

By Philip M. Gulisano
and Jonathan S. Hickey

An evolving area of law that counsel and industry personnel alike would be well-served to monitor.

Preemption Legislation Creates a Cap on Liability

Vicarious liability for rental and leasing companies virtually became a thing of the past a little over three years ago when federal legislation known as the “Graves Amendment” was signed into law. This legislation

impacted several jurisdictions across the country as well as transportation and trucking attorneys and their clients in the process. For years, vicarious liability has increased consumer costs in acquiring vehicles and buying insurance, which in turn resulted in higher commercial costs for the transportation of goods. See Bulk Transporter, April 1, 2006, <http://bulktransporter.com/>. Moreover, plaintiffs have exploited the vulnerability of otherwise non-negligent owners by inflating recoveries in jurisdictions that allowed for unmitigated recovery from vicariously responsible owners.

Prior to the Graves Amendment, owners of motor vehicles in many jurisdictions were considered to be vicariously liable for injuries caused by negligent operators who had the owner’s permission to operate the vehicle. Imposition of such liability comes in many ways. Some states codify vicarious liability in an unlimited manner on car owners (including lessors), for example in New York, Rhode Island and Maine. See Susan Lorde Martin, *Commerce Clause Jurisprudence and the Graves Amendment:*

Implications for the Vicarious Liability of Car Leasing Companies, 18 U. FLA. J.L. & PUB. POL’Y 153, 162 (2007).

Other states such as California, Florida, Delaware, Arizona, Wisconsin and Oklahoma make owners “financially responsible” by requiring maintenance of specified insurance minimums. Similarly, Nebraska has a financial responsibility statute for trucks, but not cars, leased for less than 30 days or leased for any amount of time for commercial purposes that makes truck lessors jointly and severally liable for injuries caused by the truck’s operator. That is, unless the lessor has a liability insurance policy with coverage limits of at least \$1 million. See Martin, *supra* at 159. Still other states have used distinctions in the law and the duration of the lease for vicarious liability purposes (for instance, Michigan distinguishes between long-term and short-term lessors and the District of Columbia treats the driver of the car as the agent of the owner). See Martin, *supra* at 162; MICH. COMP. LAWS 257.401 (2006) and D.C. CODE ANN. 50-1301.08 (2001).



■ Philip M. Gulisano and Jonathan S. Hickey are two of the founding partners in the Buffalo, New York, law firm of Burden, Gulisano & Hickey, LLC. Both trial attorneys are members of DRI’s Trucking Law Committee and concentrate their practice in the areas of trucking and transportation negligence.

Add to all of this the many states that do not have either statutes or common law definitively indicating whether a vehicle owner is vicariously liable for the driver's negligence, and one can see where the need for unifying legislation was derived. See Martin, *supra* at 162.

In short, the Graves Amendment preempts most ownership-based approaches to vicarious liability, relieving from liability those owners who lease or rent their vehicles when drivers get into accidents. This legislation has resulted in sporadic, yet expanding, litigation across multiple jurisdictions that are attempting to implement and reconcile this relatively new law.

What Is the Graves Amendment?

Representative Samuel Graves, (R) Missouri, sponsored this portion of federal legislation within the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, or SAFETEA-LU; a multi-billion dollar highway appropriations bill. See Pub. L. No. 109-59, 119 STAT. 1144 (2005) (codified in U.S. Code in various sections and titles). No hearings were conducted on the amendment and only one 20-minute debate in the House discussed its ramifications. See Martin, *supra* note 4, at 164. During the debate, Representative Graves stated the purpose of the amendment was to “correct an inequity in the car and truck renting and leasing industry... [and to] lower costs and increase choices for all consumers.” See Martin, *supra*; 151 Cong. Rec. H1034, 1200 (daily ed. Mar. 9, 2005) (statement of Rep. Graves). Subsequently, the Graves Amendment (49 U.S.C. §30106) was signed into law on August 10, 2005, by President Bush as part of SAFETEA-LU. As of that date, no action could be commenced seeking to hold a rental or leasing company vicariously liable for the negligent actions of the vehicle operator. See 49 U.S.C. §30106(c).

The law eliminates a cause of action against owners of motor vehicles who rent or lease a vehicle and meet one of the following qualifications of ownership: (1) a record or beneficial owner, holder of title, lessor, or lessee of a motor vehicle; (2) an individual who is entitled to the use and possession of a motor vehicle subject to a security interest in another person; or (3) a lessor, lessee, or a bailee of a motor vehicle in the

trade or business of renting or leasing motor vehicles, having the use or possession thereof, under a lease, bailment or otherwise. See 49 U.S.C. §30106(d)(2)(A)–(C). To enjoy the protection of this law, the owner must be “engaged in the trade or business of renting or leasing motor vehicles.” See 49 U.S.C. §30106(a)(1). By limiting liability to those who were actually driving the vehicle in the accident, and not the renter or lessor, it was estimated that consumers would end up saving over \$100 million annually. See 151 Cong. Rec. H1034, 1200 (daily ed. Mar. 9 2005) (statement of Rep. Graves).

The amendment also eliminated an inequity shouldered by rental companies when their vehicles were driven from a state that does not have vicarious liability into a state that does allow for such exposure. As a consequence, the rental companies no longer need, as owners, to guard against the possibility of liability because the Graves Amendment unified the law throughout the states and preempted all such laws that allowed for unfettered liability against otherwise non-negligent owners. No longer can a plaintiff claim vicarious liability against non-negligent owners who rent or lease their vehicles. This does not, however, eliminate differences in the amount a rental or leasing company has to be “financially responsible” for with respect to the vehicles they own in a particular jurisdiction. For instance, one state may require coverage of \$25,000 for injury or death, \$50,000 for injury or death to two or more people and \$25,000 in property damage, while another state may require \$500,000 in combined bodily injury and property damage coverage. See Martin, *supra* note 4, at 159. This potential discrepancy has created disputes between insurance carriers as to whose policy should be subrogated by the other and has led to ongoing issues of coverage primacy that industry personnel and coverage counsel need to be aware of.

The Impact of the Graves Amendment

The impact of the Graves Amendment has been relatively significant—especially in jurisdictions where it has preempted longstanding vicariously liability laws. The Graves Amendment bars claims seeking recovery based on a vicarious liability theory against the owner of a rented or leased motor vehicle. Owners will not be vicari-

ously liable under the law of any state, or political subdivision thereof, for harm to persons or property that results or arises out of the use, operation, or possession of the vehicle during the period of the rental or lease. See 49 U.S.C. §30106. The owner of the vehicle must be engaged in the trade or business of renting or leasing motor vehicles to receive protection from the Graves Amendment.

A significant economic impact of the Graves Amendment is that it allows vehicle rental and leasing companies to decrease their prices because the cost of liability does not have to be shifted to the consumers. In this way, leasing companies will not be deterred from doing business in states that previously held them liable as owners of leased vehicles. See, e.g., Adam Rombel, *Auto Dealers Adjust to Life with Lighter Leasing Load*, CENT. N.Y. BUS. J., Dec. 19, 2003, at 3, available at <http://findarticles.com/>. New York is a classic example of a jurisdiction where the state legislature was strongly lobbied for years by financing arms of major motor vehicle manufacturers for this very reason. See *id.* Ultimately, it took the passage of federal legislation to cure the inequity.

Opponents of the Graves Amendment assert that the law makes it much more difficult for plaintiffs to recover from solvent defendants because in many motor vehicle accidents the driver does not have the resources or adequate insurance to compensate plaintiff's injuries. New York Representative Jerrold Nadler argued the law would also encourage rental companies to rent to those who do not have enough insurance to cover an accident and take none of the liability when the under-insured drivers are negligent. See 151 Cong. Rec. H1200 (daily ed. Mar. 9, 2005) (statement of Rep. Nadler). That is one side to the argument; but as a New York court stated in terms of its own legislature, states have other ways to protect innocent victims of accidents with leased or rented vehicles: “[states] may require companies to lease or rent vehicles only to drivers with insurance, set up a fund, or take some other legislative action not barred by federal statute.” *Graham v. Dunkley*, 50 A.D.3d 55, 852 N.Y.S.2d 169 (2d Dept. 2008).

It is important to note that the law does not exempt renters and lessors who were

negligent when renting or leasing their vehicles. There are still duties owed by the owner, which, if violated, can impose liability. For example, negligence may include violating the lessor's policy to complete an insurance check on lessees (*See Whiston v. Curry*, 2007 Conn. Super. LEXIS 9 (Conn. Super. Ct. 2007)), and not maintaining the vehicle in proper working condition (*See*

No longer can a plaintiff claim vicarious liability against non-negligent owners who rent or lease their vehicles.

Colon v. Bernabe, 2007 U.S. Dist. LEXIS 51981 (S.D.N.Y. 2007)).

Nonetheless, after more than three years of litigation, when there is an owner engaged in the trade of renting or leasing motor vehicles, and there is neither an allegation of the owner's negligence nor criminal conduct, vicarious liability claims are being routinely dismissed.

Legislation such as this is found not only in the United States. In fact, the adverse impact on commerce, and the relative unfairness of treating non-negligent lessors differently from other financial sources, has been similarly recognized in Ontario, Canada, which enacted legislation in March 2006 limiting vicarious liability claims against lessors to a maximum of \$1 million (CDN) per accident. *See* Equipment Leasing Association of America, May 2006.

The Canadian Finance & Leasing Association ("CFLA") was compelled to seek reform from the provincial government's vicarious liability statutes when a car leasing company paid more than \$13 million in settling the claim of a victim involved in a car accident. The legislation was structured to make the lessor liable only if the lessee does not have insurance coverage. This law is notable and relevant in that it applies to all accidents occurring in Ontario, regardless of the registration of the vehicle or the law governing the contract of insurance. The protection

does not extend to the lease or rental of taxicabs, limousines or livery vehicles. *See id.* For counsel and industry members alike who deal with cross-border trucking and leasing issues, this is notable legislation.

Challenges to the Legislation

Due to the drastic restriction on liability in many jurisdictions, there have been challenges mounted around the country in an effort to mitigate the impact of the Graves Amendment in 2008. Florida was one of the "battle-ground" states with respect to the Graves Amendment in 2008. The United States Court of Appeals for the Eleventh Circuit in *Garcia v. Vanguard Car Rental USA, Inc.*, 540 F.3d 1242 (11th Cir. 2008), upheld the federal preemption law where the defendant driver of a rental car (owned by multiple entities), was at fault in a fatal three-way collision. Suit was brought against the owner pursuant to Florida's dangerous instrumentality doctrine, which imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts the vehicle to a negligent operator.

It was argued by the plaintiff that the Graves Amendment did not preclude the lawsuit because of the legislation's savings clause (providing that the legislation does not affect state financial responsibility requirements for motor vehicle lessors). It was argued that because Florida places limits on a lessor's vicarious liability depending on their insurance coverage, the preemptive law does not apply. It was also argued that the Graves Amendment was unconstitutional. Both arguments failed.

The court held that neither the common law imposition of vicarious liability, nor Florida's endorsement of a limitation on vicarious liability, constituted a "financial responsibility" requirement. *See id.* at 13-14. The 11th Circuit further held that the law was constitutional under the Commerce Clause of the U.S. Constitution even though the car rental and the accident took place in the same state. More specifically, "the Graves Act is valid" because the rental car market has a substantial effect on interstate commerce. The market is burdened by the imposition of strict vicarious liability because customers, owners and creditors of rental car companies bear the brunt of the expense and cost—thereby inhibiting interstate commerce. *Id.* at 26.

The Truck Renting and Leasing Association ("TRALA") filed an amicus brief in *Garcia*, as it has in at least five other cases challenging the Graves Amendment thus far with unanimous success. *See also* <http://www.nmtrucking.org/news/news.htm>. Notably, as might be expected, TRALA has taken great interest in Graves Amendment litigation across the country—tracking positive and negative decisions and posting updates on their website (<http://www.trala.org/>). This allows members to follow these trends across the country and throughout the various jurisdictions where the issue is being litigated.

Another Florida case that tested and analyzed the impact of the new federal legislation is *Brookins v. Ford Credit Tiling Trust*, 2008 Fla. App. LEXIS 10881 (Fla. App. 4 Dist. 2008), where a Florida Court had to determine whether the federal law preempted Florida's dangerous instrumentality law. The dangerous instrumentality doctrine is part of Florida's common law and is augmented by certain statutory requirements for long term lessors of automobiles. *See* FLA. STAT. §324.021. Those requirements constitute a minimum financial responsibility for lessor/owners of vehicles. The Graves Amendment states, in regard to financial responsibility statutes, that "Nothing in this section supersedes the law of any state or political subdivision thereof—(1) imposing financial responsibility or insurance standards on the owner of a motor vehicle for the privilege of registering and operating a motor vehicle, or (2) imposing liability on business entities engaged in the trade or business of renting or leasing motor vehicles for failure to meet the financial responsibility or liability insurance requirements under state law." 49 U.S.C. §30106(a) (1) and (2). For these reasons, the court did not find "a 'clear and manifest' intent of preemption of Florida's law in this regard." *Id.* at 4. The lessor did not have a special policy of insurance explicitly listing the vehicle involved in the case, but did maintain a blanket policy for all of its cars that satisfied the financial responsibility statute. Summary judgment was awarded to the lessor for its compliance with Florida's financial responsibility law, not because the Graves Amendment barred the claim against the lessor.

It seems that federal law will not preempt state law to the extent that a state law

requires a minimum amount of insurance purchased by the owner. Since the Graves Amendment does not preempt state laws regulating financial responsibility standards on owners, a trend to follow will be whether jurisdictions that have seen their vicarious liability statutes preempted will look to adopt financial responsibility statutes as their replacement. *See* Martin, *supra* note 4, at 181.

In addition to the Florida litigation discussed earlier, the Graves Amendment is also being aggressively challenged in other jurisdictions where it has significantly impacted and preempted state law imposing vicarious liability on non-negligent rental and leasing companies. A prevalent opposition argument that is being repeated across jurisdictions is that the law is unconstitutional. One of the few times this argument has been successful is in *Vanguard Car Rental USA, Inc. v. Drouin*, 521 F. Supp. 2d 1343 (S.D. Fla. 2007), which held that since the Graves Amendment regulated tort liability and not “channels of interstate commerce” it exceeded Congress’ Commerce Clause power.

However, this constitutional argument is failing in most jurisdictions as many courts have held that it is within Congress’ Commerce Clause power to regulate tort liability against rental and leasing businesses. *See, e.g., Flagler v. Budget Rent A Car System, Inc.*, 538 F. Supp. 2d 557 (E.D.N.Y. 2008); *Jasman v. DTG Operations, Inc.*, 533 F. Supp. 2d 753, (W.D. Mich. 2008); and *Johnson v. Agnant*, 480 F. Supp. 2d 1 (D.D.C. 2006).

In Michigan, *Jasman* dealt with a defendant driver operating a vehicle rented from Dollar Rental. The rental car was involved in an accident resulting in a claim of personal injuries by plaintiff. It was alleged that Dollar Rental was liable by way of operation of Michigan’s Motor Vehicle Civil Liability Act (it was argued that the driver was operating a vehicle owned by and with the express and/or implied permission of Dollar Rental). It was also claimed that the driver was in the course of his employment with Dollar Rental at the time of the accident. Dollar Rental argued that the Graves Amendment preempted the claims brought under Michigan’s Motor Vehicle Civil Liability Act. Plaintiff argued against the constitutionality of the legislation, but the court disagreed. The court

held quite clearly that the Graves Amendment preempted Michigan’s Motor Vehicle Civil Liability Act and the owner of a vehicle such as this rental car company cannot be held liable solely on the basis of ownership. *See id.* at 756–57. The court did concede that the Graves Amendment is not applicable to allegations that the driver is employed by the owner; however, the owner here provided a signed affidavit that the driver never worked for the owner and plaintiff could not rebut this proof—summary judgment was granted to the owner. *See id.* at 758.

In the District of Columbia, *Johnson v. Agnant* concerned the estate of the decedent suing the Budget defendants who rented a vehicle to the negligent driver. No negligence or criminal wrongdoing on the part of Budget was claimed. Plaintiff argued that the Graves Amendment did not preempt D.C. law. Among other arguments, it was asserted that there was no preemption because the D.C. legislation was not specifically mentioned. The *Johnson* court explained that Congress did not have to mention “every law of every state or political subdivision” that it intended to repeal. The court granted the motion to dismiss on the ground that claims of vicarious liability against the Budget defendants were prohibited by federal law. *See id.* at 15–16.

In Arizona, the matter of *Milsap v. U-Haul Truck Rental Co.* held that “Given the unequivocal language [of the Graves Amendment]... plaintiff has not and cannot state a negligence claim against U-Haul based upon a theory of vicarious liability.” *Milsap v. U-Haul Truck Rental Co.*, 2006 U.S. Dist. LEXIS 92219 (D. Ariz. 2006). The plaintiff’s action was commenced well after the effective date of the Graves Amendment and the court refused to recognize the claim even though the *pro se* plaintiff was given leeway on other procedural mistakes.

As an additional example of challenges to the legislation, and how and why the challenges are being defeated, there continues to be precedent in Connecticut confirming the preemptive impact on vicarious liability claims (based solely on lessor liability under Connecticut General Statute §14-154(a)). *See Rosa v. Silva et al.*, 2008 Conn. Super. LEXIS 2305 (Conn. Super. Ct. 2008). A practice point in terms of the proof needed to defeat vicarious liability

claims at an early stage can be taken from the dispositive motion practice in *Rosa*. Specifically, the owner of the vehicle that was negligently operated (Elrac, Inc. d/b/a Enterprise Rent-A-Car), submitted an affidavit from its loss control manager attesting that the defendant’s sole business was as a motor vehicle rental/leasing company. A copy of the rental contract between the owner and the defendant driver was also submitted. The court held that where there was no negligence alleged on the part of the owner, the claim should be dismissed. *See id.* at 6. *See also Steinfeld v. Lipman*, 2008 Conn. Super. LEXIS 1953 (Conn. Super. Ct. 2008) (holding that the defendant owner demonstrated it was a “single purpose entity which holds legal title to lease contracts and related vehicles”; therefore, the claim was dismissed).

In New York, the vicarious liability statute states “Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to persons or property resulting from negligence in the use or operation of such vehicle in the business of such owner or otherwise.” *See* N.Y. VEH. & TRAF. LAW §388. This was also preempted, extinguishing a long-standing means of inflated exposure in New York.

New York’s highest court, the Court of Appeals, held in *Jones v. Bill* that “The Graves Amendment applies ‘to any action commenced on or after the date of enactment of this section.’” *See Jones v. Bill*, 10 N.Y.3d 550, 860 N.Y.S.2d 769, 890 N.E.2d 884, 886 (2008). This is a definitive holding confirming the preemptive impact of the law in a jurisdiction that previously allowed for vicarious liability. *Jones* involved a two-car accident and the plaintiff commenced an action against defendant as the “owner and operator” of the vehicle before the August 10, 2005, enactment date.

The interesting aspect of *Jones* is that, upon discovering that the defendant was not the owner of the vehicle, the plaintiff sought to amend the complaint to include the leasing company. *See id.* The amended complaint was submitted on November 1, 2005, after the Graves Amendment enactment date. The issue before the Court was whether the action was “commenced” against the defendant leasing company before or after the enactment date. The Court held that “under the statute’s plain lan-

guage, any action filed prior to August 10, 2005, has been ‘commenced’ and therefore removed from the federal statute’s preemptive reach.” *See id.* Ultimately, the impact of the court’s ruling in *Jones* is that the rental car company could not rely on the preclusive effect of the Graves Amendment if the lessee was sued prior to August 10, 2005, and the lessor is joined after August 10, 2005, because “nothing in the language of the Graves Amendment suggests that it bars vicarious claims asserted in an amended pleading in an action commenced prior to its effective date.” *Id.* at 555.

Additional examples of arguments and theories of liability plaintiffs are utilizing in an attempt to thwart the ultimate impact of the legislation can be seen in New York where issues such as whether the Graves Amendment can impact a plaintiff’s claim for negligent entrustment and negligent maintenance are being litigated. *See Luma v. ELRAC, Inc.*, 19 Misc. 3d 1138A, 862 N.Y.S.2d 815 (Sup. Co. Kings Co., 2008); *Murphy v. Pontillo*, 12 Misc. 3d 1146, 820 N.Y.S.2d 743 (Sup. Co. Nassau Co., 2006); *Hall v. ELRAC, Inc.*, 52 A.D.3d 262, 859 N.Y.S.2d 641 (1st Dept., 2008). *Luma* explained that “vicarious liability is not abrogated where injury or damage results from the negligence of the owner’s employee in the operation or maintenance of the vehicle, nor it seems where the owner was negligent in entrusting the vehicle to the operator.” The point is that although

the legislation is relatively far-reaching, it does not abolish vicarious liability in all respects.

The plaintiffs’ bar might perceive itself as being placed in a tenuous position by this legislation because its impact seems so clear, but what if it is repealed or otherwise found unconstitutional in a particular jurisdiction? Does counsel then have a problem for the failure to state a cause of action if the leasing entity is not made part of the suit? In what might be considered an overabundance of caution, the claims continue to be made and dismissed. Appellate challenges to the dismissals continue to mount, but the challenges are finding little success.

Conclusion

The ultimate impact of the Graves Amendment is difficult to assess because most jurisdictions differ in terms of the manner and imposition of vicarious liability. Also, litigation over this issue is ongoing. However, for many states, such as Florida and New York, the Graves Amendment significantly impacts tort liability. Plaintiffs throughout the country have lost a cause of action for vicarious liability against owners who are in the business of renting or leasing their vehicles. Since the passing of the law, vicarious liability claims based solely on ownership when faced with a Graves Amendment attack in court are being routinely dismissed.

For those jurisdictions that have experienced sweeping change to certain causes of action, it will be useful for counsel to monitor whether additional financial responsibility statutes with high minimum requirements are enacted. Of course, there is no guarantee that, if and when states do adopt financial responsibility statutes, it will be enough to cover all of a plaintiff’s loss. Instead of states having the ability to decide whether rental and leasing companies should be liable, the federal government has taken matters into its own hands. Attorneys should be aware that the Graves Amendment has preempted states from imposing vicarious liability in these situations. Certainly, it can be anticipated that plaintiffs’ attorneys will continue to challenge the constitutionality of the Graves Amendment and will assert new and creative causes of action to implicate commercial lessors and owners in ways other than being merely vicariously responsible for the driver’s actions.

There has been a clear impact on both bodily injury claims and the manner in which many businesses, including those in the trucking and transportation industry, are addressing risk and structuring corporate responsibilities when it comes to ownership and leasing. This is an evolving area of law in each jurisdiction that counsel and industry personnel alike would be well-served to monitor and advise their clients about. 