

Torts, Insurance & Compensation Law Section Journal

A publication of the Torts, Insurance & Compensation Law Section
of the New York State Bar Association



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- The Recalcitrant Worker Defense
- Civil RICO
- Vehicular Electronic Device Recorders
- Lead Litigation
- Settling a Medicare Beneficiary Case
- Tips for Successful Mediation
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Litigating International Torts in U.S. Courts Travel Torts; Dispositive Motions on the Merits

By Hon. Thomas A. Dickerson and Rodney E. Gould

§ 1: On the Merits

Once personal jurisdiction over the parties has been established and any forum non conveniens motion has been addressed, the defendant may file motions to dismiss for failure to state a claim and/or for summary judgment. These dispositive motions are important litigation tools, the outcomes of which may cause the parties to re-evaluate the viability of their positions. Plaintiffs' counsel are well advised to carefully review this area of the law in preparing complaints that can survive the defendants' early substantive motions.¹

§ 2: Types of Issues Raised

This section reviews cases in which a variety of dispositive motions have been made at the commencement of the litigation in an effort to narrow the issues and determine the realistic value of a case.

§ 3: Early Choice-of-Law Determinations—Liability

The parties will attempt to establish the parameters of a given case by seeking to determine what legal theories may be utilized to establish liability.² For example, in *Naghiu v. Inter-Continental Hotels Group, Inc.*,³ the defendants were able to apply the law of two states to extinguish their liability for a tourist's property loss and physical injuries. The court held that during the plaintiff's "stay as a guest of defendant's hotel in Zaire, Africa in March 1993, he was attacked in his room, causing him to suffer personal bodily injury and a loss of \$146,000 in property." Virginia law was applied to the plaintiff's property loss claim, the result being a finding that the guest was not a bailee. Zaire law was deemed to apply to the plaintiff's personal injury claim, but since neither party supplied the court with Zaire law, Delaware law was applied instead, and the hotel was found not liable for the plaintiff's physical injuries.

In *Carris v. Marriott Int'l., Inc.*,⁴ a hotel patron was injured in a personal watercraft accident. He sought an early determination that "Illinois tort law [would] govern his case because that law includes an extension of the agency doctrine of respondeat superior that would enable him to fasten vicarious liability on Marriott for negligence by employees of NMR. Had Marriott owned the resort, the negligence of the employees...would be Marriott's responsibility under the doctrine. Marriott was not their

employer, however—NMR, a separate, indeed unaffiliated...corporation was—and so NMR's employees were not Marriott's employees and their negligence would not be imputed to Marriott as a matter of respondeat superior. But if Marriott created the appearance that NMR was owned by Marriott and Carris was led by that appearance to believe that it was owned by Marriott and he relied to his detriment on that belief, then the doctrine of apparent authority...would allow him to treat Marriott as if it were the employer of NMR's employees.... The parties agree, however, that under Bahamian law...apparent authority is not a ground for tort liability. This probably is incorrect.... But we leave the parties to their agreement and so if Bahamian law applies, Carris's only recourse is against NMR and presumably he would have to sue it in the Bahamas. So we must determine whether under Illinois conflict of law principles...Illinois or Bahamian tort law governs this case."

In *Heinz v. Grand Circle Travel*,⁵ a U.S. tour participant was injured when she was caught between hydraulic sliding doors on a cruise boat in Germany. The cruise boat was provided by a Swiss tour operator. The court relied on U.S. maritime law and held that a Basel, Switzerland forum-selection clause would be enforced and that the Strasbourg Convention on the Limitation of Liability would most likely be the governing law.

In *Sachs v. TWA Getaway Vacations, Inc.*,⁶ a tour participant was injured while disembarking a tour bus in Egypt. The U.S.-based tour operator asserted that it "has never owned, operated, managed or controlled the motorcoach." The court held that under Missouri and Florida laws, the U.S.-based tour operator generally was not liable for misconduct or selection of foreign ground handlers.

In *Oran v. Fair Wind Sailing, Inc.*,⁷ the plaintiff was injured while taking part in an "Instant Bareboater and Catamaran Course" in the United States Virgin Islands. At issue was the enforceability of a signed release. The court noted that it must determine "(a) what law to apply to evaluate the validity of the Release, (2) under what law, whether the Release is valid and (3) if the Release is valid, what is its effect on Plaintiff's negligence and unseaworthiness claims." The court found that federal admiralty law applied and, further, that regarding the validity of the release, Michigan law would be applied because the choice-of-law clause was enforceable and "does not offend the public policy of the Virgin Islands or courts

sitting in admiralty jurisdiction as such clauses are routinely enforced” The court granted summary judgment to the defendants.

Also, in *Neely v. Club Med Management Services, Inc.*,⁸ a U.S. citizen employed as a scuba instructor at the St. Lucia Club Med resort was sucked into the propellers of a dive boat. The court held that it had subject-matter jurisdiction and that maritime law governed and preempted St. Lucian law on the issues of liability and damages.

§ 4: Early Choice-of-Law Determinations—Damages

The parties will also attempt to establish the value of a case by seeking to determine what, if any, limitations exist on the recovery of damages.⁹ For example, in *Barkanic v. General Administrator of Civil Aviation*,¹⁰ the defendant was able to limit recoverable damages to near de minimus amounts. The court held, “On January 18, 1985, Peter Barkanic and Donald Fox, citizens of the District of Columbia and New Hampshire, respectively, were killed in the crash of a Chinese plane en route from Nanking to Beijing, China. Representatives of their estates brought this wrongful death action against CAAC, an agency of the Chinese government that provides domestic and international air services to passengers traveling to or from airports within China.... CAAC moved for partial summary judgment limiting its liability to \$20,000. It based this motion on Chinese law, which limits an airline’s liability for the wrongful death of a non-citizen to \$20,000.... Because we believe that...New York’s choice of law rules would lead to the application of Chinese law, we affirm the entry of partial summary judgment in CAAC’s favor.”

In *Gund v. Pilatus Aircraft, Ltd.*,¹¹ a case involving the death of six passengers in the crash of a sightseeing aircraft in Costa Rica, “[t]he court finds that the Death on the High Seas Act (DOHSA) and its provisions regarding ‘commercial aviation accidents’ apply here, and that both pecuniary and nonpecuniary damages as defined in DOHSA, may be recoverable for the wrongful death causes of action.”

Also, in *Reers v. Deutsche Bahn AG*,¹² 12 passengers, some U.S. citizens, died in a German-owned railcar on a French train because an attendant “started a fire [in the rail car] and[,] failing to extinguish it, abandoned his post without warning the sleeping passengers.” The court held that it did not have personal or subject-matter jurisdiction over the French or German rail companies involved and that the case would be dismissed on the grounds of forum non conveniens because France provided an adequate alternative forum. The court so held despite the fact that “the maximum compensation that would be available to each estate in a French Court would be approximately \$100,000.”

§ 5: Supplier Liability—Accidents on Hotel/Resort Premises

Many travel accidents occur on the premises of a hotel/resort or its beach area. Whether and to what extent a hotel or resort may be held liable will depend upon the applicable law and which defendant is being hauled into court.¹³ Dispositive motions, often detailing complex business relationships between foreign and domestic concerns, are frequently addressed by the courts.¹⁴

There is no shortage of examples of guests injured while at hotels/resorts.¹⁵ For example, in *Leinhart v. Caribbean Hospitality Services, Inc.*,¹⁶ the plaintiff “was vacationing at the Aruba Grand [which] is located next to the public beach and...provides lounge chairs and tiki huts on the beach exclusively for use of its guests. Leinhart and a friend were spending the day relaxing and had been led to chairs by an Aruba Grand employee who placed the chairs under a tiki hut for their use.... Leinhart was asleep in a lounge chair when...she was struck by a pickup truck and boat trailer operated by an employee of Unique Sports of Aruba. The boat and trailer were backing up along the beach.”

In *Kaden v. Wyndham Conquistador Resort & Country Club*,¹⁷ a guest slipped and fell on the Jacuzzi platform at Wyndham El Conquistador Resort & Country Club in Puerto Rico. The court wrote: “A guest staying at a hotel expects the latter to take all necessary security measures to [prevent] foreseeable risks. It is reasonably foreseeable that the areas surrounding or nearby a pool or Jacuzzi in a hotel will become wet by the people going in and out of both the pool and the Jacuzzi.... One would expect the hotel to take all available precautionary measures to reduce the likelihood of slips and falls in said area.”

In *Knoell v. Cerkvenik-Anderson Travel, Inc.*,¹⁸ an 18-year-old student and his parents purchased a student tour to Mazatlan, Mexico. While there, he spent three days drinking alcoholic beverages served by the tour operator. The student then decided to jump from the balcony of his hotel and was killed. The court held that the tour operator could be charged with negligence in failing to properly supervise the student and negligent and fraudulent misrepresentation in promising to adequately supervise the student participants. The court also held that the tour operator could not be charged with having violated the Arizona dramshop law prohibiting the sale of alcohol to persons under the age of 21. Because the tour operator was not a licensee in the bar business in Arizona, it was not liable for serving an 18-year-old in Mexico where the legal drinking age was 18.

Also, in *Deacy v. StudentCity.Com, LLC*,¹⁹ a case involving a young woman on spring break in Cancun, Mexico, who after consuming alcoholic beverages was raped in the swimming pool of her hotel, the court “decline(d) to extend dram shop liability to tour organiz-

ers that neither own or control the alcohol served. In the circumstances present here, where the defendant had no authority to cut the plaintiff off from voluntary alcohol consumption and did not own or furnish the alcohol consumed by the plaintiff, the defendant cannot be said to have a duty of care.”

§ 6: Supplier Liability—Torts of Beach Vendors, Concessionaires, and Local Service Providers

Concessionaires offering parasailing, scuba diving, snorkeling, waterskiing, horseback riding, and personal watercraft services are often promoted by hotels and resorts, which usually receive a percentage of the vendor’s earnings. These entities are, however, typically unrelated to the hotel or resort and, more often than not, are uninsured and unlicensed. The same may also be true of other local service providers like tour bus companies, taxi services, air carriers, and rental car companies. Defendants frequently seek early determinations of the liability of travel suppliers such as hotels and resorts, cruise lines, U.S.-based rental car companies, and tour operators²⁰ for the torts of foreign beach vendors, concessionaires, and local travel service providers.²¹

Walker v. Wedge Hotel provides a good example.²² There, “Walker, twenty seven, went parasailing during a trip to the Bahamas. She and a friend were required to ride together [because of] inclement weather. During the ride the frayed towrope failed, causing Walker to be dragged through the water for several minutes. Walker drowned.... Walker’s mother sued the management company of the hotel located on the stretch of beach on which the vendor operated its parasailing business. Plaintiff alleged the vendor, which had an office in the hotel, was an agent of the hotel, and asserted that the hotel was liable for the vendor’s negligence in failing to maintain the towrope and failing to give Walker instructions on how to unclip herself in the event of an emergency.”

In *Hernandez v. Quality Inns, Inc.*,²³ a tourist was fatally injured while using parasailing equipment rented from a local Mexican company, which had no legal connection to the hotel where the tourist was a guest. To establish the liability of the hotel, the plaintiff sought “to hold Quality Inns vicariously liable for Hotel Calinda’s failure to hire a competent parasailing concessionaire with sufficient training in parasailing and/or lifesaving, for advertising parasailing on its grounds and creating an illusion of safety without first checking on the competency of the operators of the parasailing concessionaire, and for failing to properly supervise and observe the parasailing activity. The record indicates Hotel Calinda contracted with the parasailing concessionaire ‘Deportee Aquaticos’ received a monthly fee pursuant to the contract, and that employees of the hotel were responsible for regularly inspecting the activity and equipment of the parasailing concessionaire. The parasailing activity was conducted

along the Hotel Calinda beach and signs were posted on the grounds of the hotel directing guests to the parasailing facility.... In fact, plaintiff’s husband was instructed by a clerk of the hotel’s front desk to go the beach area to sign-up for parasailing.”

In *McCullum v. Friendly Hills Travel Center*,²⁴ a travel agent was able to escape liability for injuries that a tourist incurred while waterskiing at a hotel. “[T]he driver then made too fast a turn for prevailing water conditions which caused [the plaintiff] to fall hitting ‘the water hard and twisted [his] head.’ Twenty two days after the accident he suffered a stroke as a result of that fall and is now paralyzed on the left side of his body from the stroke.”

In *May v. Club Med Sales, Inc.*,²⁵ the resort owner and tour operator escaped liability when “Plaintiff made a reservation at the Sonora Bay Resort. As part of her activities, Plaintiff went horseback riding. Plaintiff claims that while she was horseback riding, the saddle slipped because it was improperly adjusted, causing her to fall and sustain various injuries.” Also, in *Ashkenazi v. Hertz Rent A Car*,²⁶ involving a rental car accident in Mexico, and *Weiner v. B.O.A.C.*,²⁷ involving a rental car accident in England, a domestic rental car company and international airline were held not liable for rental car accidents.

In *Philippe v. Lloyd’s Aero Boliviano*,²⁸ the defendant obtained judgment dismissing the complaint brought by a tour participant who suffered bilateral cerebral hemorrhages, rupture of blood vessels in the brain, and edema when he was exposed to inadequate oxygen levels at high altitude and rapid decompression during a flight in Bolivia. Also, in *Taylor v. Costa Lines, Inc.*,²⁹ a cruise passenger purchased a shore excursion tour of Trinidad aboard a cruise ship during which a taxicab struck a tree causing severe injuries. “Costa’s advertising of ‘well planned shore excursions’ with no specification of who planned them, permits the inference that Costa did.”

Endnotes

1. For example, in *MacLachlin v. Marriott Corp., Inc.*, New York Law Journal, January 18, 1994, p. 29, col. 2 (N.Y. Sup. Ct. 1994), the plaintiff’s counsel carefully crafted a complaint to recast the Marriott Honored Guest Awards Program as a U.S.-based tour operator taking advantage of New York State law imposing fiduciary duties on tour operators. The court held that “ ‘Plaintiff and a friend...Yorke booked the Q8 Marriott Vacation Tour under Marriott’s Honored Guest’s Awards Program (HGA) which, inter alia, included air-fare to Egypt and a stay at the Cairo Marriott Hotel & Casino (the Cairo Marriott). Plaintiff and Yorke claim that upon arriving at the Cairo Marriott, they arranged to take various tours through the Marriott tour desk. Plaintiff alleges that on the morning of August 25, 1991, Abou Aziza (Aziza), the Cairo Marriott bell captain, stated that he could arrange a tour of the Sound and Light Show at the Pyramids that evening, to which the plaintiff and her companion agreed. Plaintiff contends that Aziza subsequently drove her and Yorke to a stable and informed them that a horse or camel were the only means available to reach the Pyramids. Plaintiff maintains that she explained to Aziza that she was afraid to ride a camel but was assured by Aziza that the camel and the camel path were ‘perfectly’ and that a trained handler

would guide the camel along the route. Plaintiff alleges that her camel was subsequently tied to Yorke's camel and they were led down the trail by a young boy (the Camel Guide), a practice plaintiff avers was not in keeping with Egyptian law which requires one adult handler per camel. Plaintiff's claim that the path she was taken on was rocky, unlevel and strewn with debris, and that the Camel Guide continually beat the legs of both camels to prod them along. At some point, plaintiff avers that her camel stumbled and tripped, 'probably on some rocks or debris' and with a loud cry the camel threw her into the air. Plaintiff landed on the rocky road where she remained until Aziza assisted her into his car and drove to the Pyramid Hospital. The fall allegedly caused plaintiff to break six ribs and fracture her pelvis.... Even assuming that Aziza arranged the Pyramid Tour on his own accord, the allegations of plaintiff concerning how she was offered and subsequently booked the camel trip by the Bell Captain in the lobby of the Caro Marriott and subsequently driven to the camel stable in what appears to be an official Cairo Marriott car, in addition to Marriott's brochures which promoted the Q8 vacation and lauded the preferential treatment plaintiff and her companion would receive, raise factual issues as to whether defendant should be estopped from disclaiming liability for the negligence of an independent contractor...and as to whether that contractor's negligence was the proximate cause of plaintiff's injuries. Contrary to defendant's contention, the question is not whether plaintiff was a sophisticated traveler and was at fault, but, rather was the employee of Marriott's subsidiary negligent in the performance of his official duties and whether such duties included the planning, arranging and booking of the ill-fated camel ride to the Pyramids."

2. See, e.g., *U.S. Supreme Court: Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 116 S. Ct. 619, 133 L. Ed. 2d 578, 1996 A.M.C. 305 (1996) (12-year-old infant killed in a collision in Puerto Rico while riding Jet Ski; Supreme Court held that state remedies remain applicable in wrongful death and survival actions arising from accident to nonseaman in territorial waters).

First Circuit: Barrett v. Ambient Pressure Diving, Ltd., 2008 DNH 172, 2008 WL 4280360 (D.N.H. 2008) (diving accident in Bermuda; defective rebreather; defendants' motions to apply English law and for a default denied).

Second Circuit: Mayer v. Cornell University, 107 F.3d 3 (2d Cir. 1997) (bird watcher on Cornell University-sponsored 28-day tour of Costa Rica drowns while snorkeling off Il DeCano in the Pacific Ocean; defendants owed no duty to drowning victim; "the evidence amply demonstrates that neither Cornell nor Brown was in a position to ensure the safety of the snorkeling activity because neither had any particular expertise in snorkeling... and more significantly neither had any authority over the actions of Marengo or its employees.... Indeed, there was no realistic opportunity for Brown or Cornell in particular to control the circumstances of the snorkeling because in planning its sponsorship of the tour, Cornell could not have anticipated Marengo's unexpected offer for the group to join the del Cano day trip.... We see no reason for extending New York law to impose a duty of care on the basis of what appellant characterizes as the 'special relationship' between a sponsor and the third party controlling an event or between a sponsor and the event participants."); *Szollosy v. Hyatt Corp.*, 396 F. Supp. 2d 147, 2005 A.M.C. 2501 (D. Conn. 2005); ("The Szollosys took a day trip to the nearby Rum Point recreation area. Rum Point offered a swimming beach and several restaurants and snack bars. Defendant Red Sail also operated a concession stand at Rum Point where sailboats, paddleboats, windsurfers and wave runners and other equipment were available for rental.... The wave runner carried Dean across the Rum Point harbor and crashed directly into a stone jetty or break wall...as a result of the crash, he suffered injuries including come and brain hemorrhage Considered collectively Red Sail's procedures in mooring and monitoring the wave runners 'set into motion a chain of circumstances which may be contributing cause' of Dean

Szollosy's injuries.... For that reason the Court finds that defendant Red Sail may not limit its liability under 46 U.S.C. § 181; admiralty law applies"); *Lubick v. Travel Services, Inc.*, 573 F. Supp. 904, 1986 A.M.C. 132 (D.V.I. 1983) (cruise passenger injured in tour bus accident during shore excursion of St. Thomas; one-year time limitation in passenger contract applies to shore excursions; complaint dismissed as time-barred).

Fifth Circuit: Sacks v. Four Seasons Hotel Ltd., 2006 WL 783441 (E.D. Tex. 2006) (guest dies at Mexican hotel; Texas law applies to liability and damages).

Ninth Circuit: Carney v. Singapore Airlines, 940 F. Supp. 1496 (D. Ariz. 1996) (tourist falls into steaming hot liquid in volcanic sulfur pit in Indonesia; Indonesian law applies, not that of Arizona).

3. *Naghui v. Inter-Continental Hotels Group, Inc.*, 165 F.R.D. 413 (D. Del. 1996).
4. *Carris v. Marriott Intern., Inc.*, 466 F.3d 558, 560 (7th Cir. 2006).
5. *Heinz v. Grand Circle Travel*, 329 F. Supp. 2d 896, 2004 A.M.C. 2020 (W.D. Ky. 2004).
6. *Sachs v. TWA Getaway Vacations, Inc.*, 125 F. Supp. 2d 1368 (S.D. Fla. 2000).
7. *Oran v. Fair Wind Sailing, Inc.*, 2009 WL 4349321 (D.V.I. 2009).
8. *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166, 1996 A.M.C. 776 (3d Cir. 1995).
9. See, e.g., *Fifth Circuit: Sacks v. Four Seasons Hotel Ltd.*, 2006 WL 783441 (E.D. Tex. 2006) (guest dies at Mexican hotel; Texas law applies to liability and damages).

State Law:

Arizona: Wendelken v. Superior Court In and For Pima County, 137 Ariz. 455, 671 P.2d 896 (1983) (Arizona resident attends "Arizona Singles Who's Who" weekend party at private residence in Senora, Mexico, and falls and breaks hip; Arizona law and not the law of Mexico applied).

New Jersey: Mastondrea v. Occidental Hotels Management S.A., 391 N.J. Super. 261, 918 A.2d 27 (App. Div. 2007) (tourist purchased package tour featuring accommodations "at an all inclusive resort known as Royal Hideaway Playacar located in Quintana Roo, Mexico.... While at the resort plaintiff slipped and fell on a wet exterior staircase breaking her ankle." Mexican law applied).

10. *Barkanic v. General Admin. of Civil Aviation of the People's Republic of China*, 923 F.2d 957 (2d Cir. 1991).
11. *Gund v. Pilatus Aircraft, Ltd.*, 2010 WL 887376 (N.D. Cal. 2010).
12. *Reers v. Deutsche Bahn, AG*, 320 F. Supp. 2d 140 (S.D. N.Y. 2004).
13. See § 11:9, *infra*.
14. See, e.g., *First Circuit: Santos v. Posadas De Puerto Rico Associates, Inc.*, 452 F.3d 59, 70 Fed. R. Evid. Serv. 617 (1st Cir. 2006) (guest at Wyndham Condado Plaza Hotel and Casino in Puerto Rico injured entering hotel pool; jury verdict for vacationers in the amount of \$1 million for injured guest and \$250,000 to wife for loss consortium affirmed; "Knowing that guests used the steps to enter and exit the pool, the Hotel neither made them safe for this readily foreseeable use nor warned of the inherent danger. These failures, the jury plausibly could have found, caused the accident"); *Fiorentino v. Rio Mar Associates, LP, SE*, 381 F. Supp. 2d 43 (D.P.R. 2005) (guest at Westin Rio Mar Beach Resort & Casino in Puerto Rico rendered quadriplegic after "body whomping" in surf at Rio Mar beach "when he was suddenly hit by a wave which caused him to topple over and strike his head and neck on the ocean bottom rendering him partly unconscious.... Both experts conclude that the injuries [guest] sustained resulted from activities such as body surfing or body whomping"; medical malpractice claim against Hospital San Pablo del Este settled; motion in limine to exclude some expert testimony at trial granted); *Raybourn v. San Juan Marriott Resort & Stellaris Casino*, 259 F. Supp. 2d 110 (D.P.R. 2003) (guest falls in bathtub; award of \$500,000

compensatory damages grossly excessive and award of \$150,000 in lost earnings unsupported by evidence; discussion of liability and damages theories); *See* In re San Juan Dupont Plaza Hotel Fire Litigation, 768 F. Supp. 912 (D.P.R. 1991), order vacated, 982 F.2d 603 (1st Cir. 1992) (attorney's fees); In re San Juan Dupont Plaza Hotel Fire Litigation, 117 F.R.D. 30, 9 Fed. R. Serv. 3d 172 (D.P.R. 1987) (discovery).

Second Circuit: Welch-Rubin v. Sandals Corp., 2004 WL 2472280 (D. Conn. 2004) ("The central issue in this case is whether Defendants, a resort company and a tour-operator owned, operated or controlled the Beaches Resort which Plaintiff...injured her shoulder while attempting to board a boat; defendants' summary judgment motion granted; discussion of liability theories); Carley v. Theater Development Fund, 22 F. Supp. 2d 224 (S.D. N.Y. 1998) (tourists purchase tour of Russia and during a stay at Hotel Pulkovskaya in St. Petersburg "Anne Marie Carley sustained serious injuries while trying to open her hotel window.... Mrs. Carley fell approximately six floors when the window swung into the room unexpectedly and she fell out"; hotel and tour operator not liable; discussion of liability theories).

Third Circuit: Schwartz v. Hilton Hotels Corp., 639 F. Supp. 2d 467 (D.N.J. 2009) ("Schwartz alleges that...she entered the bathroom of her (Greek) hotel room, slipped on a puddle of water on the floor and broke her leg; "defendants' summary judgment motions granted; discussion of liability theories including travel agent's liability).

Eleventh Circuit: Cutchin v. Habitat Curacao-Maduro Dive Fanta-Seas, Inc., 1999 A.M.C. 1377, 1999 WL 33232277 (S.D. Fla. . 1999) (guest at Habitat Curacao in Netherlands Antilles suffers decompression sickness during scuba dive; complaint alleged that Habitat negligently failed to conduct dive properly and failed to administer necessary medical treatment; disclaimer of liability enforced; discussion of liability theories).

State Law:

Illinois: Behr v. Club Med, Inc., 190 Ill. App. 3d 396, 137 Ill. Dec. 806, 546 N.E.2d 751 (1st Dist. 1989) (guest at Club Med facility in Cancun, Mexico, ingested toothpick that lodged in her liver; complaint dismissed; discussion of liability theories).

Minnesota: Powell v. Trans Global Tours, Inc., 594 N.W.2d 252 (Minn. Ct. App. 1999) (tour participant falls from Mexican hotel balcony; tour operator not liable; discussion of liability theories).

New York: Meshel v. Resorts Intern. of New York, Inc., 160 A.D.2d 211, 553 N.Y.S.2d 342 (1st Dep't 1990) (guest at Britannia Tower suffers heart attack; complaint alleges that hotel was negligent in providing defective oxygen equipment including spent or inadequate oxygen cylinders; complaint dismissed against parent corporation; discussion of liability theories); Jacobson v. Princess Hotels Intern., Inc., 101 A.D.2d 757, 475 N.Y.S.2d 846 (1st Dep't 1984) (guest at Hotel Marques in Acapulco, Mexico, owned by a Mexican corporation, Impulsora de Revolcadero S.A., "falls 14 feet from a wall adjacent to the pool deck"; discussion of jurisdiction and liability theories); MacLachlin v. Marriott Corp., New York Law Journal, January 18, 1994, p. 29, col. 2 (N.Y. Sup. 1994) ("Plaintiff and a friend...Yorke booked the Q8 Marriott Vacation Tour under Marriott's Honored Guest's Awards Program (HGA) which, inter alia, included air-fare to Egypt and a stay at the Cairo Marriott Hotel & Casino"; plaintiff suffered serious injuries after being thrown from a camel on a tour of the Pyramids).

North Mariana Islands: Furuoka v. Dai-Ichi Hotel (Saipan), Inc., 2002 MP 5, 6 N.M.I. 374, 2002 WL 32984615 (N. Mar. Isl. 2002) (swimming pool accident at hotel in the Mariana Islands: "It is undisputed that the hotel did not have a lifeguard on duty and that [local law] required a lifeguard to be provided by the hotel").

15. Carris v. Marriott Intern., Inc., 466 F.3d 558 (7th Cir. 2006).

16. Leinhart v. Caribbean Hospitality Services, Inc., 426 F.3d 1337 (11th Cir. 2005).

17. Kaden v. Wyndham El Conquistador Resort & Country Club, 2005 WL 1949694 (D.P.R. 2005).

18. Knoell v. Cerkenik-Anderson Travel, Inc., 181 Ariz. 394, 891 P.2d 861 (Ct. App. Div. 1 1994), vacated, 185 Ariz. 546, 917 P.2d 689 (1996).

19. Deacy v. Studentcity.com, LLC, 75 Mass. App. Ct. 1110, 916 N.E.2d 422 (2009).

20. *See* § 1:6, *infra*.

21. *See, e.g., First Circuit:* Rams v. Royal Caribbean Cruise Lines, Inc., 17 F.3d 11, 1994 A.M.C. 1573 (1st Cir. 1994) (cruise passenger on shore excursion in Haiti slips and falls in hotel owned by cruise line; one-year statute of limitations for filing of lawsuit in passenger ticket only applies to accidents aboard ship, not on shore).

Second Circuit: Oleksiuk ex rel. Oleksiuk v. Caribbean Watersports and Tours, LLC, 2005 WL 1668906 (D.V.I. 2005) (guest at Elysian Beach Resort on St. Thomas owned and operated by Equivest broke leg in accident with Jet Ski provided by concessionaire Caribbean Watersports and Tours LLC; cross-claim against Equivest dismissed); Szollosy v. Hyatt Corp., 396 F. Supp. 2d 147, 2005 A.M.C. 2501 (D. Conn. 2005) ("the Szollosys took a day trip to the nearby Rum Point recreation area. Rum Point offered a swimming beach and several restaurants and snack bars. Defendant Red Sail also operated a concession stand at Rum Point where sailboats, paddleboats, windsurfers and wave runners and other equipment were available for rental.... The wave runner carried Dean across the Rum Point harbor and crashed directly into a stone jetty or break wall.... As a result of the crash; he suffered injuries including coma and brain hemorrhage.... Considered collectively Red Sail's procedures in mooring and monitoring the wave runners 'set into motion a chain of circumstances which may be contributing cause' of Dean Szollosy's injuries.... For that reason the Court finds that defendant Red Sail may not limit its liability under 46 U.S.C. § 181; admiralty law applies.").

Seventh Circuit: Carris v. Marriott Intern., Inc., 466 F.3d 558 (7th Cir. 2006) (hotel patron injured in personal watercraft accident).

Eighth Circuit: Rawlins v. Clipper Cruise Lines, 1998 A.M.C. 1260, 1996 WL 933862 (E.D. Mo. 1996) (accident during whale-watching excursion from Victoria Harbor, British Columbia, Canada; cruise ship not liable).

Ninth Circuit: Isham v. Pacific Far East Line, Inc., 476 F.2d 835, 1973 A.M.C. 1138 (9th Cir. 1973) (passenger broke both wrists in accident while being transported ashore to Wake Island; shipping company not liable); Dubret v. Holland America Line Westours, Inc., 25 F. Supp. 2d 1151, 1999 A.M.C. 859 (W.D. Wash. 1998) (cruise passengers purchased a shore excursion in Acapulco and while being transported by tour bus were severely injured in accident; bus chaperones having identified themselves as cruise line's "representatives" was "insufficient to establish apparent authority"; cruise line not liable).

Eleventh Circuit: Fojtasek v. NCL (Bahamas) Ltd., 613 F. Supp. 2d 1351 (S.D. Fla. 2009) ("this action arises out of the death of Plaintiff's spouse during a zip-line excursion (provided by a Honduran shore excursion operator and independent contractor Tabyana Tours), which was sold to her on-board the Defendant's vessel, in Honduras"; plaintiffs asserted a variety of causes of action against the defendant cruise line seeking to hold it directly responsible and/or vicariously liable for the misconduct and/or negligence of Tabyana Tours including (1) negligent selection or monitoring of Tabyana Tours, (2) negligent misrepresentation, (3) violations of Florida Deceptive and Unfair Trade Practices Act (FDUPTA), (4) apparent agency, (5) actual agency, (6) joint venture; each cause of action including defendant's disclaimer defense reviewed by the court); Isbell v. Carnival Corp., 462 F. Supp. 2d 1232, 2007 A.M.C. 677 (S.D. Fla. 2006) ("The excursion consisted of floating down a river in the rain forest in Belize, in and out of caves, while on an inner tube.... During the course

of the excursion, Plaintiff began to feel ill. Plaintiff's husband removed her life vest and noticed two small puncture wounds on her left upper arm.... It was determined that Plaintiff had been bitten by a snake.... On October 29, 2004 Plaintiff allegedly suffered a heart attack. Subsequently Plaintiff underwent a successful cardiac surgery.... Plaintiff alleges that the snake bite and the treatment that she received as a result thereof have caused a "myriad of long term physical and psychological effects that are compensable in this action"; cruise line not liable); *Cutchin v. Habitat Curacao-Maduro Dive Fanta-Seas, Inc.*, 1999 A.M.C. 1377, 1999 WL 33232277 (S.D. Fla. 1999) (guest at Habitat Curacao in Netherlands Antilles suffers decompression sickness during scuba dive; complaint asserts that Habitat was negligent in failing to properly conduct dive and in failing to administer necessary medical treatment; disclaimer of liability enforced); *In re Royal Caribbean Cruises, Ltd.*, 55 F. Supp. 2d 1367, 1999 A.M.C. 2475 (S.D. Fla. 1999), *aff'd*, 214 F.3d 1356 (11th Cir. 2000) (cruise passenger disembarks at Coco Cay Island, Bahamas, an island owned by cruise line; rents a Jet Ski owned by cruise line; and is injured in an accident; cruise line was not negligent in operating Jet Ski rental facility on Coco Cay Island).

State Law:

California: *Fiduccia v. Princess Cruise Lines, Ltd.*, 2007 WL 2181888 (Cal. App. 2d Dist. 2007), unpublished/noncitabile (cruise passenger "alleged that while onboard, [he] purchased a ticket for an onshore excursion to the Crooked Tree Wildlife Sanctuary near Belize City; during the excursion, [he] fell through a rotten, broken and defective boardwalk, causing him to suffer serious personal injuries"; travel agent and cruise line not liable); *Caplan v. Boyce*, 2003 WL 22495836 (Cal. App. 6th Dist. 2003), unpublished/noncitabile (tourist participating in boat tour of Galapagos Islands falls off cliff during soccer game; operators not liable); *DeRoche v. Commodore Cruise Line, Ltd.*, 31 Cal. Rptr. 2d 278, 1994 A.M.C. 2347 (App. 1st Dist. 1994), republished at 31 Cal. App. 4th 802, 46 Cal. Rptr. 2d 468 (1st Dist. 1994) and review granted and opinion superseded, 33 Cal. Rptr. 2d 567, 880 P.2d 111 (Cal. 1994) and dismissed, remanded and ordered published, 40 Cal. Rptr. 2d 838, 893 P.2d 1159 (Cal. 1995) (cruise passenger on shore excursion injured in motor scooter accident in Cozumel, Mexico; cruise ship not liable).

Florida: *Carnival Cruise Lines, Inc. v. Levalley*, 786 So. 2d 18 (Fla. Dist. Ct. App. 3d Dist. 2001) (jury verdict for cruise passenger injured during shore excursion scuba dive in Grand Cayman Island reversed for failure of trial court to allow introduction of evidence of diver's asthmatic condition as a causative factor in accident).

New York: *Travalja v. Maieliano Tours*, 213 A.D.2d 155, 622 N.Y.S.2d 961 (1st Dep't 1995) (rental car accident in Italy; U.S.-based tour operator not liable for torts of European rental car company; discussion of liability theories); *Aronson v. Hyatt Intern. Corp.*, 202 A.D.2d 153, 608 N.Y.S.2d 187 (1st Dep't 1994) (guest at Hyatt Regency Cancun Hotel in Mexico purchases a "wilderness snorkeling boat trip" and is severely injured when her boat is struck by another boat; default judgment for defendants); *Fogel v. Hertz Intern., Ltd.*, 141 A.D.2d 375, 529 N.Y.S.2d 484 (1st Dep't 1988) (rental car accident in Florence, Italy; domestic rental car company may be liable under apparent authority and agency by estoppel); *Barber v. Princess Hotels Intern., Inc.*, 134 A.D.2d 312, 520 N.Y.S.2d 789 (2d Dep't 1987) (guest of Acapulco Princess Hotel thrown from horse and seriously injured for which hotel not liable because horse riding incident "arranged by local Mexican residents having no affiliation with the hotel and since the accident occurred on property owned by the Mexican government defendants owed no duty to plaintiff").

22. *Walker v. Wedge Hotel Management (Bahamas) Ltd.*, 2003 WL 23218085 (S.D. Fla. 2003) (jury awarded \$1.5 million to estate of decedent). *See also* 27 A.T.L.A. Law Reporter 127 (Sept. 3, 2002).
23. *Hernandez v. Quality Inns, Inc.*, *New York Law Journal*, March 23, 1993, p. 21, col. 6 (N.Y. Sup.) (forum non conveniens motion denied).
24. *McCollum v. Friendly Hills Travel Center*, 172 Cal. App. 3d 83, 217 Cal. Rptr. 919 (2d Dist. 1985).
25. *May v. Club Med Sales, Inc.*, 832 F. Supp. 937 (E.D. Pa. 1993).
26. *Ashkenazi v. Hertz Rent A Car*, 18 A.D.3d 584, 795 N.Y.S.2d 624 (2d Dep't 2005).
27. *Weiner v. British Overseas Airways Corp.*, 60 A.D.2d 427, 401 N.Y.S.2d 91 (2d Dep't 1978).
28. *Philippe v. Lloyd's Aero Boliviano*, 589 So. 2d 536 (La. Ct. App. 1st Cir. 1991), writ denied, 590 So. 2d 594 (La. 1992).
29. *Taylor v. Costa Lines, Inc.*, 441 F. Supp. 783, 1978 A.M.C. 1254 (E.D. Pa. 1977).

Hon. Thomas A. Dickerson is an Associate Justice of the Appellate Division, Second Department, New York State Supreme Court and has previously served as Presiding Justice of the Tax Certiorari and Eminent Domain Part of the 9th Judicial District, as a Judge on Westchester County Court, as an Acting Family Court Judge and as a Judge on Yonkers City Court. Justice Dickerson is also the author of *Class Actions: The Law of 50 States* (2012), *Travel Law* (2012), Revised Article 9 of Weinstein Korn Miller, *New York Civil Practice CPLR*, 2012 (David Ferstendig, ed.), and Consumer Protection Chapter 98 in *Commercial Litigation in New York State Courts: Third Edition* (Robert L. Haig ed.) (West & NYCLA 2010, 2011). Justice Dickerson has been writing about travel law for over 35 years, the first 17 of which he also practiced law in Manhattan focusing on consumer law, consumer class actions and travel law.

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This article is an excerpt from Chapter 11, Dispositive Motions on the Merits, by Hon. Thomas A. Dickerson and Rodney E. Gould, from the book *Litigating International Torts in U.S. Courts*, 2012 (Dickerson, Hon. Thomas A.; Gould, Rodney E.; and Chalos, Mark P.) with permission. Copyright (c) 2012 Thomson Reuters/West.