# TOUR OPERATOR LIABILITY

By: John H. (Jack) Hickey[1]
Hickey Law Firm, P.A.
1401 Brickell Ave., Suite 510
Miami, FL 33131
www.hickeylawfirm.com

This paper will discuss briefly the liability of tour operators when they either knew or should have known, made representations about, or undertook to plan or manage the risks of the tour, event, or planned activity.

**THE VARIABLES.** One variable in tours is the involvement of the tour operator in the planning and/or management of the tour, event, or planned activity. Another variable is the representations made by the tour operator in the first place about what it is that the tour operator is offering. The third set of variables is the knowledge of the tour operator of the risks involved in the tour, event, or planned activity and whether the risks were effectively communicated to the consumer.

**WHAT IS A "TOUR"?** Tour operators offer so called "tours" either as a part of a cruise or independently. The word "tour" is a misnomer because it seems to imply taking someone on a sightseeing trip. In fact, "tours" can include events or specific trips with planned activities. And "tours" can be limited to actual tours of or travel to or around a destination where the operator provides only transportation. One of the major indemnity companies for maritime interests and tour operators, Gard, describes tours as "off ship activities". In a description of such insurance, Gard says that it offers: "Risk solutions covering passenger liabilities during pre and post journey, shore excursions, and other off ship activities." See: http://www.gard.no/ikbViewer/Content/67297/Tour%20Operators%20passenger%20liability%20cover%202013.pdf.

**CRUISE LINE AND OTHER THIRD PARTY LIABILITY**. This paper is not meant to focus on the liability of any other connected party such as a cruise line but will mention the basics of such liability. There are cases which uphold the liability of a cruise line for the

[1] ***John H. (Jack) Hickey*** *is Board Certified as a Civil Trial Lawyer by The Florida Bar and by the National Board of Trial Advocacy, Board Certified in Admiralty and Maritime Law by The Florida Bar, a Past President of the Dade County Bar Association, on the Board of Governors of The Florida Bar, Listed in Who's Who in America and in American Law, and named by The South Florida Legal Guide as a "Top Lawyer" in the areas of personal injury and maritime. Hickey graduated from Florida State University (B.A., magna cum laude, Phi Beta Kappa) and from Duke Law School. He handles cases in the fields of transportation torts (cruise ship, recreational boating, trucking, and automobile accidents), premises liability (negligent security and negligent physical premises) other admiralty and maritime cases, personal injury and wrongful death, and products liability. Contact him at hickey@hickeylawfirm.com or see www.hickeylawfirm.com.*

negligence of the tour operator as its agent or where the cruise line knew or should have known of the conditions of the tour. *See, e.g., Belik v. Carlson Travel Group, Inc.,* 864 F.Supp.2d 1302 (S. D. Fla. 2011). There also is a case where a Court dismissed an action filed against a cruise line for the negligence of a tour operator or excursion operator. See, *Smolnikar v. Royal Caribbean Cruises, Ltd.,* 787 F.Supp.2d 1308 (S.D. Fla. 2011) [DE 378 p.5]. But the complaint in *Smolnikar* based liability solely on the basis that the excursion was sold through the cruise line.

**THE BASIS OF LIABILITY: INVOLVEMENT OR ACTUAL OR CONSTRUCTIVE KNOWLEDGE**. Tour operators can sponsor or organize cruises. Often, these operators organize theme cruises or cruises for groups such as singles. If they organize the cruise or the excursion, they should do so in a reasonable manner or they will be liable for the injuries they cause. See, e.g., *Belik v. Carlson Travel Group, Inc*., 864 F.Supp.2d 1302 (S. D. Fla. 2011). Also, where the operator of the tour or excursion has some knowledge of the hazards of the trip or provides guides and promises safety, the tour operator can be liable for injuries caused by that risk of which it did not warn. See *Stevenson v. Four Winds Travel, Inc*., 462 F.2d 899 (5th Cir. 1972); *Rookard v. Mexicoach,* 680 F.2d 1257, 1261-62 (9th Cir. 1982). In *Rookland,* the 9th Circuit said that under California law issues of fact precluded summary judgment on duty to warn claim where travel agent knew that it was hazardous to ride on Mexican buses but "made no efforts to investigate the safety record" of those buses. See *Isbell,* 462 F.Supp.2d at 1237. See also *Tradewind Transportation Co. v. Taylor,* 267 F.2d 185, 188 (9th Cir.1959). The 9th Circuit in *Tradewinds* also said that the duty owed by a transportation company which drove tourists to points of interest was "to warn them of any unreasonable risk of harm in or about [the site], i.e., a dangerous condition known to [the company] and unknown to the passengers"). *Rawlins v. Clipper Cruise Lines,* 1996 WL 933862, at *3 (E.D.Mo.1996) (adopting standard set forth in *Tradewind Transportation*).

In *Stevenson*, the tour was accompanied by an escort and director. The tour brochure stated:

> Four Winds also guarantees that every tour will be escorted by a qualified professional tour director. Our directors have been carefully selected and trained. ... Your Four Winds Jet Tour is an escorted tour. From the moment you leave until your journey ends you are cared for by a carefully selected Four Winds tour escort.

*Id*. at 903. In *Feinswog v. Holland America Line West Tours, Inc*. 636 So.2d 98 (Fla. 3d DCA 1994), the court followed *Stevenson* and held that the operator of a walking tour of a state park who provided a tour guide owed members of the tour group the duty to operate the tour in a reasonably safe manner.

Similarly, in *Kaufman v. A1 Bus Lines, Inc.* 416 So.2d 863 (Fla. 3d DCA 1981) the court reversed a summary judgment and held that a jury question was presented as to whether the bus company served in a capacity beyond that of furnishing transportation to a museum and acted as a tour guide so as to make itself liable for any negligence which may have resulted in the injury sustained by the plaintiff when she fell from a catwalk while part of a tour group visiting the

museum. This decision cited to *Restatement of Torts* '323 and 324a, which address voluntary undertakings. The court held:

> First, whether A-1 Bus Lines assumed a duty commensurate with its undertaking to act as tour guide presents a jury question. If the jury finds that A-1 served in a capacity beyond that of furnishing transportation and acted as a tour guide, liability for negligence may result. An action undertaken for the benefit of another must be performed in accordance with a duty to exercise due care 416 So.2d at 864.

**ACTIVE PARTICIPATION**. Other cases draw the same distinction between a passive tour operator who merely books a tour and participatory or guided tours. *See, e.g., Antonio v. Pedersen,* 897 F.Supp.2d 210 (D. Vermont 2012) (complaint stated negligence claim against snowmobile tour operator with respect to the breach of a duty of ordinary care to driver in the operation of the tour); *Cohen v. Heritage Motor Tours, Inc.,* 205 A.D.2d 105, 618 N.Y.S.2d 387 (N.Y. Ct. App. 1994) (tour operator may be held liable for negligence of tour guide which accompanied tour participants). *Cf. Tradewind Trans. Co. v. Taylor*, 267 F.22 185, 188 (9th Cir. 1959) ("It should be emphasized that Tradewind's $6.50 tour service did not include a guided tour through the points of interest themselves").

In *Stevenson v. Four Winds Travel, Inc*., 462 F.2d 899 (5th Cir. 1972), the tour was accompanied by an escort and director. In addition, the tour brochure stated:

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In *Stevenson,* the tour participants were escorted from a large boat to a smaller boat and then to a pier that extended out into the water. The walkway was only a few inches above the water and the water splashed onto the pier on both sides, resulting in a slip and fall. The court held that, pursuant to Florida law, Four Winds' duty arose through the terms of the contract and the representations and statements made to the plaintiff in the brochure. The court held that because of the emphasis that Four Winds put in its brochure on tour escorts and directors, Stevenson had the right to expect that the tour guide would warn her of any danger like the slippery condition of the pier walkway.

*Stevenson* and its progeny create a clear distinction between passive travel agents and participatory tour operator/event planners. In *Feinswog v. Holland America Line West Tours, Inc.*,636 So.2d 98 (Fla. 3d DCA 1994), the court followed *Stevenson* and held that the operator of a walking tour of a state park who provided a tour guide owed members of the tour group the duty to operate the tour in a reasonably safe manner. Thus, it reversed a summary judgment.

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The travel agent who is a passive seller of tickets to a consumer for vacation travel generally is not liable for the negligence of the independent tour operator. See, *Cutchins v. Habitat Curacao-Maduro Dive Fanta-Seas, Inc., supra*, and *Sachs v. TWA Getaway Vacations, Inc., supra*,. However, that lack of liability if premised on the fact that the travel agent is a passive, non-participating travel agent who sold tickets to the plaintiff for a vacation and who did not represent that the travel agent would do anything else. The plaintiff in *Cutchins* was injured while scuba diving on vacation, due to the direct negligence of the scuba diving instructor in Curacao who instructed the plaintiff to ascend to the surface without properly decompressing. The court granted summary judgment to the travel agent because it did not hire, employ, control, or train the crew, including diving personnel. *Id.* at *6. The key to *Cutchins* was the lack of any evidence of control or knowledge of the operations or tour operator by the agency, and lack of representations by the agency as to the tour.

**PREMISES LIABILITY.** Liability of the tour operator depends on concepts of negligent planning or supervising of events. That in turn involves premises liability. It is well established that a party who exercises control or implied authority over a premises by inviting people to utilize the premises in a particular manner may become responsible to the invitees in the same manner as the owner. *Burton v. MDC PGA Plaza Corp.*, 78 So.3d 732 (Fla. 4th DCA

2012). Such a landowner or ***occupier*** owes two duties to an invitee: (1) the duty to use reasonable care in maintaining the property in a reasonably safe condition, and (2) the duty to warn of latent or concealed dangers. *Id.*

The control by the defendant of the premises or event does not have to be exclusive. For example, in *Metsker v. Carefree/Scott Fetzer Co.*, 90 So.3d 973 (Fla. 2d DCA 2012), the court reversed a summary judgment finding material issues of fact as to whether a manufacturer of RV awnings was in control of an exhibit booth at an RV show. The court held that a landowner and an independent contractor who were in charge of a business premises jointly may each owe a duty to the business invitee to keep that premises in a reasonably safe condition. This is true regardless of whether the independent contractor has a superior right to possession of the property. The court held that anyone who assumes control over the premises in question, no matter under what guise, assumes the duty to keep them in repair. Joint responsibility or control over the premises does not relieve either party of responsibility. *Id*.

In *DAttilio v. Fifth Avenue Business Association, Inc.,* 710 So.2d 117 (Fla 2d DCA 1998), the plaintiff was injured at an Oktoberfest street fair sponsored by a business association when she tripped and fell on an uneven area in the pavement of a pedestrian walkway. The association claimed that the City of Naples was responsible for maintaining the streets and pedestrian walkways and the trial court granted summary judgment. The Second DCA reversed finding that the association as the coordinator of the fair had some responsibility to ensure the comfort and safety of its invitees. The Court held that the level of control by the association over and responsibility to the fair's invitees were factual questions to be resolved by the jury. *Id*. at 118.

Finally, in *The Improved Benevolent and Protected Order of Elks v. Delano,* 308 So.2d 615 (Fla. 3d DCA 1975), the court held that where the caterer of a company picnic failed to remedy a defective condition of the grounds where the picnic was held, both the landowner and the caterer could be jointly liable for the injury suffered by the plaintiff whose foot slipped into a hole while crossing the lawn.

**NEGLIGENT MISREPRESENTATION LIABILITY.** Tour operators also can be liable for negligent misrepresentation by way of representations made in their literature whether on the website or in print. The elements of negligent misrepresentation are: (1) misrepresentation of a material fact; (2) that the representor made the misrepresentation without knowledge as to its truth or falsity or under circumstances in which he ought to have known of its falsity; (3) that the representor intended that the misrepresentation induce another to act on it; and (4) an injury resulted to the party acting in justifiable reliance on the misrepresentation. *Fojtasek v. NCL (Bahamas) Ltd.,* 613 F.Supp.2d 1351 (S.D. Fla. 2009).

The *Restatement (Second) of Torts*, Section 311, entitled "Negligent Misrepresentation Involving Risk of Physical Harm" provides as follows:

> (1) One who negligently gives false information to another is ***subject to liability for physical harm*** caused by action taken by the other in reasonable reliance upon such information, where such harm results:

(a) to the other, or
(b) to such third persons as the actor should expect to be in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or
(b) in the manner in which it is communicated.

(Emphasis added).

Comment b to *Restatement (Second) of Torts*, Section 311 provides that:

> The rule stated in this Section finds particular application where it is a part of the actor=s business or profession to give information upon which the safety of the recipient or third person depends. . . . The rule is not, however, limited to information given in a business or professional capacity, or to those engaged in a business or profession. ***It extends to any person who, in the course of an activity which is in furtherance of his own interests, undertakes to give information to another, and knows or should realize that the safety of the person or others may depend upon the accuracy of the information***.

(Emphasis added).

Comment c provides further clarification:

> The rule stated in this Section may also apply where the information given is purely gratuitous, and entirely unrelated to any interest of the actor, or any activity from which he derives any benefit... .

Usually, however, the information is not given gratuitously; it is given in an effort to sell the trip or tour.

The liability described in *Restatement (Second) of Torts,* Section 311 has been adopted in admiralty. *See Lobegeiger v. Celebrity Cruises, Inc.*, 2011 WL 3703329 (S.D. Fla. 2011); *Isham v. Padi Worldwide Corp.*, 2008 WL 877126 (D. Hawaii 2008); *Jurgens v. Poling Transp. Corp.*, 113 F. Supp. 2d 388, 397-98 (E.D.N.Y. 2000). *See also Rovins v. Alvarez*, 2004 WL 5642455 (D.C. Cal. 2004) (Where the negligent misrepresentation may result in physical harm, admiralty courts have relied on the *Restatement (Second) of Torts,* Section 311.) (*citing, Jurgens, supra, Kommanvittselskapet Harwi* (*Rolf Wigand) v. United States*, 467 F.2d 456, 459 n.4, 464 n.10 (3d Cir. 1972) and *McAleer v. Smith*, 791 F.Supp. 923, 933 n.3 (D.R.I. 1992). The *Isham* case involves allegations that a Discover Scuba Experience was safe and suitable . . . *Id* at *10.

As the court noted in *Isham*, "Section 311 of the *Restatement (Second) of Torts* requires only that false information be given, not that a false statement be made." 2008 WL at *11. The court observed that "one of the illustrations to Section 311 states that a person could be found liable where they make an incomplete disclosure thereby giving a false impression." *Id*. (citing *Restatement (Second) of Torts* Section 311cmt.a).

**DISCLAIMERS.** Furthermore, disclaimers are not always controlling. Statements from the tour operator's website and other literature which expressly contradict the terms of any disclaimer are admissible. The law with respect to negligent misrepresentations provides an exception to the parol evidence rule. While final agreements may not be contradicted by parol or extrinsic evidence, an exception is made in actions alleging negligent misrepresentation or fraud in the inducement. In such a case, the parol evidence rule does not preclude admission of extrinsic evidence. *Hill v. Celebrity Cruises, Inc.*, 2011 WL 5360247 (S.D. Fla. 2011) (quoting *Bagget v. Electricians Local 915 Credit Union*, 620 So.2d 784, 786 (Fla. 2d DCA 1993)).

**JOINT VENTURE LIABILITY.** The tour operator also may be liable for a joint venture with the planner or manager of the event which is the subject of the tour. Whether a joint venture was formed is typically a question of fact. *See e.g. Gentry v. Carnival Corp.*, 2011 WL 4737062 (S.D. Fla. 2011). *See also Russell v. Thielen*, 82 So.2d 143 (Fla. 1955); *Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536 (Fla. 3d DCA 1974); *Bowe v. Giardina*, 719 So.2d 941 (Fla. 3d DCA 1998).

The tour operator may be in a joint venture with the cruise line for the creation or the management of the event or activity. The Eleventh Circuit previously has recognized that excursions are the *sine qua non* of the cruise experience. *See Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2011).

The starting point for any analysis on this issue is the Eleventh Circuit's seminal opinion in *Fulchers Point Pride Seafood, Inc. v. M/V Theodora Maria,* 935 F.2d 208, 213 (11th Cir. 1991) in which the Court upheld the finding that a joint venture existed and said:

> Joint ventures involve joint control or the joint right of control, and joint proprietary interest in the subject matter of the venture. Both venturers share in the profits, and both have a duty to share in the losses. But of course *these elements cannot be applied mechanically. No one aspect of the relationship is decisive*. [citation omitted]. The factors listed by the *Sasportes* Court are not a checklist. *They are only a sign post, likely indicia, but not prerequisites*.

935 F.2d at 211 (emphasis added). *Accord, Lapidus v. NCL America, LLC*, 2012 WL 2193055 (S.D. Fla. 2012). Accordingly, the Eleventh Circuit held that a joint venture existed between Fulcher, a seafood vendor, and Caustin, the owner of the *Theodora Maria*, a fishing vessel, even though:

> The parties did not intend for Fulcher to share in the profits of the boat[s]. Instead, Caustin was to receive all profits from the boat[s], and Fulcher would benefit from the arrangement by the increased business at his dock. The parties never discussed who was to bear any losses from the boat because both Fulcher and Caustin assumed that the boat would make profits.
>
> Fulcher, of course, did expect to profit from the agreement. He hoped his business would profit from packing and selling catches from Caustins boats.

935 F.2d at 210, *quoting from Fulchers Point Pride Seafood, Inc. v. M/V ATheodora Maria,* 752 F.Supp. 1068, 1070 (S.D. Fla. 1990).

Many factors indicate the existence of a joint venture. However, not all of the factors have to exist in order for a joint venture to exist. The court will look at the transaction and relationship of the parties as a whole. *Fulchers Point Pride Seafood, Inc. v. M/V ATheodora Maria,* 935 F.2d 208, 213 (11th Cir. 1991).

The Eleventh Circuit rejected the argument that the absence of a specific profit sharing agreement was fatal to the finding of a joint venture,

> Though profit-sharing is a significant factor, we consider the total circumstances of an agreement to determine its status as a joint venture, *vel non.* While the profit of the *vessels* were not explicitly shared under the Fulcher-Caustin agreement, the other circumstances of the arrangements suggest that profit from the *enterprise* was a motive for both parties. We agree with the district court that, in light of the strong control elements in this case, the profit consideration is less weighty than it might otherwise be.

935 F.2d at 212 (emphasis in the original). Thus, the element of profit sharing in the joint venture context is not limited to a mere agreement to divide revenue, but encompasses other manners in which the participants profit from the arrangement. *Fulchers Point Pride Seafood, Inc.*, 935 F.2d at 1212. *Also see Ridinger v. 33' Speedboat, Hull number: EMO0331169A89*, 2009 WL 2030237 (S.D. Fla. July 9, 2009)(joint venture existed for *recreational* use of speed boat, resulting in gain for both parties).

Both the Florida and federal courts have construed the sharing of losses in the same context. Although joint ventures may take many forms, one of the more typical is where one party supplie[s] the labor, experience and skill and the other party the necessary capital. *Russell v. Thielen*, 82 So.2d 143, 146 (Fla. 1935).

> Losses under such circumstances would be shared, for in the event of a loss the party supplying the know how would have exercised

> his skill in vain and the party supplying the capital investment would have suffered diminishment. *Id.* at 146.

*See also Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536, 539 (Fla. 3d DCA 1974).

Furthermore, joint venture liability is not premised upon vicarious or *respondeat superior* liability. Rather, as the name implies, it is a joint liability, where each member of the venture is 100% responsible for the negligence not only its own agents or employees, but also those of its joint venture. *See Florida Tomato Packers, Inc. v. Wilson*, 296 So.2d 536, 539 (Fla. 3d DCA 1974); *Muzuco v. ResubmitIt, LLC*, 2012 WL 3242013 at *7 (S.D. Fla. 2012) ("If the arrangement was a joint venture, then Bank Atlantic is equally liable with ResubmitIt.").

**CONCLUSION.** The liability of the operators of tours, excursions, and events depends on the duties owed by the operators. Whether a duty exists in general depends on the relationship of the parties, the surrounding facts and circumstances, and existing statutes or regulations. In the case of operators of tours, excursions, and events, the variables of the relationship of the parties and the surrounding facts and circumstances include (a) the operator's actual knowledge of the activities and thus the risks; (b) the operator's constructive knowledge of the risks or what reasonable inspection or investigation should have revealed; (c) what the operator represented that the tour would consist of and what the operator's involvement in that tour or in planning, managing, or ensuring the quality of that tour; and (d) the operator's actual involvement in the planning or management of the tour.