plaintiffs brought suit against their travel agent for both a refund of the trip cost and the additional expenses incurred. In affirming the trial court's award of a return of the travel agent's commission only, the Missouri Appellate Court wrote that "where the travel agency is unaware that the vacation is not an impossibility, the travel agency is not required to inform its clients of the possible danger ahead." Since the travel agent had no "inside information" as to the pendency of a labor strike and subsequent bankruptcy of Eastern, the travel agent was under no obligation to attempt to ascertain the financial integrity of the carrier.

Of note in the Markland case was the court's reference to language in a form "customer disclosure notice" that the

travelers could purchase appropriate insurance coverage to protect them from losses such as this. As mentioned previously, such a written disclosure of the availability of travel insurance is advisable in all travel contracts, and, indeed, may be required by law in certain states.

Courts are more inclined to impose liability on travel agencies for supplier bankruptcies in situations where the travel agent uses a third-party service supplier without disclosing the nature of the supplier to the traveler. One such situation involved a travel agent's booking of a client on a charter airline which subsequently went bankrupt and ceased operations without the travel agent's informing the client that a charter airline (as opposed to a commercially-scheduled carrier) was being used, Rodriguez v. Cardona Trav. Bureau, 523 A.2d 281 (N.J. Super. Ct., Small Claims Div. 1986). Other similar situations involve a travel agent's booking of a client with a tour operator without disclosing that a tour operator was being used, Van Rossem v. Penney Travel Service, Inc., 128 Misc. 2d 50, 488 N.Y.S.2d 595 (N.Y. Dist. Ct., Suffolk Co. 1985), and a travel agent's booking of a client on a tour with a tour promoter which was not properly registered to do business in the state. Grigsby v. O.K. Travel, 118 Ohio App. 3d 671, 693 N.E.2d 1142 (Ohio Ct. App. 1997). In such cases a travel agency may be liable for both

a refund of the trip price and any other damages incurred by the client.

### **III. TRAVEL AGENT LIABILITY FOR TERRORIST INCIDENTS**

Travel agents generally are not liable for injuries or wrongful death claims brought by travelers as a result of terrorist activity occurring while they are on trips or tours booked through the agent.

While case law on this particular issue is limited, there are a few reported decisions which hold travel agents and tour operators not responsible for injuries sustained by travelers as a result of terrorist activity. The leading case on this issue is Klinghoffer v. S.N.C. Achille Lauro ed Altri-Gestione, 816 F. Supp. 934 (S.D.N.Y. 1993), in which summary judgment was granted in favor of a travel agency on plaintiffs claims that it was responsible for the PLO's hijacking of the Achille Lauro and the resulting death and personal injuries caused by the PLO hijackers. Another such case is Semmelroth v. American Airlines, 448 F. Supp. 730 (E.D. Ill. 1978) in which American Airlines (acting as a tour operator) promoted a fam trip to various travel agencies to view its hotels in Acapulco, Mexico. During this trip, one of the participating travel agents was killed by guerilla activity. The court granted the airline's motion to dismiss, holding that the airline had no duty to warn or

otherwise insure against such criminal activity. The court noted that to hold otherwise "would in fact make the promoters of travel insurers for the health and safety of all travelers," a proposition the court was not inclined to accept.

These cases really are but a subset of a broader category of cases which generally hold travel agents and tour operators not liable for random third-party criminal activity. For example, in Wilson v. American Trans Air, Inc., 874 F.2d 386 (7th Cir. 1989), the court found a charter tour operator not liable for injuries a traveler received when an unknown third party entered her and her husband's hotel room and attempted to rob and rape her. The court found that the tour operator did not owe a duty to investigate or warn the couple of the safety of the hotel and that the tour operator could not be held liable to the travelers pursuant to the heightened duties of an innkeeper. Numerous courts have adopted this reasoning. See, e.g., Manahan v. NWA, 821 F. Supp. 1105 (D.V.I.), supplemental op., adhered to, recons. denied sub nom. Manahan v. Yacht Haven Hotel, 821 F. Supp. 1110 (D.V.I. 1992), aff'd without op., 995 F.2d 218 (3d Cir. 1993) (the plaintiff was injured in a purse-snatching incident near her tour hotel in St. Thomas; the tour operator was granted summary judgment on the traveler's claim that it was responsible for the allegedly negligent advice its local ground handler, gave plaintiff about safety of walking to the restaurant near her

hotel at night); Fling v. Hollywood Travel and Tours, 765 F. Supp. 1302, 1306 (N.D. Ohio 1990), aff'd, 933 F.2d 1008 (6th Cir. 1991) (tour operator held not liable for injuries travelers suffered when they were robbed and one of them was shot near their tour hotel in the Bahamas), Dow v. Abercrombie & Kent Int'l, Inc., 2000 U.S. Dist. LEXIS 7290 (May 24, 2000) (assault and robbery in Masai Mara game reserve in Kenya) and West v. Maupintour, Inc., Civil Action No. 97-WY-1893-CB, slip op. (D. Colo. Dec. 29, 1997) (assault and robbery in Serengetti National Park in Tanzania).

In each of these cases, it was determined that the agent or operator had no prior, specific knowledge of criminal activity occurring at the place of the crime, and in such situations courts found that the agent or operator had no legal duty to ferret out criminal statistics in an attempt to determine the relative incidents of crime or to warn the traveler prior to departure about the same. It should be noted, however, that to the extent that a travel agent does have prior, specific knowledge of criminal activity occurring at a specific location (or in situations in which such information is readily available to the travel agent), and the agent or operator fails so to inform travelers, the agent or operator may be subject to liability on failure to warn or investigate theories. See, e.g.,

Createau v. Liberty Travel, Inc., 195 A.D.2d 1012, 600 N.Y.S.2d 576 (N.Y. App. Div. 1993).

In certain situations it may be advisable for a travel agency to inform its clients of potential dangers of visiting specific areas (i.e., from time to time, Israel and the West Bank). Unfortunately, it is impossible to determine what disclosure is "reasonable under the circumstances" because such a standard varies depending upon the location of the court and the composition of a jury. To the extent a travel agent believes it has information it should disclose to the traveler, the agent should err on the side of disclosing such information. This is true regardless if the agent believes the traveler should know this information, since some courts take the position that a reasonable traveler is one who is completely uninformed about the world around him and rightly relies upon his travel agent to provide him with all such information. While not serving as a complete safe harbor, the U.S. Department of State's web site, www.state.gov, provides travel warnings, public announcements, and generalized consular information sheets on foreign countries which provide some information as to what the U.S. government determines as long- and short-term safety issues to Americans traveling abroad.

Given that there is no bright-line rule as to what must or must not be disclosed by a travel agent or operator, it is

advisable that the agent or operator engage counsel to draft an appropriate disclaimer of liability in its reservation forms, itineraries, and brochures which expressly disclaims liability for matters such as wars, terrorist activity, banditry, and criminal activity which may occur while on trips or tours. (This disclaimer should be included in a more general disclaimer of liability for the possible negligence, errors, or omissions of third-party suppliers of services.) Many of the cases previously discussed, including Klinghoffer, Wilson, Dow, West, and Catalano, have acknowledged the effectiveness of such disclaimers, and such disclaimers have been of tremendous assistance in extricating travel agents and tour operators from litigation at a very early stage, prior to a lengthy, expensive, and burdensome discovery process.