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SUPREME COURT EXPANDS THE SCOPE OF ADA COVERAGE TO FOREIGN-FLAGGED CRUISE SHIPS SAILING IN U.S. WATERS AND PROVIDES HELPFUL GUIDANCE ON WHAT CONSTITUTES “READILY ACHIEVABLE” BARRIER REMOVAL

On June 6, 2005, in a 6–3 decision, the Supreme Court announced that Title III of the Americans with Disabilities Act (ADA) applies to foreign-flagged cruise ships operating in United States waters (*Spector v. Norwegian Cruise Line Ltd.*). Title III prohibits discrimination against the disabled in the full and equal enjoyment of public accommodations and public transportation services. With some narrow exceptions, the statute defines discrimination to include, inter alia, (1) imposing eligibility criteria that tend to screen out disabled individuals; (2) a failure to make reasonable modifications in policies, practices, or procedures when they are necessary to provide disabled individuals with full and equal enjoyment of the accommodation or service; (3) a failure to provide auxiliary aids and services; and (4) a failure to remove architectural or structural barriers where the removal is readily achievable.

The Court stated that the barrier removal requirement of Title III would not require foreign-flagged cruise ships to make any changes that would make a vessel noncompliant with the International Convention for the Safety of Life at Sea (SOLAS) or any other international legal obligation. In addition, the Court held that a structural modification that would result in a direct threat to the health and safety of others would not be required by the barrier removal obligation.

The Court’s holding regarding the barrier removal requirement of Title III is helpful to all entities covered by Title III in two ways. First, the holding makes clear that barrier removal may not be “readily achievable,” even where the removal might be affordable. For example, barrier removal that would be inconsistent with state or local health and safety laws might not, under the Court’s reasoning, be considered readily achievable. Second, the Court expanded the scope of Title III’s “direct threat” defense. The statute states that its nondiscrimination and accommodations requirements do not apply if *disabled individuals* would pose a “direct threat” that cannot be eliminated to the health and safety of others. The

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Court stated in this case that the exception includes not only the threat posed by disabled individuals but also the safety threat imposed by the requested barrier removal.

Beyond the points stated above, however, the justices' views diverged with regard to a foreign-flagged cruise ship's obligation to remove barriers where the removal would not necessarily make a ship noncompliant with international obligations or pose a direct health or safety threat. Justices Ginsburg and Breyer stated in a separate concurring opinion that, other than the limited exceptions stated above relating to barrier removal that would conflict with international obligations or pose a direct health or safety threat, all of Title III's requirements should apply to foreign-flagged cruise ships in U.S. waters. Justices Stevens, Souter, and Kennedy were not willing to go quite as far. Based on the Court's precedents that laws of general applicability do not apply to matters involving the internal order and discipline of foreign-flagged cruise ships absent a clear congressional directive (one not present in the ADA), they concluded that any structural changes necessitated by the ADA's barrier removal obligations would likely interfere with the internal affairs of a foreign-flagged ship and, as a result, would probably not be required. However, they were not willing to adopt a blanket rule and advocated a case-by-case analysis. Justice Thomas was more definitive on this point, writing separately to express his position that any structural changes to a vessel would pertain to its internal affairs and therefore would not be required by Title III.

Justices Rehnquist, Scalia, and O'Connor dissented, finding that Title III plainly affects the internal order of foreign-flagged cruise ships and subjects them to the possibility of conflicting international obligations. Since there is no clear congressional statement in Title III that such ships should be covered, these justices concluded that Title III does not apply to them at all.

This decision makes clear that disabled individuals will now be able to bring an action under Title III against foreign-flagged cruise ships for alleged violations that do not involve the removal of architectural or structural barriers. Policies that single out disabled individuals (e.g., surcharges or other special requirements) or that fail to accommodate disabled individuals will all be fair game for litigation. The decision also leaves open the possibility of ADA challenges alleging a failure to remove barriers where such removal would not contravene international law or pose a direct health or safety threat.

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For more information on this decision and its practical impact, please contact **Minh N. Vu** in EBG's **Washington, D.C.**, office at 202/861-1841 or mvu@ebglaw.com.

Ms. Vu is a member of EBG's Disability Practice Group which has extensive experience with the ADA and state disability laws. Members of the Group regularly advise clients in all industries about their compliance obligations under these statutes and defend public accommodations, employers, and state and local governments against claims of disability discrimination.

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