

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

MARK CASAVANT;)
TARA CASAVANT,)
Appellants,)
) No. SJC-10717
v.)
) APPEALS COURT No.2008-P-2102
NORWEGIAN CRUISE LINE, LTD.,)
Appellee.)

BRIEF OF APPELLANTS

On Appeal From the Worcester Superior Court

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Norwegian Committed Per Se Violations Of Ch. 93A By Violating The Applicable Attorney General Regulations Requiring Disclosure Of All Refund Policies Before Receiving Any Payment. Whether The Superior Court Committed Flagrant Error In Holding To The Contrary.
2. Whether The Superior Court Erred In Holding That Norwegian's Nondisclosure Of Its Refund Policy Was Not A Legal Cause Of Plaintiffs' Loss, And In Concluding That Norwegian's Refund Policy Was Not Applicable.
3. Whether Norwegian's Violations Of Ch. 93A Are Established By The Prior Court Of Appeals Decision, Which Is The Law Of The Case. Whether The Superior Court Committed Error Of Law In Concluding To The Contrary.
4. Whether The Superior Court Committed Multiple Errors In Its Findings and Conclusions Regarding The Cancellation Fees In The Initial Invoices.
5. Whether The Superior Court Erred In Ignoring Plaintiffs' Other Ch. 93A Claims.
6. Whether Plaintiffs Are Entitled To Award Of Attorneys Fees For The Two Appeals In This Action, In The Event Plaintiffs Prevail On A Ch. 93A Claim.

STATEMENT OF THE CASE

In this action, Mark and Tara Casavant claim a refund from Norwegian Cruise Line in the amount of \$2,017.50 paid for two tickets for a cruise which they cancelled, and claims for Norwegian's violations of ch. 93A.

In 2002, a few months after the action was commenced, the Worcester Superior Court dismissed the action on motion by the defendant based on a forum selection clause. The dismissal was reversed by this Court in Casavant v. Norwegian Cruise Line Ltd., 63 Mass. App. 785, 829 N.E.2d 1171 (2005), rev. denied 445 Mass. 1102, 834 N.E.2d 256 (2005), cert. denied 546 U.S. 1173 (2006). The case was remanded for trial, and eventually tried by the Superior Court in November of 2007. In February 2008, the Superior Court issued a decision finding in favor of the plaintiffs on the claim for refund of the ticket prices, and in favor of the defendant on the ch. 93A claim. The plaintiffs timely appealed.

Mark and Tara Casavant are, and at all relevant times have been, husband and wife, and residents of Worcester in the Commonwealth of Massachusetts. App. 108. Norwegian Cruise lines is a provider of travel services, specifically ocean cruises, which advertises and sells such services in the Commonwealth. App. 109-110.

The subject voyage was to be a seven-day round-trip from Boston, Massachusetts, to Bermuda. The cruise was scheduled to depart September 16, 2001 from

Boston, to make one port of call in St. George's, Bermuda, and to return to Boston. App. 109.

The Casavants booked the reservations for the voyage on October 25, 2000 through a travel agent in Massachusetts, BJ's Vacations. They paid a deposit of \$628 at the time of booking. The Casavants also purchased the particular travel insurance policy endorsed by Norwegian. App. 110-111, 163.

The Passenger Invoice and Confirmation issued by BJ's Vacations to the Casavants in October 2000 confirmed receipt of the \$628 down payment, and stated that the balance of the price had to be received by 7/18/01. App. 163. It contained a section entitled Cancellation Fees, which stated that, for Norwegian, a 50% forfeiture would be imposed for cancellations 15 to 29 days prior to departure, and a forfeiture of 100% would be imposed for cancellations 0 to 14 days prior to departure.* App. 164.

Norwegian required that the balance of the ticket prices be received by 7/18/01. In compliance with Norwegian's requirement, on July 12, 2001 the

* There was no evidence that this cancellation/refund policy was authorized by Norwegian. This point, and related issues, are addressed in section 4 of the Argument.

Casavants paid the full balance of the ticket prices. The net price paid for two tickets was \$2,017.50, App. 112-113, 168, 174.

At the beginning of September of 2001, approximately two weeks before the departure date, and two months after the Casavants had completed payment in full, the Casavants received from Norwegian a "Passenger Ticket Contract of Passage," which included 28 numbered paragraphs of printed terms on a form issued by Norwegian, in print so fine as to be barely legible. App. 114-115, 178-182.

The Contract of Passage, which had never previously been disclosed or communicated to the Casavants, contained numerous material additional terms. App. 115, 178-182. Also, the Contract of Passage was not merely a proposed modification to an existing contract, but rather was imposed by Norwegian as a non-negotiable requirement; the passenger's acceptance of the Contract of Passage was an unconditional requirement for the passenger to be permitted to take the cruise. Consequently, no legally valid contract existed between the Casavants and Norwegian unless and until the Casavants affirmatively accepted the Contract of Passage, either

by express communication of acceptance, or by the action of actually taking the voyage, which would constitute an implied acceptance. These propositions were true as matters of basic law, and the Contract of Passage itself expressly so stated in Paragraph 1.

Among the material additional terms contained in the Contract of Passage was the provision in Paragraph 2 that the ticket prices were considered to be fully earned at the time of payment, and were not refundable for any reason, notwithstanding any statute or government regulation to the contrary. App. 178, 180. In addition, Paragraph 28 contained a forum selection clause, requiring that any and all claims and disputes arising under or in connection with the Contract of Passage or the cruise be litigated in Dade County, Florida.[†] App. 179, 182.

[†] In addition, the Contract of Passage, in ¶¶ 5 and 12, contained purported releases and waivers, which were directly and flagrantly violative of federal law. App. 178-181. 46 U.S.C. App. §183c.

The Casavants never accepted the Contract of Passage, nor any of the terms therein, nor did they take the cruise. App. 116. Therefore, it is basic and clear that no legally valid contract was ever formed between Norwegian and the Casavants. Consequently, the Casavants were entitled to full refund of their payments at any time on demand, for any reason or for no reason.*

After the horrific events of September 11, 2001, and prior to the scheduled departure date on September 16, the Casavants contacted Norwegian on three separate occasions to inform Norwegian that they were unwilling to proceed with the September 16 voyage, and to request a refund or rescheduling of their cruise to a later date. App. 117-118, 183.

The Casavants' first telephone conversation with Norwegian was on the evening of September 11, 2001.

* It is basic that a party has a right to refund of money paid on account of an anticipated contract which is never formed, or which is invalid or unenforceable for any reason, whether by absence of mutual assent to terms, failure of consideration, noncompliance with the statute of frauds, impossibility of performance, etc. 14 Mass. Practice, Summary Of Basic Law-Contracts, §5.5 at 665 & n.7; 17 Mass. Practice, Money Had And Received, §5.3 at 241 & n.2; 66 Am.Jur.2d, Restitution, §§163-165.

Mark Casavant requested a refund, or a rescheduling of the cruise to the next year. App. 118-121. He explained to Norwegian that the reasons for the requests were concern over the fact that the terrorist attacks had originated from Logan Airport in Boston, that security for both Logan and the Black Falcon Pier were provided by MassPort, that there had been a bomb threat at the pier that day, that they were concerned about the adequacy of security, and that they did not want to leave their two children (ages 5 and 3) under these circumstances. Id.

The Norwegian representative responded that the Casavants were required first to affirmatively cancel their trip, and then later, after the sailing date, something could be worked out. App. 119-120.

The second telephone conversation occurred on September 12 or 13. Mark Casavant requested that Norwegian confirm its position in writing, but Norwegian refused. App. 121-123. The Norwegian representative pushed Casavant to cancel the trip, stating that they could work on resolution by refund or rescheduling later. Therefore, Casavant confirmed cancellation of the trip. Id. In the third conversation, which was also prior to the departure

date of September 16, the Norwegian representative stated that the Casavants had cancelled the trip, and that they were not entitled to a refund or rescheduling. App. 124-126.

The Casavants confirmed these requests by letter to Norwegian dated September 17, 2001. App. 183. Norwegian responded by letter dated October 11, 2001 stating that it construed the Casavants' requests for rescheduling as an election to cancel the voyage, and refusing to provide any refund of the ticket price. App. 184.

Subsequent to Norwegian's letter, the Casavants followed up with Norwegian for many months, without any success. They also pursued relief under the travel insurance policy, but this policy provided no coverage for the loss. App. 128-131.

In August of 2002, the Casavants retained counsel, and a written demand under ch. 93A § 9(3) was sent to Norwegian. App. 131, 185-190. The demand letter requested a refund primarily on the following ground:

"The Casavants are legally entitled to a refund for each of the following reasons:

1. The Casavants never accepted the "Contract of Passage" required by NCL [Norwegian] and first issued by NCL

to the Casavants more than a month after they had completed payment of the price for the tickets. Ordinarily, the passengers are deemed to have accepted such contract provisions by actually taking the voyage of passage, but that did not happen in the present case. There was no acceptance by the Casavants, no contract was formed, and they are entitled to a full refund of the price paid." App. 186.

Norwegian responded by letter from its attorney dated September 26, 2002. App. 191-192. Norwegian refused to refund the ticket price, refused to make any offer of settlement whatever, and asserted that Norwegian's Contract of Passage was legally binding and enforceable against the Casavants:

"Your argument that your clients never accepted the "Contract of Passage" because they did not actually take the cruise on the NORWEGIAN MAJESTY, commencing on September 16, 2001, is contrary to established law. A passenger is bound by the terms and conditions of a passenger ticket contract whether or not the cruise is taken because its mere receipt without raising any objections to its terms and conditions prior to the beginning of the cruise constitutes an acceptance."
Id.

Norwegian's assertion in this regard was utterly lacking in any legal basis whatever, and was totally contrary to settled law, as held by this Court in Casavant v. Norwegian Cruise Line Ltd., 63 Mass. App.

785, 829 N.E.2d 1171 (2005), rev. denied 445 Mass.
1102, 834 N.E.2d 256 (2005), cert. denied 546 U.S.
1173 (2006).

Norwegian's response letter also asserted that
the forum selection clause in the Contract of Passage
would be legally binding in any ensuing litigation:

"In any event, if suit is
instituted, such action must be brought
in a court of competent jurisdiction
located in Dade County, Florida. The
forum selection clause in NCL's ticket
contract is valid and enforceable under
the general maritime law and has been
repeatedly enforced by various courts
..." † App. 192.

At the end of September 2002, the Casavants
commenced this action in the Worcester County Superior
Court with a complaint containing multiple claims for
restitution of the ticket prices, and a claim under
ch. 93A. App. 5-21.

On October 15, 2002, Norwegian filed an Answer
and Counterclaim (alleging "vexatiously commenced

† This statement was also totally untrue. The forum
selection clause in Norwegian's Contract of Passage
has only been enforced in circumstances where the
passenger accepted the Contract of Passage by
proceeding to take the voyage. **It has never been
enforced under the circumstances of the present
case, where the passenger canceled and did not take
the voyage.**

litigation"). App. 22-26. The Casavants duly filed a Reply to the Counterclaim. App. 27.

On November 18, 2002, Norwegian served a purported motion to dismiss based on the forum selection clause in Norwegian's Contract of Passage, and supported by an affidavit of Jane Kilgour, an employee of Norwegian. App. 197-205.

Norwegian's Kilgour affidavit stated that Norwegian purportedly had a refund policy, which provided that any customer who objected to any terms in the Contract of Passage prior to the date of the voyage would be entitled to a refund. App. 199. This Kilgour affidavit filed in November of 2002, months after commencement of action, was the first time that any such purported refund policy was disclosed to the Casavants. Norwegian's purported refund policy as stated in the Kilgour affidavit does not appear anywhere in writing. This purported refund policy was never mentioned in any of the multiple communications between the Casavants and Norwegian from the initial booking of the cruise in October of 2000, until November 2002. App. 110-111, 115, 127-128.

As explained by this Court in Casavant v. Norwegian Cruise Line, Ltd., supra, 63 Mass. App. 785,

Norwegian procured, through misconduct and abuse of procedure, a dismissal of the Casavant's action. On appeal, the judgment of dismissal was reversed by this Court, and remanded for trial.

In Casavant, supra, this Court held that Norwegian had not satisfied the legal requirements of fundamental fairness, which are conditions to enforceability of a forum selection clause. This Court held that Norwegian's Contract of Passage had not been reasonably and timely communicated to the Casavants, that Norwegian had not provided the Casavants with the requisite opportunity to cancel with impunity and with full refund, but that instead Norwegian had subjected the Casavants to punitive measures. This Court also held as a matter of law that the Casavants had not accepted Norwegian's Contract of Passage, and that Norwegian's argument of implied acceptance by silence was contrary to settled law and was legally baseless.

As a result of this Court's holding on the appeal, that the Casavants had never accepted the Contract of Passage and that no contract had been formed, Norwegian acknowledged that it was left without any defenses to the Casavants' claim for

restitution of the ticket prices. App. 101-02. Yet Norwegian persistently refused to repay the Casavants until after trial and entry of judgment. When the action eventually came up for trial in October of 2007, the case was tried solely on the Casavants' claims under ch. 93A. Id. The trial lasted half of a day. The only witnesses were Mark and Tara Casavant. Norwegian did not present any witnesses.

On February 13, 2008, the Superior Court issued a Memorandum Decision and Order for Judgment Following Jury-Waived Trial. Addendum, and App.28-34. On the Casavants' ch. 93A claim, the Superior Court found in favor of Norwegian and against the Casavants. On the Casavants' claim for refund of the ticket prices, the Superior Court ordered entry of judgment in favor of the Casavants only because Norwegian had not defended the claim.

On March 3, 2008, judgment was entered in accordance with the Decision. On March 11, 2008, the Casavants timely appealed from the judgment denying their ch. 93A claim. On April 10, 2008, Norwegian paid the judgment for refund to the Casavants of their ticket prices, which the Casavants had paid to Norwegian in 2000 and 2001, seven years earlier.

ARGUMENT

STANDARD OF REVIEW

The applicable standard of review is as follows. Errors of law are reviewed de novo. The Superior Court's "findings will not be set aside 'unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' We apply this standard to findings of subsidiary facts and to ultimate findings. The inquiry is not whether we would have reached the same result as the judge but rather whether, on the entire evidence, we are 'left with the definite and firm conviction that a mistake has been committed.'" Commonwealth v. Source One Assoc., 436 Mass. 118, 125, 763 N.E.2d 42 (2002) (citations omitted, emphasis added).

1. Norwegian Committed Per Se Violations Of Ch. 93A By Violating The Applicable Attorney General Regulations Requiring Disclosure Of All Refund Policies Before Receiving Any Payment. The Superior Court Committed Flagrant Error In Holding To The Contrary.

Norwegian committed per se violations of ch. 93A by violating various regulations of the Attorney General, promulgated under ch. 93A, regarding sale of travel services, including ocean cruises (940 CMR

§15.01 et seq.) The Superior Court committed both error of law and clear error in concluding to the contrary.

Section 15.04(2) of 940 CMR prohibited Norwegian from accepting any payment, directly or indirectly, until after disclosure to the Casavants of

"(e) the complete terms of any cancellation or refund policy of [Norwegian] that may apply to the consumer's purchase of travel services."

The cruise was scheduled for September 16, 2001. The Casavants were required to make a down payment in October 2000, when they booked the cruise, and to pay the complete balance in July 2001, two months before the cruise date. However, Norwegian's key purported refund policy--which supposedly is that any customer who objects to the Passenger Ticket Contract of Passage is entitled to a refund (Kilgour aff., App. 199)-- does not appear anywhere in writing, and was never disclosed to the Casavants until the Fall of 2002, more than a year after the scheduled date of the cruise, and more than two years after Norwegian accepted payment from the Casavants:

"Norwegian's [refund] policy, [which] policy was first disclosed in the Kilgour affidavit attached to Norwegian's motion to dismiss [was] not honored in this case. According to this

Norwegian affidavit, the policy is to fully refund the ticket price, if rejection precedes the beginning of the voyage." Casavant, supra, 829 N.E.2d at 1180-82.

Section 15.04(4) of 940 CMR provides that where a seller of travel services violates any provision of §15.04, the consumer may cancel its purchase of travel services, and where the consumer does so cancel the seller must return all payments within 30 days. In the present case, the Casavants in fact cancelled and requested refund from Norwegian in the conversations on and shortly after 9/11/01. Norwegian in its letter dated October 11, 2001 stated that it was construing the Casavants to have cancelled their purchase. Therefore, Norwegian was obligated under the regulations to have fully refunded the Casavants' purchase price within 30 days of the cancellation.

In addition, §15.03(2) of 940 CMR provides: "No seller of travel services may make any representation . . . that has the capacity or tendency to deceive or mislead a consumer, or that has the effect of deceiving or misleading a consumer, in any material respect, including but not limited to . . . the terms of any cancellation or refund policy . . . that may apply to a consumer's purchase of travel services."

Norwegian violated § 15.03(2), because the terms of Norwegian's Contract of Passage, which did not include and was not accompanied by the terms of Norwegian's purported cancellation/refund policy, were deceptive and misleading regarding the consumer's right to cancel and obtain a refund.

The applicable facts were not disputed. As a matter of law, it was established that Norwegian violated the applicable regulations, and thereby committed per se violations of ch. 93A. The Superior Court committed error of law in holding to the contrary.

2. The Superior Court Erred In Holding That Norwegian's Nondisclosure Of Its Refund Policy Was Not A Legal Cause Of Plaintiffs' Loss, And In Concluding That Norwegian's Refund Policy Was Not Applicable.

In reference to Norwegian's nondisclosure of its refund policy [i.e., that any customer who objected to the terms of the Passenger Ticket Contract of Passage would receive a refund], the Superior Court concluded that such nondisclosure was not a legal cause of the Casavants' loss, because the Court concluded that the Casavants "did not disagree with a provision of the Passenger Ticket Contract . . ." (App. 33). The Superior Court also concluded that the undisclosed

refund policy "did not apply under the circumstances," because the Casavants "had no objection to the terms of the Passenger Ticket Contract," but rather that their decision not to proceed with the cruise was motivated by fears resulting from the recent terrorist attacks. Id.

The Superior Court thereby denied the Casavants' claims under ch. 93A on the basis that when the Casavants cancelled and requested a refund they did not invoke the refund policy which Norwegian had unlawfully failed to disclose, and of which they were therefore unaware. These conclusions by the Superior Court are not only clearly erroneous, but also errors of law, for the reasons set forth below.

In cases of nondisclosure under Ch. 93A, if the information which is not disclosed is material, then the element of causation is thereby proven and the plaintiff is entitled to relief. 35 Mass. Practice, Consumer Law, §4:31. And where the nondisclosure involves information which applicable A.G. Regulations require to be disclosed, then the materiality of the information is established as a matter of law. Purity Supreme, Inc. v. Attorney General, 380 Mass. 762, 407 N.E.2d 297 (1980).

It cannot be known what the Casavants would have done had Norwegian properly and timely disclosed its alleged refund policy in compliance with the A.G. Regulations. Any proffered testimony on that point would necessarily have been speculative, and could not possibly be based on personal knowledge. It is Norwegian's unlawful conduct, in failing to timely disclose its refund policy, that created this uncertainty, and the law does not permit wrongdoers such as Norwegian to gain advantage from their own unlawful conduct in this regard.

Rather, the law uniformly holds that, in cases of a defendant's unlawful nondisclosure of material information, the plaintiff is entitled to a presumption that the plaintiff would have relied upon such information, had it been disclosed by the defendant. See, e.g., Affiliated Ute Citizens v. U.S., 406 U.S. 128 (1972); Holmes v. Bateson, 583 F.2d 542, 558 (1st Cir. 1978).

This rule has been adopted in the context of Ch. 93A claims. 35 Mass. Practice, Consumer Law, §4:31, and cases cited; Sheehy v. Lipton Industries, Inc., 24 Mass. App. 188, 195, 507 N.E.2d 781, 785 (1987). Per se violation of ch. 93A will arise from nondisclosure

where the undisclosed information "may have influenced" the consumer's decisions regarding the transaction. See, e.g., York v. Sullivan, 369 Mass. 157, 162 338 N.E.2d 341, 345 (1975); Restatement Second of Torts, §551(1). The Superior Court erred as a matter of law in holding to the contrary.

In addition, even apart from the above-stated legal rules regarding proof of causation in cases of nondisclosure, the uncontradicted evidence in the present case overwhelmingly proved a causal link between Norwegian's unlawful nondisclosure of its purported refund policy and the Casavants' entitlement to a refund. The Casavants' actual conduct clearly shows that the Casavants would have rejected (and in fact did reject) the term in ¶2 of the Contract of Passage that the fares were deemed to be fully earned upon payment, and were not refundable even if the passengers did not use the tickets or take the cruise. This was proved by the Casavants' repeated requests for refund, and cancellation of their reservation, in the communications with Norwegian after September 11.

In addition, the evidence and the Casavants' actual conduct proved that the Casavants would have rejected (and did in fact reject) the forum selection

term in ¶28 of the Contract of Passage, requiring that any dispute be litigated in Florida. The Casavants carried their objection to this particular provision to the Court of Appeals.

The waivers and releases stated in §§5 and 12 of the Contract of Passage are illegal by federal law, 46 U.S.C. App. §183c. Therefore, these provisions are, by federal law, presumptively unacceptable to any passengers, including the Casavants. No passenger could or would find these provisions to be acceptable and contractually binding.

The Casavants, probably like the vast majority of customers, never read the Contract of Passage. App. 140-141, 154-155. However, it was undisputed that, on and after 9/11/01, the Casavants repeatedly and persistently pursued cancellation of their voyage and a refund of their ticket prices, which Norwegian denied. Assume, for purposes of argument, that Norwegian had performed its legal obligation to inform the Casavants that their entitlement to a refund would depend upon whether they objected to any of the terms in the Contract of Passage. Under this scenario, the only possible conclusion is that the Casavants (and any other customer) would then read the Contract of

Passage, and voice objection to the terms found to be objectionable. Clearly, the reason that Norwegian does not inform any passengers about this refund policy is that providing such information would enable any passenger who wished to do so to cancel and obtain a refund. Norwegian could easily rectify this situation, and comply with all legal obligations, simply by disclosing to passengers both the terms of the Contract of Passage and the refund policy at the outset, at the time of initial reservation and payment.

The Superior Court's decision denied the Casavants' claim because they did not invoke a refund policy, which Norwegian had unlawfully failed to disclose to them, and of which they were therefore unaware. For the reasons stated above, the Superior Court committed both errors of law and clear errors of fact in this regard.

3. Norwegian's Violations Of Ch. 93A Are Established By The Prior Court Of Appeals Decision, Which Is The Law Of The Case. The Superior Court Committed Error Of Law In Concluding To The Contrary.

Under the "law of the case" doctrine, questions decided on an earlier appeal in the same case are binding, and may not be reconsidered or relitigated.

See, e.g., Commonwealth v. Clayton, 63 Mass. App. 608, 611, 827 N.E.2d 1273, 1276-77 (2005).

In the prior appeal of the present case, Casavant, supra, 63 Mass. App. 785, 829 N.E.2d 1171, various findings and conclusions by the Court of Appeals, which are final and binding as the law of the case, are determinative of plaintiffs' ch. 93A claims. The Court of Appeals held Norwegian's conduct was "unfair [and] unreasonable," that Norwegian did not meet the standard of fundamental fairness, that Norwegian did not comply with its own purported refund policy, that Norwegian did not timely disclose this purported refund policy to the Casavants, that "the Casavants were subjected to punitive measures" by Norwegian, that Norwegian's contention that the Casavants had accepted by silence the terms of the ticketing contract "is unavailing and indeed borders on the ephemeral," and that "the course of conduct of Norwegian was unreasonable and unjust." Id., 829 N.E.2d at 1179-1182.

The foregoing findings and conclusions by the Court of Appeals, which are final and binding as the law of the case, establish that Norwegian's conduct was unfair and deceptive as a matter of law, and are

determinative of Norwegian's liability for violation of ch. 93A. The Superior Court erred as a matter of law in rejecting the Court of Appeals decision, and in making conclusions inconsistent with said decision.

4. The Superior Court Committed Multiple Errors In Its Findings and Conclusions Regarding The Cancellation Fees In The Initial Invoices.

The Superior Court based its decision against the Casavants in large part on the fact that the initial invoice from the travel agent, in October 2000, included a listing of cancellation fees - a 100% forfeiture for cancellations less than 14 days prior to departure, and a 50% forfeiture for cancellations between 15 and 30 days prior to departure. App. 164. The Superior Court committed multiple errors in its conclusions regarding these cancellation fees.

There was no evidence whatever that the cancellation fees stated in the travel agency invoices were authorized by Norwegian. The travel agent, BJ's Vacations, was the agent of the Casavants and was not an agent of Norwegian. Norwegian never contended at any point, in either the background fact pattern or in the entire history of this action, that these cancellation fees were authorized by or the policy of Norwegian. These cancellation fees were never

mentioned or asserted by Norwegian in its attorney's letter response to demand, in its answer or other pleadings, in its joint pre-trial memorandum, nor by any witness on its behalf.

Moreover, these cancellation fees were inconsistent with, and contradictory to, both the provisions of the Contract of Passage and Norwegian's refund policy as stated in the Kilgour affidavit. The Contract of Passage provides that the ticket prices are fully earned upon payment, and that no part is refundable, at any time or under any circumstances. App. 180, §2. The Kilgour affidavit states that Norwegian's policy is to give a full refund to any customer who objects to the Passenger Ticket Contract of Passage at any time prior to departure. App. 199.

Even assuming that the cancellation fees stated in the travel agency's invoices were authorized by Norwegian, the Superior Court's conclusion that these cancellation fees were contractually binding is flagrantly erroneous as a matter of law. The material terms of the contract, in the form of the Passenger Ticket Contract of Passage, were never disclosed by Norwegian to the Casavants until the first week of September 2001, approximately two weeks before the

departure date. The Casavants never accepted and no contract was ever formed. That no contract was formed was obvious as a matter of settled law, was expressly confirmed by the Court of Appeals, and was even acknowledged by Norwegian at trial. App. 100-102. The Superior Court committed flagrant error of law in holding the cancellation fees to be contractually binding.

In addition, it was utterly preposterous for the Superior Court to find that the listing of the cancellation fees in the initial invoice negated any unfairness or deception on the part of Norwegian. Under Norwegian's procedure, the passenger ticket prices, which are required to be paid in full at least 60 days prior to departure date, would be forfeitable and non-refundable before the passenger even receives the terms of the contract, in the form of the Passenger Ticket Contract of Passage. Even Norwegian recognizes the unfairness and deception of that situation, which is the reason Norwegian purports to have a policy of making full refund to any passenger who objects to the Contract of Passage.

5. The Superior Court Erred In Ignoring Plaintiffs' Other 93A Claims

The Superior Court erred by ignoring plaintiffs' other claims that Norwegians's conduct was unfair and deceptive in violation of ch. 93A. The late disclosure of the onerous terms of the Passenger Ticket Contract of Passage was unfair and deceptive. The nondisclosure of Norwegian's purported refund policy was unfair and deceptive. Norwegian's position that the Casavants had accepted the Passenger Ticket Contract of Passage, which position was clearly contrary to settled law, was unfair. Norwegian's attempt to enforce the forum selection clause, which the Casavants had never accepted, was an attempt to use the burden and expense of litigation in a distant and unrelated forum as leverage for forfeiture of the Casavants' ticket prices.

It is established under ch. 93A that forcing a consumer to litigate in a distant and inconvenient forum - even where venue in such forum is proper - is unfair and violative of ch. 93A. Vol. 35 Mass. Practice, Consumer Law, §4:35; Schubach v. Household Finance Corp., 375 Mass. 133, 376 N.E.2d 140 (1978) (forcing a Holyoke resident consumer to litigate in

Boston was unfair in violation of ch. 93A, even though venue was proper in Boston as well as in Holyoke).

It is violative of ch. 93A for a business to take a position which is contrary to settled contract law. "The unfairness stems from the 'extortionate quality' or 'coercive effect' of the breaching conduct." Vol. 35 Mass. Practice, Consumer Law §4:36, and cases cited.

The Superior Court ignored these claims. The evidence mandated findings of violations of ch. 93A on these grounds. The Superior Court's failure to do so was clearly erroneous.

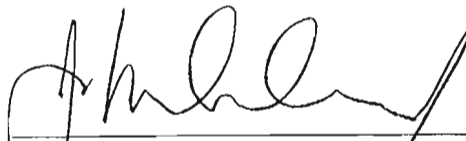
6. Plaintiffs Request, And Are Entitled To, Award Of Attorneys Fees For The Two Appeals In This Action, In The Event Plaintiffs Prevail On A Ch. 93A Claim.

Assuming that this Court reverses the Superior Court's decision denying the Casavants' 93A claim, the Casavants' request that this Court award attorneys' fees for this appeal and for the prior appeal in this action. Attorneys' fees are recoverable under ch. 93A, and attorneys' fees for appeals can be awarded only by the Appellate Court.

CONCLUSION

This Court should reverse the decision of the Superior Court regarding the plaintiffs' 93A claim. This Court should hold that Norwegian violated ch. 93A. This Court should award attorneys' fees to plaintiffs for the two appeals. This Court should remand to the Superior Court, for determination of whether Norwegian is liable for multiple damages under ch. 93A, and for award to plaintiffs of attorneys' fees under ch. 93A for attorney time expended before the Superior Court.

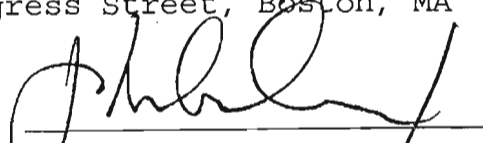
By their attorney,



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CERTIFICATE OF SERVICE

I hereby certify that on this 26 day of January, 2009, I caused to be served by First Class U.S. Mail, postage prepaid, two copies of the within Brief of Appellant and Appendix to Barbara P. Lazaris, Esq., Lambos & Junge, 50 Congress Street, Boston, MA 02109.



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Addendum (Decision of the Superior Court)

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
CIVIL ACTION NO. 02-2096

MARK CASAVANT and TARA CASAVANT

vs.

NORWEGIAN CRUISE LINE, LTD

MEMORANDUM OF DECISION AND ORDER FOR JUDGMENT
FOLLOWING JURY-WAIVED TRIAL

This matter is before the Court for a trial without a jury of the plaintiffs' claim of a violation of G.L. c. 93A in the defendant's refusal to refund the price paid by the plaintiffs for a cruise which they declined to take in the aftermath of the terrorist attacks of September 11, 2001. In their complaint the plaintiffs had also sought a refund under a breach of contract theory. The defendant, Norwegian Cruise Line, Ltd. (Norwegian) has agreed to provide the plaintiffs with a refund of the purchase price of the cruise tickets, plus interest; hence I will not address that contractual claim.

Prior Proceedings

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The Casavants commenced this litigation on October 3, 2002. In addition to an answer and counterclaims, Norwegian filed a motion to dismiss the complaint based on the forum selection clause contained in the ticketing contract. That clause required that litigation be commenced in Florida. The motion to dismiss was supported by an affidavit of a Norwegian manager. Before the plaintiffs opposition was received, another judge of this Court allowed the motion to dismiss and, later, denied the plaintiffs' motion for reconsideration. The plaintiffs appealed the dismissal. Finding both procedural and substantive errors, the Appeals Court reversed the judgment in favor of Norwegian. Casavant v. Norwegian Cruise Line, Ltd., 63 Mass.App.Ct. 785 (2005).

The Appeals Court found that the forum selection clause was unenforceable "where the course of conduct of Norwegian was unreasonable and unjust . . . the ticket purchasers took no affirmative action to accept the contract, but rather expressly rejected the services offered in the

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contract . . . In these circumstances, as there was not, under Federal maritime law, the allowance of an opportunity for the Casavants to reject the ticketing contract 'with impunity,' nor, under State contract law, did the Casavants' actions give rise to an accepted contract, we conclude that the forum selection clause is unenforceable." Id. at 799.

Findings of Fact

Based on the evidence submitted by the parties at trial, I make the following findings of fact:

On or about October 25, 2000, the Casavants booked reservations for a Norwegian cruise to Bermuda, scheduled to depart on September 16, 2001, from Boston. They paid a deposit of \$628.00 at the time of booking. They received a "Passenger Invoice and Confirmation" (Exhibit 1), which included a section headed "Cancellation Fees". That section indicated that cancellation 0-14 days before departure would mean a 100% cancellation fee. Mr. Casavant indicated at trial that he was aware of that information. As part of the materials they also received a "Travel Information and Service Agreement" sheet which warned of the possibility of cancellation fees. That sheet also recommended that travelers purchase trip insurance to protect against cancellation fees "in the event of a medical emergency." On or about June 27, 2001, the Casavants received a "Payment Reminder" (Exhibit 2), which included the same information regarding Norwegian's cancellation fees. On or about July 10, 2001, the Casavants paid the full balance of the ticket price, \$2,017.50 for the two tickets. They also purchased trip insurance costing \$118.00. They received another "Passenger Invoice and Confirmation" form (Exhibit 4) dated July 12, 2001, which again included the information regarding Norwegian's cancellation fees.

On or about August 27, 2001, Norwegian issued two passenger tickets and a Passenger Ticket Contract consisting of twenty-eight numbered paragraphs of terms on a form integrated with the tickets. The Casavants received those materials around September 1, 2001. The Casavants did not communicate their acceptance of the contract terms to Norwegian and the Appeals Court found that the Casavants had not accepted the ticket as a binding contract under either Federal maritime law or Massachusetts contractual law.

On September 11, 2001, terrorist attacks occurred in New York City, Washington, D.C., and Pennsylvania.

In the aftermath of those attacks, the Casavants were fearful of going on the cruise which was scheduled to depart from Boston Harbor. On Septemebr 11, 2001, Mark Casavant spoke to a Norwegian representative about not wanting to go on the cruise and about desiring to reschedule or obtain a refund, and was told he should not simply not show up for the cruise but should cancel it, and that after the sailing date something could be worked out. Mr. Casavant had a second conversation with a Norwegian representative, a day or two after the first conversation, in which the same advice was given to him and in which the representative indicated that they would not put that advice in writing. The representative indicated that if the Casavants wanted any consideration of their request to reschedule or obtain a refund, they would have to cancel the trip. In another conversation, a male representative of Norwegian indicated that they would not be able to reschedule and they would have to deal with the requests after the boat left.

The Casavants sent a letter dated September 17, 2001 (Exhibit 7), to Norwegian setting forth their request to reschedule the cruise. In response, the Casavants received a letter dated October 11, 2001 (Exhibit 8), from Norwegian indicating that Norwegian was "sorry to learn that you elected to cancel you scheduled voyage . . ." and that it was unable to honor their request for a refund or a credit of the price paid. The letter also indicated that Norwegian recommended that passengers obtain trip insurance through BerkleyCare, Ltd. Although the Casavants had done so, their request for coverage or indemnification of the purchase price was denied by that insurer. The Casavants continued their efforts to obtain a refund or to reschedule the trip, to no avail.

The Casavants retained Attorney John Deacon to represent them in their effort to obtain a refund. On August 22, 2002, Attorney Deacon sent a demand letter (Exhibit 9) in accordance with G.L. C. 93A, setting forth the Casavants' demand and the bases for it. The demand letter raised five bases for the claim of unfair or deceptive acts or practices: 1) the plaintiffs never accepted the contract, 2) there was no consideration because Norwegian's fare was fully earned before the sailing, 3) the plaintiffs had the right to use their tickets for another cruise for any reason, 4) Norwegian failed to file its fare with the appropriate Massachusetts agency, and 5) the ticket contract's limitation of liability for personal injury or death was illegal. Subsequently, in June of 2006, the plaintiffs asserted another basis for their claim of a c. 93A violation: that Norwegian violated 940 CMR §15.01 et seq. by deceiving them with regard to the cancellation policy within the passenger ticket

contract.

By letter dated September 26, 2002 (Exhibit 10), Norwegian responded to the 93A demand letter, but made no offer of settlement. In that response, Norwegian indicated that its policy was to provide passengers with a 100% refund if they had an objection to a provision in the Passenger Ticket Contract. That policy was not made known to the plaintiffs before the letter of September 26, 2002. The Casavants did not object to any provision of the Passenger Ticket Contract – they simply did not want to take the cruise when it was scheduled. Mr. Casavant indicated that there was nothing which would have induced them to sail at that time.

Applicable Law

Massachusetts General Laws, Chapter 93A, § 2(a) makes unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." "Courts have deliberately avoided setting down a clear definition of conduct constituting a violation of G.L.c. 93A." Spence v. Boston Edison Co., 390 Mass. 604, 616 (1983). "It has been held, generally, that for conduct to violate the standard of § 2(a), (1) it must fall within at least the penumbra of some common-law, statutory, or other established concept of fairness, (2) it must be unethical or unscrupulous, and (3) it must cause substantial injury to a consumer or another businessman." Wasserman v. Agnastopoulos, 22 Mass.App.Ct. 672, 679 (1986), quoting PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 596 (1975). The focus for determining unfairness is "on the nature of the challenged conduct and on the purpose and effect of that conduct." Massachusetts Employers Ins. Exchange v. Propac Mass, Inc., 420 Mass. 39, 43 (1995).

"Conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes." Anthony's Pier Four, Inc. v. HBC Associates, 411 Mass. 451, 474 (1991). Accordingly, "conduct undertaken as leverage to destroy the rights of another party to the agreement," particularly "unilateral, self-serving conduct ... during the course of a dispute," based on a position lacking "substantive merit," has been found to violate c. 93A. See Massachusetts Employers Ins. Exchange v. Propac Mass, Inc., 420 Mass. at 43. However, "a mere breach of contract, without more, does not amount to a c. 93A violation." Madan v. Royal Indemnity Co., 26 Mass.App.Ct. 756, 762 (1989), citing Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 100-01 (1979). Even a breach accompanied by "sham justifications" has

been held not to violate c. 93A, where the conduct lacks an "extortionate quality" arising from use of the breach "as a lever to obtain advantage for the party committing the breach in relation to the other party." Atkinson v. Rosenthal, 33 Mass.App.Ct. 219, 226-27 (1992).

Not every consumer contract, oral or written, that is noncompliant with any statute, rule, regulation, or court decision, automatically constitutes an "injury" under G.L. c. 93A entitling the plaintiff to recover statutory damages, attorney's fees, and costs. If, however, any person or entity invades a consumer's legally protected interests, and if that invasion causes the consumer a loss--whether that loss be economic or noneconomic--the consumer is entitled to redress under the consumer protection statute. A consumer is not, however, entitled to redress under G.L. c. 93A, where no loss has occurred. Hershenow v. Enterprise Rent-A-Car Company of Boston, Inc., 445 Mass. 790, 801-802 (2006).

Discussion

I find no unfair or deceptive act or practice on the part of Norwegian. While the Casavants' desire to postpone or to cancel their cruise so soon after the events of September 11, 2001, is perfectly understandable, Norwegian's cancellation fees were clearly spelled out in documents received nearly a year before those events occurred. Mr. Casavant indicated that he was aware of the cancellation fees as stated in several of the documents which the Casavants had received. In the year between the booking and the cancellation, there was never an objection by the Casavants to those cancellation policies and there was never an indication by Norwegian that it would not enforce those policies. No one that Mr. Casavant spoke to at Norwegian made any promise that the cancellation fees would not be charged or promised that the trip could be rescheduled. While the refusal to waive the cancellation fees or to permit the Casavants to reschedule the cruise may have been poor business judgment, it was not an unfair or deceptive act or practice.¹ I find that the dispute between the parties over whether the Casavants were entitled to a refund under the circumstances was a legitimate dispute. The position taken by Norwegian did not lack substantive

¹The determination of the Appeals Court that the Casavants had rejected the passenger ticket contract, see Casavant v. Norwegian Cruise Line, Ltd., 63 Mass.App.Ct. 785, 799 (2005), does not mandate a different result. The Court noted that the issues of whether the Casavants were entitled to a full refund of the ticket price and whether there was an unfair or deceptive act or practice on the part of Norwegian were open issues.

merit and was not a sham justification. There was a legitimate dispute over whether Norwegian owed the Casavants a refund under the circumstances. While Norwegian's decision may have exhibited insensitivity to the Casavants' legitimate concerns about traveling at that time, and while it may have exhibited poor business judgment, it was not an unfair or deceptive act.

The refund policy noted in the defendant's response to the c. 93A demand letter does not apply here. That policy provides that in the event of an objection to a provision of the ticket contract, the passengers would be entitled to a full refund. The Casavants had no objection to the terms of the Passenger Ticket Contract; they simply did not feel comfortable taking a cruise at that time. The defendant did not commit an unfair or deceptive act by not refunding the ticket price to the Casavants under this policy as it did not apply under the circumstances.

The Casavants assert that there were unfair or deceptive acts or practices committed by the defendant in violation of various regulations of 940 CMR §15.01 et seq. I do not find such violations. As noted above, the terms of the cancellation policy were provided to the Casavants nearly a year before the events which led to their desire to cancel or postpone the trip.² While the ability to obtain a refund if they disagreed with a provision of the Passenger Ticket Contract was not relayed to the Casavants until the defendant responded to the 93A demand letter, that failure was not a cause of any loss by the Casavants. They did not disagree with a provision of the Passenger Ticket Contract, they simply decided that under the circumstances then present they did not wish to sail. Similarly, the failure by Norwegian to file its fares with the appropriate Massachusetts administrative agency does not give rise to liability under c. 93A. Even assuming such a filing requirement and a violation of that requirement, the plaintiffs have not shown that they suffered any loss as a result of the violation. See *Hershenow, supra*. Similarly, the claim that the ticket's limitation of liability for personal injury or death was illegal and, therefore, a violation of c. 93A is to no avail. The plaintiffs cannot show an injury or loss caused by that provision.

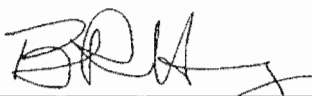
²In finding that the forum selection clause within the Passenger Ticket Contract was not enforceable because the Casavants had not been given sufficient time to reject the contract with impunity, the Appeal Court noted that there was a "blackout of any prior information" regarding the refund/cancellation policies. It does not appear that the Appeals Court was provided with information regarding the notices of the applicable cancellation fees contained in Exhibits 1, 2, and 4.

For all of the foregoing reasons, I find that the plaintiffs have not established a violation of G.L. c. 93A.

ORDER

Judgment shall enter for the plaintiffs on their claim for a refund in the amount of \$2,135.50, plus statutory interest and costs. Judgment shall enter for the defendant on the claim brought pursuant to G.L. c. 93A.

Dated: February 13, 2008




Bruce R. Henry
Associate Justice

For all of the foregoing reasons, I find that the plaintiffs have not established a violation of G.L. c. 93A.

ORDER

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