

# *CARNIVAL CRUISE LINES, INC. v.* *SHUTE: THE TITANIC OF* *WORST DECISIONS*

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Hands down incontestably, *Carnival Cruise Lines, Inc. v. Shute*<sup>1</sup> handily wins the honor as the worst non-obvious, non-constitutional Supreme Court decision ever.<sup>2</sup> Not only is the decision profoundly anti-consumer, but it bears no conceivable relationship to the way real people live in the real world. It is patently iniquitous and offends “traditional notions of fair play and substantial justice.”<sup>3</sup> But more on that later. The Court’s decision is a corporate rogue wave, hurling unsuspecting, ordinary people overboard without a flotation device or life raft. Too bad.

Moreover, the decision is based on injudicious, insupportable rationales that irrationally and erroneously extend inapplicable prior precedent. The decision is untouched by any empirical proof. If this were not bad enough, the Court’s *Carnival Cruise* decision tacitly has encouraged further judicial endorsement of two similar perils (the Scylla and Charybdis<sup>4</sup> of forum selection): the choice-of-law clause<sup>5</sup> and the mandatory arbitration clause,<sup>6</sup> which collectively scr\*w folks of ordinary understanding in their everyday lives.

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<sup>1</sup> *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991).

<sup>2</sup> Irrefutably, *Carnival Cruise Lines* wins the distinction as the worst Supreme Court decision in this Symposium issue, having garnered the scathing opprobrium of not one, but two law professors (the only such deserving decision in this issue). See Professor Knapp’s parallel commentary, 12 Nev. L.J. 553 (2012). Our articles have taken on even greater resonance since the sinking of the Italian cruise ship *Costa Concordia*, off the shores of Tuscany, where the shipwrecked passengers (including many Americans) have now discovered that they will have to sue in Genoa, Italy because of a forum selection clause.

<sup>3</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>4</sup> For you Greek mythology fans, Scylla and Charybdis were two sea monsters perched on either side of a narrow channel of water; sailors seeking to navigate the channel and attempting to avoid Charybdis would inevitably pass too close to Scylla and meet with unfortunate consequences.

<sup>5</sup> Arguably a close contender in the worst, dubious decision category is *Burger King Corp. v. Rudzewicz*, in which the Court held that the presence of a choice-of-law clause in a franchise agreement (which contained no choice-of-forum clause) was sufficient to confer jurisdiction on Burger King’s preferred Florida forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 481–83 (1985). Somehow the franchisee was supposed to divine the Florida forum by the choice-of-law clause.

<sup>6</sup> Always a favorite; there has been lots of approving Supreme Court jurisprudence in the arbitration clause arena in recent years. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

THE TANEY<sup>7</sup> AWARD FOR THE WORST SUPREME COURT DECISION EVER, IN  
THE NON-OBVIOUS, NON-CONSTITUTIONAL CATEGORY

For those unfamiliar with the Court's decision in *Carnival Cruise Lines*, this means that you graduated from law school prior to 1991, or your civil procedure teacher excised the case in the interests of shoe-horning all of civil procedure as well as the entire Federal Rules into fourteen weeks. This is a tragic shame. *Carnival Cruise Lines* is the rare entertaining case in an otherwise bleak landscape of dense, boring, and exceeding technical procedural stuff that is universally hated by first year law students, and many of their professors.

Here is the highly condensed version. Eulala and Russell Shute took a Carnival Cruise Line trip off the California coast (en route to Mexico), where Eulala slipped and fell during a ship galley tour.<sup>8</sup> On return, she sued Carnival in Washington state court. Carnival invoked a forum selection clause in the passenger ticket which said Shute could only sue in Florida. Eulala balked, for entirely valid reasons, which included the fact that the clause was buried at the end of a multi-page ticket, in teeny-tiny print, which of course she had not read. She was so mad she took her case to the Supreme Court, which upheld the validity and enforceability of Carnival's forum-selection clause.<sup>9</sup>

Shortly after the Court decided *Carnival Cruise Lines*, I published an exceedingly short but nonetheless absolutely definitive article on why the decision was both dumb and unfair.<sup>10</sup> Having concisely exhausted every absurdity in the opinion, as well as almost every conceivable nautical metaphor,<sup>11</sup> I will not rehash my prior commentary here. Instead, my comments now focus on procedural objections<sup>12</sup> that buoy up designating *Carnival Cruise Lines* as the

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<sup>7</sup> In honor of Chief Justice Robert Taney, author of *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

<sup>8</sup> Having the good or bad fortune to have fallen at sea, this technically placed Shute's grievance within federal maritime jurisdiction, *see Carnival Cruise Lines v. Shute*, 499 U.S. 585, 591 (1991), but we need not be diverted by this technicality, as it is not necessary to the really bad stuff in the Court's decision.

<sup>9</sup> Granted, this description omits a great deal of crucial legal argument, not the least of which is competing arguments over specific and general jurisdiction. As the Supreme Court chose to ignore these theories, this doctrinal nuance has been omitted in my five allotted pages.

<sup>10</sup> Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323 (1992).

<sup>11</sup> My colleague Professor Knapp suggests, to his dismay, that I have used up all the nautical metaphors in my 1992 article. Nonsense. I am awash in sea-worthy and sea-faring clichés. Full speed ahead.

<sup>12</sup> Although an entirely perplexing exercise, Professor Knapp, by agreement, will focus on why *Carnival Cruise Lines* wins the worst-decision-ever award as a matter of contract law. A word about this somewhat peculiar division of labor: when our estimable editor, Professor Jeff Stempel, proposed this project to an array of academic colleagues, he was surprised to learn that two proposed to write on the same case. Rather than alienate one or two friends, Professor Stempel came up with the Solomon-like solution that Professor Knapp would write on the contract dimensions of *Carnival Cruise*, and Mullenix on its procedural deficiencies. Never mind that this tears at the very heart of the substance-procedure problem and is difficult to unpack. But, in keeping with our agreement, I roughly confine my remarks to proce-

winner of the worst Supreme Court decision ever (in the non-obvious, non-constitutional category).

CORPORATE AMERICA BATTENS DOWN THE HATCHES, REMAINS THE CAPTAIN  
OF ITS OWN SHIP, LEAVES ORDINARY PEOPLE HIGH AND DRY,  
OR, ALTERNATIVELY THROWS THEM TO THE SHARKS

I teach the entire personal jurisdiction case line because it is fun for me.<sup>13</sup> Around about week seven or so of this extended personal jurisdiction saga—and after endless folderol about due process and “traditional notions of fair play and substantial justice”<sup>14</sup>—students finally get sucker-punched with *Carnival Cruise Lines*.<sup>15</sup>

Personal jurisdiction jurisprudence consists of an incomparable, stirring litany of due process rhetorical flourishes. Who among us—except for Justice Brennan—has not been moved by the Court’s conclusion that a defendant may not be sued in a distant forum, away from its home, because this “has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.”<sup>16</sup> And who among us has not been inspired by the Court’s observation that “the foreseeability that is critical to due process analysis” is whether the defendant should have “reasonably anticipate[d] being haled into court there.”<sup>17</sup>

Right. This due process protection of defendants is chiefly predicated on the underlying rationale that because plaintiffs have the initial choice of forum, defendants need some countervailing fairness protection. But when a corporate defendant effectively gets to choose the forum in advance by means of a forum selection clause, the law offers no succor to Grandma and Uncle Irv taking that once-in-a-lifetime Alaskan cruise.<sup>18</sup> Thus, we have yet to see the Supreme Court decision holding that a plaintiff blind-sided<sup>19</sup> by a forum selection clause could not reasonably foresee being haled into a distant forum of the defendant’s choice; that such clauses offend traditional notions of fair play and substantial justice; and that such clauses lay too great and unreasonable a burden on the plaintiff to comport with due process. We are waiting.

So, the major lesson from *Carnival Cruise Lines* is, if you are going to take a cruise, for God’s sake don’t take the galley tour and slip and fall at sea.

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dure, although not entirely successfully. Professor Knapp has the enviable shooting fish-in-a-barrel side of the argument.

<sup>13</sup> Many of my procedure colleagues find this objectionable. Perhaps perversely, it is always entertaining to observe first year law students slowly discover that the Supreme Court can tie itself into inconsistent, incoherent knots.

<sup>14</sup> See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Is there a lawyer who cannot recite this phrase from memory in his or her sleep?

<sup>15</sup> I feel their pain.

<sup>16</sup> *Int’l Shoe*, 326 U.S. at 317.

<sup>17</sup> *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Justice Brennan also was not inspired by this.

<sup>18</sup> Needless to point out, the corporate use of forum selection clauses now extends well beyond cruise passenger tickets, in all sorts of other consumer contractual agreements.

<sup>19</sup> Which they may or may not have seen or understood, or actually agreed to.

AND IN THE WAKE OF *CARNIVAL CRUISE LINES* . . .

If the court's endorsement of a corporate "heads-I-win, tails-you lose" personal jurisdiction jurisprudence were not bilge enough, the decision has not fulfilled its core rationale—its ballast, so to speak—of providing certainty in the litigation forum. (Well, admittedly, the decision does provide near absolute certainty to the corporate defendant that wrote the clause.) Nonetheless, *Carnival Cruise Lines* has instead inspired a lot of litigation by astonished would-be plaintiffs who had no idea that they had unwittingly<sup>20</sup> signed on to banishment to some distant state (or foreign country, for that matter) if they want to sue.<sup>21</sup>

Instead of ensuring the certainty of forum selection, *Carnival Cruise Lines* has ensured a thriving satellite industry in challenging such clauses. All this litigation is excellent for the corporations who always win because courts uniformly enforce the provisions; and it is great for the lawyers on both sides because they earn their livelihood whether they win (the corporations) or lose (the plaintiffs). But it is really unfortunate for the poor, clueless schlemiel<sup>22</sup> or schamozzel<sup>23</sup> who is faced with the choice to either spend a raft of money litigating in distant Kankanee; spend a raft of money arguing against the forum selection clause (and then losing); or give up their grievances altogether.<sup>24</sup>

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*Carnival Cruise Lines* leaves us with the rather unsettling and disturbing conclusion that common law contract principles—or statutory contract law—trump constitutional due process.<sup>25</sup> If this were not bad enough, in almost every instance where a forum-selection clause is invoked against a consumer, courts routinely endorse the consumer's waiver without knowing and intelligent consent. If ever there were a case demonstrating that the law is an ass,<sup>26</sup> surely this must be it.

Thus, if the opportunity ever arises again for the Court to reconsider *Carnival Cruise Lines*, it is high tide that the Court set a new compass. The Court ought to clear the decks, untether this decision from its moorings, trim its sails, set it adrift, then torpedo it and bury the decision at sea. Only then will plaintiffs and defendants be on an even keel, with clear sailing into the sunset.

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<sup>20</sup> Just think about all those agreements you routinely click through when you sign up for something or purchase something online—ever read it? I recognize this point comes dangerously close to trenching on Professor Knapp's contract exercise.

<sup>21</sup> Again drifting into Professor Knapp's territorial waters. Proliferating litigation over forum selection clauses is matched by proliferating litigation over mandatory arbitration clauses, and for similar reasons.

<sup>22</sup> Yiddish for an ineffectual person who bumbles through life. This is not a constitutionally protected class, but should be.

<sup>23</sup> Yiddish for an unlucky person. Not a constitutionally protected class, either.

<sup>24</sup> The most likely outcome, and the entire point behind forum selection clauses. No Virginia, forum selection clauses are not really intended to ensure the certainty of the litigation forum.

<sup>25</sup> Sailing into Professor Knapp's waters, again.

<sup>26</sup> CHARLES DICKENS, *OLIVER TWIST* (London, Richard Bentley 1838).