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CONFERENCE**  
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## **REPRESENTING CRUISE LINES AND BEACHFRONT HOTELS**

**REPRESENTATION OF CRUISE LINES IN  
PASSENGER AND CREW CLAIMS AND POTENTIAL  
MARITIME ISSUES/IMPLICATIONS FACING  
BEACHFRONT HOTELS**

# Presenter

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- **JERRY D. HAMILTON, ESQ.**
- Founding managing shareholder of Hamilton Miller & Birthisel, LLP, a Martindale Hubbell AV rated law firm.
- Florida Board Certified litigator who has been named by the South Florida Business Journal as the BEST OF THE BAR.
- Recognized by Law & Politics as a Florida Super Lawyer every year since 2006.
- Practice dedicated to litigation, including, admiralty and maritime claims, hospitality law claims, transportation, personal injury defense, property and casualty, commercial litigation, medical and professional malpractice, products liability, and mass torts.
- [www.hamiltonmillerlaw.com](http://www.hamiltonmillerlaw.com)

# Presenter

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- LAWRENCE MENTZ, Member
- Kaplan, Massamillo & Andrews, LLC
  - Chicago and New York
- Representing airlines and others in the aviation and hospitality industry for over 25 years



# PASSENGER CLAIMS

## General Background

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- **Who is a Passenger?** – A passenger is one who travels in a public conveyance by virtue of a contract with the carrier, express or implied, paying fare or something accepted as an equivalent.
- **What Law Applies?** – The federal general maritime law governs the substantive legal issues when an injury occurs on navigable waters.



# Standard of Care Owed to Passengers

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- A ship owner's behavior is measured by an ordinary reasonable care under the circumstances standard.
- The standard requires as a prerequisite to imposing liability that the carrier have actual or constructive notice of the risk-creating condition.
- A ship owner must give notice of dangers to passengers that are not apparent and obvious.

# Duty to Warn Passengers

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- A ship owner has a duty to warn passengers
  - Of dangers known to the carrier
  - In places where the passenger is invited to
  - or may reasonably be expected to visit.

*Carlisle v. Ulysses Line Ltd, SA.*, 475 So. 2d 248, 251 (Fla. 3d DCA 1985).

# Time for Filing Suit and Forum Selection Clauses

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- Three year statute of limitations in suits for personal injury or death claims arising out of a maritime tort.
- However, carrier may contractually limit the time period to at least one year.
- Carrier can also contractually select the location where suit is to be brought.

# EXCULPATORY CLAUSES - DISCLAIMERS OF LIABILITY IN PASSENGER TICKETS

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- Disclaimers of liability in passenger ticket contracts for harm caused by the negligence of providers of shore excursion services are enforceable when
  - the disclaimer communicates that the shore excursion is run by independent contractors and
  - the disclaimer supports the lack of any agreement or warranty on the part of the ship owner to guarantee the safety of the passenger while on the shore excursions.



# The “Reasonable Communicativeness Test”

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- Courts focus on physical characteristics of the ticket and assess features such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question.
- Courts then evaluate the circumstances surrounding the passenger’s purchase and subsequent retention of the ticket.
- Contractual clauses are scrutinized under a fundamental fairness standard.

# Passenger Assaults

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- The standard which governs a ship owner's liability to its passenger for crew member assaults is strict liability.
- The ship owner owes a non-delegable duty to protect their passengers from crew member assaults and thereby safely transport their passengers.

# Liability for Shipboard Physician

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- Ship owner has no legal duty to provide a passenger with medical services.
- However, when a carrier undertakes to employ a doctor aboard ship for its passengers' convenience, it has a duty to employ a doctor who is competent and duly qualified, and is responsible for its own negligence if the carrier breaches that duty.

# Wrongful Death

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- Death on the High Seas Act (“DOHSA”) provides the exclusive damages remedy when wrongful death arises beyond 3 nautical miles from the shore of the United States.
- DOHSA authorizes recovery for pecuniary damages only, which includes loss of support, loss of the services of the deceased, loss of inheritance, and recovery of funeral expenses.

# CREW CLAIMS

## The Jones Act

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- Statutory right of seaman to sue their employers for negligence where
  - A seaman is injured while
  - employed aboard a vessel in navigation
  - where such injury occurs in the scope of the seaman's employment and
  - arises from the negligence of the employer



# The Jones Act Proper Venue

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- Claim may be brought against employer
  - In state or federal court.
  - In the court of the district where the Defendant employer resides or where its principal office is located.



# The Jones Act

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- Employer owes a duty to the seaman to exercise reasonable care and prudence in providing a reasonably safe place to work.
- The standard for causation in Jones Act claims is very low, and requires only that the negligence be a cause, however slight, of the injury. *Rogers v. Missouri Pacific Railway Co.*, 352 U.S. 500, 506 (1957).

# CREW CLAIMS

## Unseaworthiness

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- A seaman must allege that his injury was caused by a defective condition of the ship, its equipment, appurtenances or the ship's unfit crew.
- The test for an unseaworthy condition is whether the vessel, equipment, or *appurtenances* were reasonably fit for their intended use.
- “Reasonable fitness” is determined according to the reasonable man standard and not the stricter Jones Act standard.





# Unseaworthiness

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- Warranty of seaworthiness owed to
  - All Jones Act seaman
  - Workers who are not true Jones Act seaman but who perform traditional seaman's duties
- Warranty of seaworthiness NOT owed to
  - Passengers, invitees, or guests who are aboard a vessel for purposes unrelated to work

# Unseaworthiness

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- Some illustrations of unseaworthiness:
  - Improper methods of operation
  - Failure of equipment under regular use
  - Improper manning
  - Crew assaults
  - Slippery and obstructed decks
  - Insufficient supplies and equipment

# CREW CLAIMS

## Maintenance and Cure

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- **Maintenance** to which a seaman may be entitled is the cost of food, lodging, and transportation to and from a medical facility.
- **Cure** to which a seaman may be entitled includes the cost of medical attention, including the services of physicians and nurses as well as the cost of hospitalization, medicines and medical apparatus until the seaman is fit for duty or until maximum medical cure is reached.

# Maintenance and Cure

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- Employers **defenses** to a failure to provide Maintenance and Cure claim:
  - Seaman's acts or omissions
    - Willful misconduct
    - Concealment of a pre-existing condition
    - Fighting
    - STD
  - Failure to Mitigate
  - Laches

# Failure to Provide Maintenance and Cure Recoverable Damages

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- Compensatory damages
- Attorney Fees
- Punitive damages for callous, willful or arbitrary failure to investigate and/or provide



# MARITIME ISSUES/IMPLICATIONS OF BEACHFRONT HOTELS

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- Providing amenities and services beyond hotel rooms (jet ski rentals, boat rentals and tours)
  - Limit exposure by having independent contractor provide service
  - Provide written notice to guests that amenities are provided by independent contractors



# Limitation of Liability

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- Allows vessel owner to limit liability to the amount of value of the vessel and her freight then pending
- if the casualty was incurred without the vessel owners privity or knowledge
- Courts have limited liability to the value of a wave runner.

*In re Complaint of Royal Caribbean Cruises Ltd., 459 F.Supp. 1284 (S.D. Fla. 2006)*

## Liability arising from Adjacent Beach

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- Generally, no duty to protect guest from naturally occurring swimming hazards (riptides, undertows)
- **BUT** if innkeeper is exercising a degree of **supervision or control** over beach area, then a potential duty of care to guest might arise



## If a hotel evidences control over the beach area liability may attach

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- Courts have applied the “sphere of control” test to determine whether the hotel expressed an intent to control the swimming area
- Liability may follow if the hotel
  - Promulgates regulations concerning the area
  - Installs buoys to mark the area
  - Employs lifeguards, and
  - Installs warning signs before and after the accident

*Campbell v. Starwood Hotels and Resorts Worldwide, Inc.* 2008 WL 4609986

# Use of Liability Waivers

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- Exculpatory clauses are valid and enforceable when clear and unequivocal. *Cutchin v. Habitat Curacao-Maduro Dive Fanta-Seas, Inc.*, No. 98-1679, 1999 WL 33232277 (S.D. Fla. Feb. 8, 1999).
- Pre-injury releases executed by a minor or a parent on behalf of a minor child are unenforceable. *See Kirton v. Fields*, 997 So. 2d 349 (Fla. 2008).

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**HM&B**  
**HAMILTON, MILLER & BIRTHISEL<sup>LLP</sup>**  
*Attorneys At Law*



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# A PRIMER ON REPRESENTING AIRLINES

A Bird's-Eye View of the Fundamentals

# Introduction

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- Airlines and the Hospitality Industry
- Legal Needs of Airlines
  - Same as any corporation PLUS

# International Legal Framework

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- International Convention on Civil Aviation, Chicago, 1944
  - Established Rights to Conduct International Commercial Operations
- International Civil Aviation Organization (“ICAO”)
  - Promulgates Minimum Standards for Civil Aviation
- Bilateral International Agreements for Air Services

# U.S. Requirements for Commercial Operations

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- Domestic Airlines Must be Owned and Controlled by U.S. Nationals
- Foreign Airlines Must be Owned and Controlled by Foreign Nationals
- Foreign Air Carrier Not Permitted to Conduct Domestic Commercial Operations

# Legal Framework - Differences

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- Employer-Employee Relations
  - Railway Labor Act
- Safety
  - Ground based operations – OSHA
  - Aircraft operation, maintenance - FAA
- Passengers with Disabilities
  - Air Carrier Access Act
  - DOT Regulations Detail Standards and Requirements



# State Law Preempted

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- 1999 Montreal Convention
  - Preempts state law liability rules for death, personal injury, baggage and cargo in “International Transportation”
- Statutory Preemption of State Law and Regulation
  - Airline Deregulation Act
  - Some tort law claims preempted
- Regulatory Preemption of State Incorporation by Reference Rules

# Airline Distribution and Marketing

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- Airline Advertising and Marketing Governed by DOT
- DOT Regulations Provide Specific Guidelines, 14 C.F.R. Part 399, subpart G
- Internet Distribution Agreements for Airlines and for Hotels Very Similar
  - Stephen Barth Presentation: “Negotiating Online Travel Agreements: Where are We in Light of Choice-Expedia” Provided Very Useful Information

# The Airline-Passenger Relationship

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- Primarily Contractual
  - Airline Ticket Incorporates by Reference
  - Contract of Carriage Available on Airline's Web Site
- Tariffs
- Montreal Convention Provides Liability Rules for "International Transportation"
  - Applies to domestic flight if ticket includes international flight

# Airline Claims – Flight Delays

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- Domestic
  - Disclaimer in most Airline Contracts of Carriage
  - Amenities Specified for Certain Circumstances
  - New DOT Regulation Imposes Penalties for Extended Tarmac Delays
- International
  - Article 19 of Montreal Convention liability for delay in carriage
  - Provable Damages - no damages for aggravation or inconvenience
  - Liability limited to 4,150 SDRs

# Airline Claims – Bumping

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- Equivalent to “Walking” Hotel Guest
- Domestic
  - Governed by DOT Regulation, 14 C.F.R. Part 250
  - Denied Boarding Compensation maximum of \$800
  - If DBC Accepted, Waiver of right to Sue
- International
  - DOT Rules do Not Apply to Flights Originating Outside U.S.
  - Foreign Jurisdiction may Have Similar Rules, e.g, EU Rules
  - Montreal Convention Liability Limitation for Delay may Apply

# Airline Claims – Baggage

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- Domestic
  - Contract of Carriage Includes Liability Rules for Loss, Damage, Destruction and Delay
  - Limitation on Liability and Time for Notice of Claim
  - DOT Regulation Prohibits Limitation Less than \$3,300
- International
  - Montreal Convention Provides Exclusive Remedy
  - Liability Limited by Article 22 of Convention to 1,000 SDRs
  - Notice of Claim Required within 7 days for damage and within 21 days for delay

# Airline Claims – Personal Injury

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- Domestic
  - Generally Governed by State Negligence Law
  - Certain Claims May be Preempted, e.g., false imprisonment
  - Choice-of-Law Disputes Common
  - No Limitation of Liability Permitted in Contract of Carriage

# Airline Claims – Personal Injury

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- International
  - Montreal Convention Provides Exclusive Remedy
  - Liable for Accident – If no “Accident” NO Liability
  - No Defense for Damages up to 100,000 SDRs
  - No Punitive Damages or Damages for Mental Injury



# Airline Claims – Statute of Limitations

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- Domestic
  - State Law for Death and Personal Injury Claims
  - Airline Contract of Carriage for Baggage and Cargo Claims
- International
  - Two Years for Death, Personal Injury, Baggage and Cargo
  - Not Subject to Tolling