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SUPREME COURT HOLDS ADA TITLE III APPLIES TO FOREIGN-FLAG CRUISE SHIPS

By Walter Johnson

Background

In recent years, disabled individuals have filed a number of lawsuits under Title III of the ADA and related state laws seeking to compel foreign-flag cruise lines to change what they contend are discriminatory policies and practices and to remove barriers to access on their ships. Cruise ships flying foreign flags serve more than seven million U.S. residents annually, the great majority of them departing from and returning to U.S. ports. An increasing portion of this huge clientele consists of people with disabilities, for many of whom cruising represents an ideal vacation. Cruise lines have generally welcomed this growing segment of their customer base but have resisted these lawsuits out of concern that Title III is ill-suited to the unique requirements of travel by sea. Calls for structural modifications have been especially problematic for cruise lines since the government agencies charged with providing standards governing “new construction and alterations” have failed to do so for almost fifteen years. (Draft guidelines for large passenger vessels and a notice of proposed rulemaking were finally issued in November 2004.) Some cruise lines have taken the position that Title III does not apply to foreign-flag cruise ships at all. The Eleventh Circuit Court of Appeals disagreed in *Stevens v. Premier Cruises*, 215 F.3d 1237 (11th Cir. 2000), a crucial decision for the cruise industry because so much of it is based in Florida. Four years later, however, the Fifth Circuit came to the opposite conclusion in *Spector v. Norwegian Cruise Line*, 356 F.3d 641 (5th Cir. 2004). This conflict set the stage for the Supreme Court’s recent decision.

The Supreme Court’s Decision

On June 6, 2005, the Supreme Court reversed an earlier ruling of the Fifth Circuit, holding that foreign-flag cruise ships operating in U.S. waters are indeed subject to Title III. Unfortunately for all concerned, the Court was able to muster a majority on only two of seven substantive subparts of its opinion. Most subparts garnered only three votes and will therefore have no value as precedent. As a result, although the Court has rearranged the playing field, the rules of the game remain largely undefined. The majority agreed that cruise ships in general fall within Title III’s definitions of “public accommodation” and “specified



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public transportation” and would, thus, be covered by the literal terms of the ADA. It also agreed that the ADA applies to foreign-flag cruise ships, despite considerations of international comity, but not to every aspect of the ship and its operations. Structural modifications received special attention. The majority noted that “barrier removal” is required by Title III only when it is “readily achievable,” which means “readily accomplishable and able to be carried out without much difficulty or expense.” With this in mind, the Court held that any barrier removal or other modification that would cause the ship to be out of compliance with applicable foreign law or with international obligations would cause “difficulty” and would, therefore, not be required by Title III. Also, a structural modification that would pose a direct threat to the health or safety of others would also cause “difficulty” and would not be required.

Beyond these few points, the Court could not agree. Three justices, led by Justice Kennedy, believed that Title III would not apply to “the internal affairs and management” of the ship. How these justices would define “internal affairs and management” is unclear. One part of the plurality opinion suggests that policies, practices, and procedures are not internal but that structural changes to the vessel are. Two justices, led by Justice Ginsberg, believed that the ADA applies to all aspects of the ship except where an actual conflict with foreign or international law can be shown. Three dissenting justices, led by Justice Scalia, believed that the ADA did not apply to foreign-flag cruise ships at all. In a separate opinion, Justice Thomas agreed that Title III does not apply to the “internal affairs” of foreign-flag ships, including the structure of the ship, but he otherwise sided with the dissent.

The real problem for the Court in *Spector* was an old one: the extent to which any U.S. law applies to foreign ships in U.S. waters. In earlier decisions the Supreme Court had held that a ship is deemed to be a part of that nation whose flag it flies and not to lose that character when it enters the territorial waters of another nation. There must be some law on shipboard, and it cannot change in every port. A ship that enters the territorial waters of a foreign sovereign is concurrently subject to the laws of that sovereign during its stay; but it is also “settled American doctrine,” based on considerations of international comity, that the local sovereign should abstain from any interference with the “internal affairs and management” of a foreign ship in matters that do not directly involve “the peace or dignity of the country, or the tranquility of the port.” The Court has recognized that contact with multiple jurisdictions is the essence of maritime commerce and that if each nation were to exploit such contacts to the limits of its power, “a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.” On this basis, the Court has adopted a presumption that Congress does not intend its general statutes to apply to foreign-flag ships in U.S. ports. For the Court “to run interference in such a delicate field of international relations there must be the affirmative intention of the Congress clearly expressed.” *Benç v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). Title III does not contain any such “affirmative intention of Congress clearly expressed” and, for this reason, the Fifth Circuit ruled in NCL’s favor.

Several of the justices in *Spector* were troubled by the application of this “clear statement rule” to the U.S. cruise industry. In his plurality opinion, Justice Kennedy noted that virtually all cruise ships operating out of this country fly foreign flags of convenience. By and large, they are operated by companies owned or controlled by U.S. interests; they serve a U.S. clientele; and they depart from and return to U.S. ports. According to Justice Kennedy, to hold that Title III affords no protection to U.S. passengers in such circumstances would be a “harsh and unexpected interpretation of a statute designed to provide broad protection for the disabled.” The plurality would create a new presumption, in effect, stating that while it may be reasonable to presume that Congress does not intend to interfere with matters that are primarily of concern only to the ship and its flag state, it is also reasonable to presume that Congress “does intend its statutes to apply to entities in U.S. territory that serve, employ, or otherwise affect American citizens, . . . even if those entities happen to be foreign flag ships.” Thus, the plurality would hold that the “clear statement rule” precludes only those applications of Title III that would interfere with the “internal affairs and management” of the foreign-flag ship; but not even the plurality opinion would offer the lower courts much guidance in drawing the line between internal and external affairs, except to suggest that the structure of the ship is probably part of its “internal affairs.”

Reviewing the complaint, the plurality opinion noted that there were many allegations involving discriminatory “policies, practices, and procedures,” including such things as imposing extra charges on disabled passengers, requiring disabled passengers to travel with an able-bodied companion, and reserving the right to disembark disabled passengers whose presence endangers the “comfort” of other passengers. The plurality observes that none of these alleged Title III violations implicate any requirement that would interfere with the internal affairs and management of a vessel. The analysis is different with respect to structural barriers. For example, there are coamings throughout the ship – the raised edges around the ship’s doors – that tend to block the passage of wheelchairs and scooters. Title III might mandate the removal of such barriers or of other permanent and significant features that are elements of basic ship design and construction; however, “these applications of the barrier removal requirement likely would interfere with the internal affairs of foreign ships.” In a separate opinion, Justices Ginsberg and Breyer disagreed, believing that Title III should apply across the board unless an actual conflict with foreign or international law can be shown.

The “Readily Achievable” Standard

A majority of the Court agreed that many issues involving structural barriers might be resolved solely by reference to Title III’s own “readily achievable” standard and without resort to the clear statement rule. “Readily achievable” is defined as “easily accomplishable and able to be carried out without much difficulty or expense.” The Court observes that use of the term “difficulty” indicates factors other than cost alone are to be considered. The majority held that any barrier removal or modification that would bring the ship into noncompliance with foreign law or treaties such as the International Convention for the Safety of Life at Sea (“SOLAS”) would constitute such a “difficulty.” (This surprising extension of the concept of “difficulty,” as Justice Scalia noted in his dissent, “may be the

most significant aspect of today's foreign-flag decision.”) Further, courts must take into consideration the effect of barrier removal on shipboard safety. The majority holds that a structural modification is not “readily achievable” if it would pose a direct threat to the health or safety of others. That being so, the plurality suggests, “it may well follow . . . that Title III does not require any permanent and significant structural modifications that interfere with the internal affairs of any cruise ship, foreign flag or domestic.”

Justice Scalia's Dissent

Justice Scalia wrote a dissenting opinion, joined in by Chief Justice Rehnquist and Justice O'Connor and in part by Justice Thomas. Justice Scalia would have affirmed the Fifth Circuit's decision on the grounds that permanent structural modifications of whatever nature are obviously integral to the ship's operation and not subject to the laws of the local sovereign. The structure of the ship cannot be changed as it moves from one port to another. Further, the clear statement rule, according to Justice Scalia, does not depend on the existence of an actual conflict with foreign law but on the potential for such conflict. This has always been true, he points out, of the similar presumption that general statutes are presumed not to have extraterritorial effect unless the intent of Congress is affirmatively stated. See *EEOC v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (applying the presumption to hold that Title VII of the Civil Rights Act of 1964 does not apply abroad). Such matters are not decided on a case-by-case basis. The presumption is based on conflicting sovereignties, not on conflicting laws. Justice Scalia foresees that trial courts following the *Spector* decision are going to have a complex and difficult task.

What Should Places of Public Accommodation, Providers of Public Transportation, and Employers Do Now?

Largely because the Supreme Court was so divided in this case, it is hard to determine exactly what effect the *Spector* decision will have on ADA compliance obligations. In addition, because the decision addresses only Title III and not Title I (governing employment), it does not directly change employment law. However, there are some steps that entities covered by the ADA should take.

1. The *Spector* decision serves to reaffirm the importance of self auditing to identify or eliminate barriers to access. The aging population of the U.S. means that more and more individuals will be adversely affected by such barriers. In many circumstances, this audit can, or should be, protected under attorney-client privilege and/or the attorney work-product doctrine.
2. *Spector* provides helpful authority that modifications which would violate other laws or which pose a direct threat to the health or safety of others are not required under Title III. The same logic should presumably also support the related proposition that accommodations for employees under Title I are not “reasonable” and thus do not need to be made if they pose a direct threat to the health or safety of others or would violate other laws. Covered entities should consider whether such exceptions apply in determining what sort of accommodations they must make under the ADA.

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