

Litigators of the Week: Quinn Emanuel Clears the Decks for Norwegian Cruise Line to Ask for COVID Vaccination Docs in Florida

By Ross Todd
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The Norwegian Gem is set to push off from Miami Sunday for its first cruise in more than a year-and-a-half. And if you're one of the more than 1,200 passengers who've booked a ticket, you'll be showing your proof of COVID vaccination before you step aboard.

Thanks to a boatload of work over the past few weeks by a **Quinn Emanuel Urquhart & Sullivan** team led by **Derek Shaffer**, **Olga Vieira** and **John O'Sullivan**, Norwegian Cruise Line Holdings Ltd. can ask passengers to show their vax cards despite a "vaccine passport" ban signed into law earlier this year by Florida Gov. Ron DeSantis. The Quinn Emanuel team this week won a **preliminary injunction** from U.S. District Judge Kathleen Williams in Miami who found the state law likely violates the First Amendment and the dormant Commerce Clause.

"The cruise line industry is a unique sector whose entire business model depends on operators' abilities to traverse across various federal, state, local, and international jurisdictions in a matter of days and even hours—each with different laws, regulations, and protocols. At the same time, scientific research shows that cruise lines are hotbeds for COVID-19 transmission," Williams wrote. The judge concluded that while Norwegian "demonstrated that public health will be jeopardized if it is required to suspend its vaccination requirement," the state had identified "no public benefit from the continued enforcement of the statute" against the cruise line.



Courtesy photos

(L-R) **Derek Shaffer**, **Olga Vieira**, and **John O'Sullivan** of **Quinn Emanuel**.

Litigation Daily: Who was your client and what was at stake?

Derek Shaffer: Our clients are Norwegian Cruise Line Holdings, Ltd. and the three subsidiary brands that sail under it, each of which is a plaintiff and all of which we refer to together as "NCLH". Had we not obtained the preliminary injunction, these plaintiffs would not have been able to sail safely from Florida as planned – with 100% of their passengers vaccinated and able to prove it – and there would have been no good option. As Judge Williams observed, NCLH would have had to choose between canceling its Florida cruises or abandoning its vaccination policy on those cruises and thus putting everyone at undue risk. Either way, NCLH would be breaking its commitments to passengers, employees, vendors, and local populations in various ports who count on these cruise ships to bring tourism but not COVID-19. Those are high stakes, and we felt them every step of the way.

Who all is on your team and how have you divided the work?

Olga Vieira: Our team was divided in roughly equal parts between Miami and DC. Derek led the team from DC, developing the legal theories and strategies for pursuing the relief we sought, with help from DC partners **Jon Cooper** and **Bill Burck**, who added their government-facing expertise, along with some extremely talented associates led by **Paul Henderson** and **Brian McGrail**. Of course, the case is in Miami, and our Miami team brought the know-how to ensure our submissions translated for this Court and complied with its practices and rules. John O'Sullivan and I were intimately involved from the earliest stages and helped shape all the submissions, with valuable help from our very talented associate, **David Nabors**. Last and not least, thanks to some fortuitous timing, we were able to enlist a couple of our summer associates, who were eager to be part of a litigation like this and were able to see it through to the PI hearing on August 6, which happened to be their last day with us (before they both return to us full-time).

Your complaint says that Norweigan filed suit after “extensive settlement efforts failed.” What can you tell me about the attempts to get these issues resolved prior to litigating them?

Vieira: As reported in the press, the cruise lines had been pushing for a carve-out for their industry ever since the Governor's executive order was issued. The discussions regarding whether and how the cruise industry might be exempted from enforcement of the law continued until the final moments before we filed suit. Every effort was made to avoid litigation, which NCLH has always considered its last resort. But NCLH simply couldn't afford to wait any longer while still positioning itself to resume sailing on August 15th with a fully vaccinated ship.

You brought this injunction request after Florida had already won an injunction of its own in a separate case in the Middle District of Florida. There the state challenged the CDC's “conditional sailing order” requiring cruise operators to meet certain requirements before resuming operations. What complications did having that ruling already out there make for you?

Shaffer: Interestingly, the injunction from the Middle District of Florida didn't really change the state of play for NCLH. By its terms, that injunction is limited to ships stopping in Florida ports, and NCLH's ships and operations extend to other ports in other U.S. jurisdictions where the conditional sailing order remains operative and NCLH remains obligated to comply. Also, before the injunction was entered, NCLH had already submitted signed certifications to the CDC committing to ensure that at least 95% of its passengers were fully vaccinated, which NCLH planned to do only by requiring vaccine documentation. From NCLH's perspective, therefore, the Middle District's injunction didn't give it any comfort and it certainly didn't obviate the need for this preliminary injunction.

That said, we always expected Florida to defend against our preemption challenge (focusing on the conflict between Florida's prohibition against requiring vaccine documentation and NCLH's commitment to the CDC that it would verify that its passengers are vaccinated) largely by arguing that CDC's regulations are likely invalid according to the Middle District of Florida. So we were closely monitoring developments in that case and it made for some interesting wrinkles – particularly as the Eleventh Circuit initially issued a stay of the injunction against CDC's conditional sailing order, before then vacating its stay a week later. And we didn't want to risk having developments in a parallel litigation pull anything out from under us. Although we very much believe in our preemption argument and Judge Williams indicated that she finds it compelling, it made things easier for us and the court to have two other strong bases for challenge – the First Amendment and Dormant Commerce Clause – in play, and we wanted to do justice to those.

Arguments on this motion were heard via Zoom, right? Describe for me how the hearing went and what the judge was interested in hearing from the parties.

John O'Sullivan: It was a long and substantive Zoom hearing that went on for well over two hours.

In this situation, doing it via Zoom may have been a plus. Although there were many people observing, only the judge, the lawyers arguing, and the exhibits were on the screen. The set-up had everyone focused on exactly the same thing, and there was an immediacy to the back and forth that enhanced the flow of the argument.

The most striking aspect, for me, were the Court's penetrating questions. Judge Williams came into that hearing with a clear command of all of the briefing, caselaw, and exhibits, and posed questions that went to the nuances of various authorities and materials that had been cited, and to nailing down the precise contours of the Florida statute at issue. As much as we had thought about the case, it was no small challenge for us to keep up with her.

A spokeswoman for Governor Desantis said after the decision that the state law in question “does not even implicate, let alone violate, anyone’s speech rights.” Let me hear your best summary of your First Amendment argument.

Shaffer: Thanks for giving us a crack at that. I'd encourage anyone who's puzzled or skeptical about the First Amendment argument to start with reading [the statute](#) and [Judge Williams' explanation](#) of why it violates the First Amendment. Beyond that, here's what I'd emphasize:

This statute is conspicuously contoured to go after one particular mode of expression. It doesn't prohibit NCLH or any other business from asking customers about COVID-19 vaccination status, differentiating based on that, or conditioning entry on being vaccinated. It doesn't even prohibit NCLH from demanding oral assurances from passengers that, yes, they have in fact been vaccinated before coming aboard. The only thing that triggers this statute is NCLH insisting upon written documentation that supplies a truthful answer to a concededly legitimate inquiry into vaccination status, as a concededly legitimate precondition to boarding. And the state's effort to shut down a particular way of expressing truthful

information about controversial subject matter is very much a concern of the First Amendment. That's what this law does. I don't see how Judge Williams could have avoided the First Amendment problem while staying true to the governing cases from the Eleventh Circuit and Supreme Court that she cites and analyzes in her opinion.

Derek, Florida brought in your former firm Cooper & Kirk to handle this matter as outside counsel. What has it been like litigating this case against your former colleagues?

Shaffer: That's been a surreal experience for me. The lawyers at **Cooper & Kirk** are the ones who raised me as a litigator, and being opposite them feels somewhat like being opposite family members. The most daunting aspect is knowing what great lawyers they are and realizing that they're going to identify the toughest arguments to counter ours, and are going to make them with maximum persuasiveness. But I also know that, no matter how the high stakes and how hard-fought the litigation may be, we'll still be friends who approach one another with admiration and affection.

To bottom-line it, I'm glad our paths crossed this way but don't ever want to see these guys as my opposing counsel again, if only for my clients' sake!

What comes next in this case?

Shaffer: Florida has appealed the preliminary injunction, so we expect to be defending that up at the Eleventh Circuit in the coming months. Meanwhile, the litigation continues before the District Court and we're next due to respond to a pending motion to dismiss. After that, we'll need to be talking to the defendant and to the court about the larger schedule.

What will you remember most about litigating this injunction issue for Norwegian?

O'Sullivan: It was a lot of work to get done in three weeks.

Shaffer: This was my introduction to our Miami office, and I couldn't have hoped for a better one.