

TRAVEL LAW: BICYCLE TOUR ACCIDENT IN COSTA RICA:

LIABILITY DISCLAIMER NOT ENFORCED

REVISION #3

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In our recent article *Avoiding Dangerous Vacations*, www.eturbonews.com (8/13/2015) we enumerated a host of accidents that can and do occur while on vacation. In order to protect themselves travel suppliers, tour operators and online travel companies (OTCs) may seek to disclaim or limit liability for travel accidents abroad. In this article we examine a recent case, *Steinfeld v. EmPG International, LLC*, 2015 U.S. Dist. LEXIS 101881 (D. Colo. 2015) (the *Steinfeld* case), involving an accident during a bicycle tour of Costa Rica and the enforceability of the tour company's liability disclaimer.

Travel Law Update

Death In The Western Desert

In Stack, *Egypt Security Forces Accidentally Kill Mexican Tourists*, www.nytimes.com (9/13/2015) it was noted that "Egyptian security forces opened fire on a caravan of tourist vehicles in the country's Western Desert late Sunday night, killing at least 12 people from Mexico injuring 10 others, among them Mexican tourists and their Egyptian tour guides, officials said...The security forces said that they had believed that the vehicles were being used to transport terrorists. The statement said the group had been driving in a restricted area where unauthorized access is banned".

In Thomas & Kirkpatrick, *Egyptian Military Said to Fire on Mexican Tourists During Picnic*, www.nytimes.com (9/14/2015) it was noted that "The convoy of four sport utility vehicles full of Mexican tourists about three hours southwest of Cairo on a typical adventure trip through the White Desert...with the blessing of their police escort, and the apparent added security of an Apache military helicopter buzzing on the horizon, the group pulled off for a picnic...Then the helicopter opened fire, killing at least a dozen people-including at least two Mexicans-while wounding a tourist police officer and at least nine others".

Money Losing Flights & Golden Parachutes

In Zernike & Mouawad, *United C.E.O. Is Out Amid Inquiry at Port Authority*, www.nytimes.com (9/9/2015) it was noted that "The chief executive and two senior officials of United Airlines resigned on Tuesday amid a federal investigation into whether the airline had traded favors with the Chairman of the Port Authority of New York and New Jersey. The United States attorney for New Jersey has been investigating whether United, the nation's third-largest airline, agreed to reinstate money-losing flights to the airport nearest the weekend home of the authority's chairman, David Samson, in return for improvements the airline wanted at Newark Liberty International Airport, where it is the biggest carrier...United filed a report with the (SEC) on Tuesday indicating that Mr. Smisek would receive nearly \$4.9 million in a separation payment, and 60,000 shares of stock, valued at over \$3 million".

And in Editorial Board, *United Airlines and the Port Authority*, www.nytimes.com (9/9/2015) it was noted "That United Airlines would try to curry favor with Port Authority officials should come as no surprise. It is the biggest airline at Newark, controlling two-thirds of all flights at the airport...Had there been more competition at the airport, authority officials and Newark's top tenant might not have been able to trade favors so easily. The authority's shady operations might have remained secret but for the four days in 2013 when Mr. Christie's

appointees shut down traffic lanes on the George Washington Bridge as punishment for a political rival. The episode promoted federal investigators to take a harder look at the authority's management, including how the agency's \$8.2 billion budget was used by governors of New Jersey and New York...The only permanent solution is to change the laws. Legislators in both states must pass exactly the same set of strong reforms to ensure transparency, provide public notice about coming decisions and create protections for whistle-blowers".

Crash Victims' Families May Sue In U.S.

In *Crash victims' families to sue German airline in US court*, www.eturbonews.com (8/10/2015) it was noted that "The families of passengers killed in the Germanwings crash will take legal action against Lufthansa in the United States after rejecting the carrier's compensation offer as inadequate, the Bild am Sonntag newspaper reported, citing the families' lawyer. Germanwings, a unit of Lufthansa, in June offered E25,000 per victim and the pain and suffering caused by the March 24 crash that killed all 150 onboard. The E25,000 offer is on top of E50,000 per passenger already paid as immediate financial assistance to relatives...Germanwings yesterday declined to comment on the report but said compensation would be 'at least

E100,000 per passenger and, depending on families' circumstances, reach a high six-digit amount that could rise up to a million euro".

Terror In Tajikistan

In Terrorist attacks in Tajikistan: Airport attacked twice, UK issues travel advisory, www.eturbonews.com (9/4/2015) it was noted that "Dushanbe, Tajikistan...was rocked by terrorist attacks on security personnel as the capital of Tajikistan witnessed two separate incidents in which around 11 policemen and security personnel were killed".

Screeners Need To Screened

In TSA screener at JFK caught stealing \$7K diamond watch, www.eturbonews.com (9/6/2015) it was noted that "A (TSA) screener has been charged with stealing a passenger's \$7,000 diamond watch from a plastic bin at Kennedy Airport security checkpoint".

Watch Out For Drones

In FAA: Pilot reports of unmanned aircraft up dramatically in 2015, www.eturbonews.com (8/13/2015) it was noted that "Pilot

reports of unmanned aircraft have increased dramatically over the past year, from a total of 238 sightings in all of 2014 to more than 650 by August 9 of this year. The FAA wants to send out a clear message that operating drones around airplanes and helicopters is dangerous and illegal. Unauthorized operators may be subject to stiff fines and criminal charges, including possible jail time".

In *Drone World Expo draws commercial users from around the world*, www.eturbonews.com (8/19/2015) it was noted that "More than 600 commercial drone end users representing 17 countries have already registered for Drone World Expo...Conference Program Sessions to be offered include Avoiding the Traffic Jam: A Government and Industry UTM Update, Drones and Privacy: Addressing Public Concern" and other topics.

And in *Nicas, California Gov. Vetoes Drone Restrictions; Win For Amazon, Google*, <http://blogs.wsj.com/digits> (9/10/2015) it was noted that "California Gov. Jerry Brown vetoed a bill...that would have effectively banned drone flights over private property without permission, a major victory for companies such as Google and Amazon.com that want to use the devices to deliver small packages".

California Uber Driver Is Employee

In Isaac and Singer, *California Says Uber Driver Is Employee Not a Contractor*, www.nytimes.com (6/17/2015) it was noted that "In a ruling that fuels a long-simmering debate over some of Silicon Valley's fastest-growing technology companies and the work they are creating, the California Labor Commissioner's Office said that a driver for the ride-hailing service Uber should be classified as an employee, not an independent contractor...The ruling does not apply beyond Ms. (X) and could be altered if Uber's appeal succeeds. Uber has also prevailed in at least five other states in keeping its definition of drivers as independent contractors...'Defendants hold themselves out as nothing more than a neutral technological platform, designed simply to enable drivers and passengers to transact the business of transportation', the Labor Commissioner's Office wrote about Uber. 'The reality, however, is that defendants are involved in every aspect of the operation'".

Compete With Uber Or Die

In Engquist, *Judge rules on taxi-industry lawsuit: Compete with Uber or die*, Crane's New York Business (9/9/2015) it was noted that "A state judge has slammed the door on a legal challenge by opponents of Uber, clearing the way for the rideshare giant to tun traditional taxis off the road. In a

decision unveiled Wednesday, Queens Supreme Court Justice Allan Weiss ruled that for-hire vehicles could use electronic hails to compete with yellow cabs-something they have been doing well enough to threaten the existence of the iconic 80-year-old industry.

As noted by the Court in *XYZ Two Way Radio Service, Inc. V. The City of New York*, Index No. 5693/15, Decision 9/28/2015, Queens Sup. (J. Weiss) "The is case arises from the introduction of new technologies in the ground transportation industry that are used to dispatch vehicles and to connect passengers with drivers. The use of a smartphone application to obtain a ride has blurred the distinction between a street hail and a pre-arrangement and has disturbed the balance of economic interests within the industry...This case fundamentally concerns an administrative determination to classify and treat passenger communications to companies like Uber as a type of pre-arrangement rather than as a hail".

Uber Background Checks Challenged

In Toutant, *Class Suit Targets Uber's Pre-Employment Background Checks*, New Jersey Law Journal (9/4/2015) it was noted that "Uber Inc. has been hit with a putative class action in federal court in Newark claiming it violates the Fair Credit

Reporting Act (FCRA) by using background records in hiring decisions without allowing applicants to dispute entries in their reports. The case, *Cuccinello v. Uber*, was filed Sept. 2 on behalf of persons who applied for jobs with Uber and were subjects of an adverse employment action based on information from a consumer reporting agency. The suit claims Uber violated FCRA by failing to give each applicant a copy of their report and a summary of their rights under the FCRA before the hiring decision was made”.

Missed Criminal Records

In Dougherty, *Uber Missed Criminal Records of Drivers, Prosecutors Assert*, www.nytimes.com (8/19/2015) it was noted that “For more than a year, regulators in various cities have questioned whether Uber...vets its drivers from criminal backgrounds as carefully as traditional taxi companies. Now the district attorneys of San Francisco and Los Angeles have offered perhaps the most concrete evidence to date that people convicted of murder, sex offenses and various property crimes have driven for Uber, despite assurances from the company that it employs ‘industry-leading’ screening. The district attorneys said Wednesday that background checks used by Uber failed to uncover the criminal records of 25 drivers in the two cities. The charges

were made in a 62-page amended complaint to a civil suit, originally filed in December, that claims Uber has continually misled consumers about the methods it uses to screen drivers... The suit...does not name the criminals but includes some details about the crimes. One driver was convicted of second-degree murder in Los Angeles in 1982 and spent 26 years in prison... He applied to be an Uber driver under a different name from those in his court records...One driver was convicted of felony sexual exploitation of children in Wyoming in 2005, and another of 'felony kidnapping for ransom with a firearm' in 1994. Other drivers were convicted of charges like robbery, assault with a firearm, identity theft and driving under the influence. Several were convicted of more minor charges, like welfare fraud".

Uber Battle In Florida

In Ampel, *Uber Wants Drivers Classified as Independent Contractors*, www.dailybusinessreview.com (8/17/2015) it was noted that "Uber...fought to treat its Florida drivers as 'partners' rather than employees in an appellate hearing Monday...State Department of Economic Opportunity special deputy Jackson Houser heard the appeal of a state decision that Uber drivers should be considered employees, not independent contractors...Uber is fighting similar battles across the country to hold onto the

advantages of classifying workers as independent contractors”.

Delayed Flight Compensation Awaiting

In *Airlines owe British flyers millions in delayed flight compensation*, www.eturbonews.com (8/9/2015) it was noted that “London, England-Delayed airline passengers would be missing out on millions of pounds worth of compensation, a consumer investigation has claimed. Which? Found that between June 2014 and May 2015, 37 million passenger journeys to and from the UK were by 15 minutes or more, with more than 900,000 people eligible for compensation. However, the consumer magazine fund only an average of 38 per cent of passengers made a claim. Any passenger delayed for more than three hours is entitled to up to L521 under the Denied Boarding Regulation...According to Which?, 30 per cent of flyers have experienced delays or cancellations with their flight with more than 9,000 flights delays for three hours or more each year. The magazine surveyed more than 7,000 of its members-it found half of those who had been delayed, received no support or information about the delay they experienced from their airline”.

India Hotel & Restaurant Explode

In *Hotel and restaurant blown up in explosion: 60 dead*, www.eturbonews.com (9/12/2015) it was noted that "At least 60 people have been killed and dozens have been injured after an explosion destroyed a two-story restaurant in India's Madhya Pradesh...The second floor of the restaurant was reportedly occupied by a hotel".

Crane Crash In Mecca

In Hubbard, *Scores Killed in Mecca as Crane Crashes Into Grand Mosque*, www.nytimes.com (9/11/2015) it was noted that "A large construction crane toppled and crashed into the Grand Mosque in the holy city of Mecca...killing at least 107 people and raising fears about the safety of the site before the yearly hajj pilgrimage that is expected to bring in millions of visitors to Saudi Arabia this month...The Saudi government is in the midst of a multibillion-dollar project to enlarge the mosque and the site is currently ringed with cranes. Many other construction projects are also underway in Mecca, including...the world's largest hotel, with 10,000 rooms, 70 restaurants and a helipad".

Closing The Border

In Eddy, Lyman & Smale, *Germany Orders Curbs at Border in*

Migrant Crisis, www.nytimes.com (9/13/2015) it was noted that "With record number of migrants pouring across the Hungarian border and rushing west, Germany, the country that had been the most welcoming in Europe, suddenly ordered temporary border restrictions on Sunday that cut off travel from Austria and instituted spot checks on cars...Although one of the proudest European achievements of recent decades was passport-free travel between most member nations, the rules allow the reinstatement of border restrictions in cases of crisis and national security...".

Airbnb "Menace" In Paris

In *Paris hoteliers: Airbnb "a menace that enjoys unfair advantage"*, www.eturbonews.com (8/12/2015) it was noted that "Airbnb is spreading into the heart of Paris. The French city reportedly has more Airbnb inventory than any other city in the world-which has proven worrisome to the city's top hoteliers. 'The Paris market is going to get very difficult' Didier le Calvez, managing director of the Bristol Hotel said, adding that he, along with heads of the city's other palace hotels, denounce Airbnb 'as a menace that enjoys an unfair advantage'. It is estimated that Airbnb offers between 380 and 400 Paris properties at over 500 euros a night. Of those, about 40 charge over 1,000 euros (\$1,090). The Paris luxury sector already has competition

from new supply...According to Business Insider, other factors include downturns in visits from wealthy Russians and Brazilians as the economies there falter and fears among US visitors of rising anti-Semitism in France”.

Uber Sued In Dallas

In *Council, Uber Sued in Dallas Court Over Rape Allegations*, www.law.com (8/11/2015) it was noted that “A Dallas woman has filed a sexual assault lawsuit against Uber, alleging that the \$50 billion company is civilly liable for failing to check the background of a convicted felon driver who raped her. The lawsuit, *Doe v. Uber Technologies* (alleges that Mr. X) was arrested July 29 for sexual assault after he allegedly picked up the woman through Uber’s smartphone app, followed her inside her home against her wishes, struck her on the back of the head and sexually assaulted her, according to the lawsuit. Mr. X was convicted of felony assault in 1995 and again in 2007 for felony possession of firearms, according to the lawsuit. He did six-and-a-half years in federal prison before his release in 2012. He also allegedly used a fake city of Dallas permit to get himself and his company, Triple Class Limousines, approved by Uber, according to the lawsuit...’Uber’s actions were akin to letting a tiger loose in a shopping mall’ the lawsuit alleges”.

Bike Sharing Growing

In Morris, *Take my bike, please: Cycle-sharing companies reshape U.S. cities*, <http://fortune.com> (8/11/2015) it was noted that "Tim Ericson was studying in Paris in July of 2007 when the Velib public bike-sharing system was unveiled. Velib' lets citizens and tourists check out bikes from electronic docking stations and cruise around the City of Light...Ericson would go on to launch CityRyde (now Zagster), one of the first U.S. based bike share companies...The systems...are proving hugely popular, adding riders, bikes and stations...Motivate's Dani Simons says New York hopes CitiBike will help its transportation infrastructure deal with the million new inhabitants it expects by 2030. Bike sharing is also a way for cities to cater to young, educated workers, who are less interested in car ownership than accessibility and quality of life...Bikes can also increase efficiency for private companies...Those ancillary benefits are important, because as Ericson bluntly points out, 'There's no bikeshare in the world that's profitable on rider revenue'".

Fending Off Uber

In Wright, *Neighborhood Car Service Companies Adopt Their Own Apps to Fend Off Uber*, www.nytimes.com (8/11/2015) it was

noted that "apps are being adopted...by more and more of the local car services (in New York City) that have long been as much a part of the city neighborhoods as the local parish or the corner bodega...after years of independence, some companies are joining forces, powered by an app to create a car service network in hopes of fending off Uber. Issac Yehuda, a co-founder of Limosys Software, which has catered to the limousine industry since 1989, devised a network where each company could have its own app with its own brand, but that would link all of the bases to one software system so that companies could effectively pool their cars and serve more customers...High Class is part of Mr. Yehuda's network of over 75 companies—a total of 10,000 cars, across five boroughs, with apps for Apple and Android devices. Collectively, the apps have around 250,000 downloads. Among all of the companies in the network, a few thousand rides are placed a week, Perhaps that is not a threat to Uber, which has about 20,000 for-hire vehicles in the city, according to the city's Taxi and Limousine Commission, but it is a leap into a new world. And they have at least one notable edge: They take cash."

Travel Law Article: Costa Rica Bike Tour Accident

Disclaimers

As we noted in Dickerson, Gould & Chalos, *Litigating International Torts in U.S. Courts*, Thomson Reuters (2015) at Section 11:20 "Travel agents and tour operators typically require their clients to agree to terms and conditions before their voyages abroad. In some cases, a written or electronic signature is necessary; in others, the terms and conditions are part of a brochure or printed on the back of payment notices. Regardless of the manner of communication, a common provision within these travel contracts is a liability disclaimer whereby the tour operator disclaims any responsibility for the negligence of third-party service suppliers such as hotels, guides, bus companies and cruise lines".

Circumventing Disclaimers

"Injured travelers seeking redress from their U.S.-based tour operators often try to circumvent these liability disclaimers, claiming they did not see them, did not understand them, and/or the terms are unenforceable because of public policy. If appropriately drafted, courts will generally uphold these disclaimers so long as the supplier and tour operator can show that (a) the traveler saw and agreed to it; or (b) the traveler's agent or traveling companion saw and agreed to it, thereby binding the traveler herself and that the disclaimer

actually applies to the acts of an independent contractor. The actual manner in which the disclaimers are communicated will vary and include printed brochures, tickets, receipts and Web sites”.

The Bicycle Accident Case

In the *Steinfeld* case the Court noted that “This...personal injury action arose after Plaintiff Sandra Steinfeld fell off her bicycle and was injured during a bicycle tour vacation in Costa Rica gone awry. (Plaintiffs) filed suit against bicycle tour company EmPG International (‘EmPG’) (and various) Costa-Rica based and John-Doe collaborators that have yet to be identified, but who operate as ExperiencePlus! Bicycle Tours. (There are three essential claims including (1) negligence, (2) “contract-based claims for violations of Pennsylvania’s consumer-protection act and for breach of contract/negligent misrepresentation/fraud and (3) loss of consortium). The EmPG Motion urges the dismissal of all claims (as they arise) out of the parties’ contractual relationship, which in turn is limited both by executed assumption of the risk and waiver of liability forms and by the economic loss doctrine”.

Waiver & Assumption Of The Risk

"This case involves the question of the extent of an executed waiver and release of liability and the elements of assumption of risk. A waiver implicitly or explicitly is grounded on warranties of fitness, and assumption of risk can only take place when the risk is inherent and clearly foreseeable. The Complaint...abounds with allegations of misrepresentations and abandonment of good faith attempts to fulfill the obligations of the contract. The motion to dismiss is... denied".

Waiver Of Liability

"The waiver of liability on which EmPG relies is two-fold. First, the Steinfields in booking the Costa Rica bicycle trip signed separate forms stating that they had 'full understanding that bicycling and other tour activities involve risks and hazards that may involve injury and/or death' and that each agreed 'to assume full responsibility for myself...and for the bicycle(s) which is/are assigned to me, except when said bicycle(s) is/are in the care of ExperiencePlus! Bicycle Tours'.

The Web Site Conditions

Second, EmPG points to the Terms and Conditions of its website which Plaintiffs, 'in signing these forms...acknowledged

they were aware of': Responsibility: The payment of the deposit or full payment for a reservation on a tour shall constitute consent to all provisions listed under 'Terms & Conditions' herein...Experience Plus...shall not be responsible for personal injuries...arising out of the act of negligence of (anyone) rendering any of these services...being offered in these tours ...Tour participants follow the suggested itinerary at their own risk and agree not to hold ExperiencePlus! Bicycle Tours responsible for any injury or death resulting from accidents".

Colorado Law Applied

"Contractual waiver of liability clauses are recognized under Colorado law, but are narrowly and 'closely scrutinized' to make sure that the agreement was fairly entered into and that the intention of the parties is expressed in clear and unambiguous language...Only agreements insulating a party from simple negligence may be recognized and in no event will an exculpatory agreement provide a shield against a claim for wilful and wanton negligence. Moreover, even agreements purporting to insulate a party from simple negligence are 'disfavored' but they are 'not necessarily void as against public policy' in Colorado as long as one party is not 'at such obvious disadvantage in bargaining power that the effect of the contract is to put him at the mercy

of the other's negligence'".

The Decision

"The waivers at issue in this case are neither clear or unambiguous, and even if they were, the (Plaintiffs) were at such obvious disadvantage in bargaining power vis a vis the EmPG, that the effect of the waiver was to put them 'at the mercy' not only of EmPG/Experience Plus as the tour operator, but of the negligence of any number of entities and individuals in Costa Rica with whom EmPG contracts to perform services on its behalf. As an initial matter, the signed 'waivers' did not contain the words 'waiver' or 'negligence' at all, and did not purport to 'release' anyone or any entity of liability...The website language, moreover, does not make clear at all that the (Plaintiffs) were releasing EmPG/Experience Plus from its own negligence, providing that the company would not be responsible for personal injuries 'arising out of the act of negligence of any direct or supplemental carrier, hotel or other person rendering any of the services...being offered in these tours' or 'any injuries, death...or by reasons of any event beyond the actual control of ExperiencePlus! Bicycle Tours...This language, in fact, implies that ExperiencePlus could be held responsible for injuries that were not 'beyond its actual control', i.e., the

hiring, outfitting and delegation decisions it made”.

Conclusion

For more on releases and liability waivers see *Travel Law*, Chapter 5 and our recent article *Tough Mudder-adventure tourism taken to its extreme*, www.eturbonews.com (6/12/2014)].

Justice Dickerson been writing about *Travel Law* for 39 years including his annually updated law books, *Travel Law*, Law Journal Press (2015) and *Litigating International Torts in U.S. Courts*, Thomson Reuters WestLaw (2015), and over 350 legal articles many of which are available at www.nycourts.gov/courts/9jd/taxcertatd.shtml. For additional travel law news and developments, especially, in the member states of the EU see www.IFTTA.org

