"Graves" – Across the Country and in California

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Vicarious liability state laws across the country relating to the liability of rental car companies and lessors of tractors and trailers are experiencing challenges presented by the enactment of the *Graves Amendment* in 2005. It appears that companies are raising the *Graves Amendment* as a defense in states where state laws are not consistent with "Graves." It also appears that other states, including California, are responding to Graves and enacting or amending statutes to avoid federal preemption by the Graves Amendment.

The *Graves Amendment*

After several constitutional challenges based on equal protection and Congressional power, the *Graves Amendment* to the *Safe, Accountable, Flexible, Efficient Transportation Equity Act, 49 U.S.C. § 30106* (2005) essentially eliminated vicarious liability for rental car companies. The Amendment provides in pertinent part:

"(a) An owner of a motor vehicle that rents or leases the vehicle to a person (or an affiliate of the owner) shall not be liable under the law of any State or political subdivision thereof, by reason of being the owner of the vehicle (or an affiliate of the owner), for harm to person or property that result or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease, if –

(1) the owner (or affiliate of the owner) is engaged in the trade or business of renting or leasing motor vehicles; and

(2) there is no negligence or criminal wrongdoing on the part of the owner (or an affiliate of the owner)."

In essence, the *Graves Amendment* "was enacted to protect the vehicle rental and leasing industry against claims for vicarious liability where the leasing or rental company's only relation to the claim was that it was the technical owner of the car."[1]

Federal Preemption Across the Country

Courts across the country addressing the issue have consistently found that the *Graves Amendment* passes constitutional muster and preempts state law.

For example, the Court in *Green v. Toyota Motor Credit Corp.*[2] determined that a New York statute creating a cause of action predicated on a theory of vicarious liability against remote title owners and lessors of motor vehicles was preempted by the *Graves Amendment*.

Furthermore, the *Graves Amendment* was found to preempt a Florida statute that created an exception to the common law dangerous instrumentality doctrine for lessors of motor vehicles. *Garcia v. Vanguard Car Rental USA, Inc.*[3]

Finally, the Court in *Canal Insurance Company v. Kwik Kargo, Inc.*[4] stated that any attempt to impose vicarious liability on the lessor of a tractor or trailer is precluded by the *Graves Amendment* in the absence of allegations of negligence or criminal wrongdoing on the part of that lessor.

It appears based on recent decisions that the *Graves Amendment* will continue to preempt state law until state statutes are in compliance with it. Indeed, it also appears based on recent decisions that many lessors are becoming more aware of the application of the *Graves Amendment*, and as such, are raising the statute as a defense on a more regular basis.

Consistency of California Law with the *Graves Amendment*

As originally enacted in the 1970s, California *Insurance Code Section 11580.9* expressed the total public policy of the state respecting the order in which two or more liability insurance policies covering the same loss would apply. *Section 11580.9* identified four different circumstances under which two or more policies of automobile or motor vehicle insurance may afford liability insurance applicable to the same loss. The statute, which creates a conclusive presumption, sets forth the statutory priorities which determine which policy provides primary coverage and which provides excess coverage in each of several defined circumstances.

Originally, subdivision (b) stated in part that a policy issued to a named insured "engaged in the business of renting or leasing motor vehicles without operators" was excess. Subdivision (b), as amended in 2006, now states:

> "Where two or more policies apply to the same loss, and one policy affords coverage to a named insured ***who in the course of his or her business rents or leases motor vehicles without operators***, it shall be conclusively presumed that the insurance afforded by that policy to a person other than the named insured or his or her agent or employee, shall be excess over and not concurrent with, any other valid and collectable insurance applicable to the same loss … "

It should be noted that subsection (b) also requires that the motor vehicle (1) qualify as a "commercial vehicle" which means a type of vehicle that is (A) used or maintained for the transportation of persons for hire, compensation, or profit; and (B) designed, used, or maintained primarily for the transportation of property; or (2) that the vehicle has been leased for a term or six months or longer.

Prior to the amendment to subdivision (b) the Court in *Wilshire Insurance Company, Inc. v. Sentry Select Insurance Company*, 124 Cal. App. 4th 27, 21 (2004), dealt specifically with subdivision (d) of the statute, which states:

> "(d) Except as provided in subdivisions (a), (b), and (c), where two or more polices afford valid and collectible liability insurance apply to the same motor vehicle or vehicles in an occurrence out of which a liability loss shall arise, it shall be conclusively presumed that the insurance afforded by the policy in which the motor vehicle is described or rated as an owned automobile shall be primary and the insurance afforded by any other policy or policies shall be excess."

The *Wilshire* decision and its applicability to the trucking industry in California was significant in that it established that in the case of a tractor trailer unit, in which both the tractor and the trailer were specifically scheduled on their respective policies, the combined unit was to be considered one vehicle for purposes of applying the statute, thus requiring that each insurer have an equal obligation to contribute to the defense and indemnification of a covered loss.

However, in 2006 the California Legislature added new subdivision (h) to Section 11580.9 [and redesignated former subdivision (h) as subdivision (i)]. This was arguably done in order to address the fact that the *Wilshire vs. Sentry* decision was in inherent conflict with the *Graves Amendment*. Subdivision (h) now states:

> "(h) Notwithstanding subdivision (b), when two or more policies affording valid and collectible automobile liability insurance apply to a power unit **and** an attached trailer or trailers in an occurrence out of which a liability loss shall arise, and one policy affords coverage to an insured in the business of a **trucker**, defined as any person or organization engaged in the business of transporting property by auto for hire, then the following shall be conclusively presumed: If at the time of the loss, the power unit is being operated by any person in the business of a trucker, the insurance afforded by the policy to the person engaged in the business of a trucker **shall be primary for both power unit and trailer or trailers**, and the insurance afforded by the other policy shall be excess."

Subdivision (h) clarifies which of two policies responds for losses arising from a trucking accident in which one policy schedules the power unit and a different policy schedules the trailer(s) involved in the accident. The addition of this subdivision is significant in California, as it arguably resolves the inconsistencies between prior California case law, i.e., *Wilshire*, and the *Graves Amendment*. Moreover, subdivision (h) appears to be consistent with the *Graves Amendment* when applied to leased tractors and/or trailers.

Conclusion

Having found the *Graves Amendment* to be in the interest of equal protection and within the power of Congress, federal courts addressing vicarious liability for rental car companies and lessors of tractors and trailers are clearly preempting inconsistent state laws. Accordingly, in the absence of negligence or criminal wrongdoing, rental companies and lessors, and ultimately consumers, will benefit from the enactment and interpretation of the *Graves Amendment*, as well as subsequent, consistent state law.

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Endnotes

1. *Rein v. CAB East LLC*, 209 WL 1748905 (S.D.N.Y 2009).
2. 605 F. Supp. 2d, 430 (2009 E.D.N.Y.)
3. 540 F. 3d 1242 (2008).
4. 2009 WL 1086524 (D. Minn.)