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The Impact of the *Graves Amendment* on Independent Driver Cases

California state law provides an owner of a motor vehicle is vicariously liable up to a maximum of $15,000 for injury to persons and property resulting from the negligence of the permissive user of the vehicle. (Vehicle Code, §17150.)

However, for vehicle owners who are in the business of renting or leasing out their vehicles, such as taxi cab fleet operators or vehicle rental companies, that vicarious liability created by VC §17150 has been eliminated thanks to the "Graves Amendment" (49 U.S.C.S. §30106), which provides, in part as follows:

> *"An owner of a motor vehicle that rents or leases the vehicle to a person shall not be liable under the law of any State, or political subdivision thereof, by reason of being the owner of the vehicle, 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 if: 1) 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."*

Id.

However, limited liability under the *Graves Amendment* does not insulate vehicle renters and lessors from liability in every circumstance. For example, the doctrine does not protect vehicle renters and lessors from liability when they are independently negligent, such as where the renter/lessor negligently maintains its vehicle and that failure causes an accident, or where the renter/lessor negligently entrusts its vehicle to an incompetent driver. (49 U.S.C.S. §30106(a)(2).)

It also is clear that under the *Graves Amendment*, a car or truck rental company will continue to be held vicariously liable under the common law *respondeat superior* doctrine for the negligence of an employee or agent driver of a fleet vehicle who was involved in an accident caused by a negligent act or omission or other wrongful conduct of that employee or agent.

The limited liability question is not nearly so easily resolved in the case of a motor carrier who routinely leases or rents its vehicles to an independent driver (i.e., one who has no agency relationship to the vehicle lessor). In the independent contractor driver context, the determination of whether the at-fault driver of the rented vehicle is deemed the agent or employee of the renter/lessor can often be quite complex, especially in the case of hauling and sub-hauling agreements (*see*, e.g., Vehicle Code § 15242(b)).

Similarly, if the renter/lessor is a common carrier or hauling company that assigned its transportation duties to another, the renter/lessor may be held liable not as a vehicle owner, but instead is potentially vicariously liable pursuant to the non-delegable duty doctrine imposed due to the inherently hazardous activity of interstate trucking (Restatement 2d of Torts, §428; *Serna v. Pettey Leach Trucking Inc.* (2003) 110 Cal.App.4th 1475, 1486).

The key questions presented for determination of the meaningful application of the *Graves Amendment* to these types of situations are as follow:

(1) The potential existence of some independent basis of fault on the part of the vehicle renter (e.g., negligent entrustment, maintenance, etc.);

(2) The potential existence of an employment or agency relationship between the vehicle owner and the at fault driver; and

(3) Whether the vehicle owner's liability policy is potentially primary or excess in terms of the independent defense obligation imposed by law.

Impact of Limited Liability Under VC § 17150.

California's Vehicle Code § 17150, entitled "Liability of Private Owners," makes an owner of a motor vehicle vicariously liable for injuries caused by another's negligent operation of that same vehicle if the person operating the vehicle does so with the owner's express or implied permission.

The owner's vicarious liability in those instances is limited in its dollar amount by the $15,000 cap under Vehicle Code section 17151 only if there is no agency relationship that exists between the owner and the operator. Further, the owner's vicarious liability imposed by Section 17150 is **primary and direct as far as the injured third party is concerned**. However, **as between the owner and the permissive operator, the owner's liability is secondary.**

This primary/secondary liability conclusion flows from the provisions of Vehicle Code §§ 17152-17153 (see, *Heves v. Kershaw* (1961) 198 Cal.App.2d 340, 344.) Because an owner's liability is secondary to that of the operator, the owner (and the owner's automobile liability policy) essentially serves as a guarantor of their joint liability (see, *Lindgren v. Baker Engineering Corp.* (1988) 197 Cal.App.3d 1351, 1354) Thus, where the operator settles the claim of the injured third party for a sum equal to, or in excess of the amount of the owner's $15,0000 statutory liability, the owner's obligation is discharged. *(Id*.; *see also, Fenley v. Kristoffersen* (1979) 94 Cal.App.3d 139, 141).

Impact of Competing Liability Policies

California Insurance Code § 11580.9 sets forth the statutory priorities that determine which competing liability policy provides primary coverage and which provides excess coverage in each of several defined circumstances. 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…[emphasis added]."*

Ins. Code § 11580.9(b).

Subsection (b) also requires that the motor vehicle qualify as a "commercial vehicle," which means a type of vehicle (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 alternatively, (C) a vehicle that has been leased for a term of six months or longer.

Special Rules on Attached/Detached Trailers

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

"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."

Ins. Code § 11580.9(d).

The *Wilshire* decision and its applicability to the trucking industry in California was significant because 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, the 2006 amendment of Section 11580.9 added the new subdivision (h) [and re-designated former subdivision (h) as subdivision (i)]. Subdivision (h) now clarifies which of two competing policies responds at a primary level 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 an accident. Since 2006, Section 11580.9(h) states as follows:

"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 [emphasis added]."

Ins. Code § 11580.9(h).

Therefore, the applicable law in California is plain that once a trailer has been detached from the tractor, the tractor's liability coverage is no longer primary for any damage or harm that occurs to or as a result of the trailer, and instead that policy transforms to excess to the liability policy on the trailer.

Interplay of California's Minimum Insurance Obligations.

Under its express provisions, the *Graves Amendment* does not preempt State laws requiring a motor vehicle owner to maintain necessary minimum levels of liability insurance, including any omnibus coverage requirements (49 U.S.C.S. §30106(b)).

Most trucking companies meet their financial responsibility obligation by purchasing a liability insurance policy with a Form MCS-90 Endorsement that complies with Sections 29 and 30 of the Motor Carrier Act of 1980 (PL 96-296, House Report No. 96-1069 dated June 3, 1980, p. 43).

Most car rental companies meet their financial responsibility obligation by either posting a cash bond with the state in compliance with Vehicle Code § 16054.2, or carrying fleet insurance on their fleet of vehicles with statutory minimums of 15/30/5, and otherwise offering additional insurance to the renter.

Insurance Code §11580.9(b) provides that a policy issued to a named insured "engaged in the business of renting or leasing motor vehicles without operators" shall provide excess coverage to persons other than the named insured **if**, at the time of the accident, the person operating the motor vehicle has insurance coverage at least equal to the Vehicle Code's financial responsibility requirements, and the motor vehicle either qualifies as a "commercial vehicle" or is leased for a term of more than 6 months.

The stated purpose of Section 11580.9 is to ensure that coverage follows the realities of the particular transaction in question. For example, if a vehicle is leased or rented for less than 6 months for a non-commercial purpose, under Subsection (d) the economic benefit and the risk of ownership remains with the owner/lessor and his policy is primary. However, if that same passenger vehicle is leased for a term exceeding 6 months, under Subsection (b) the risk shifts to the lessee and the insurance policy issued to the owner/lessor becomes excess.

Therefore, Section § 11580.9(d) typically applies to non-commercial rental vehicles on short-term leases from car rental agencies, and the short term lessor/owner's liability insurance is primary.

However, when the leased or rented vehicle is a *commercial* vehicle that is leased for a commercial purpose, the ready inference is that the lessee typically intends to make a profit from its use, even if the vehicle is rented for less than 6 months. Accordingly, in that context, the lessee's insurance should be primary, regardless of the length of the lease. As noted previously, a "commercial" vehicle is defined as a type of vehicle subject to registration or identification under the laws of the state of California and is one of the following**: 1) used or maintained for the transportation of persons for hire, compensation, or profit**; 2) designed, used, or maintained primarily for the transportation of property. (Cal. Ins. Code §11580.9 (b)(1)(A)-(B)).

Conclusion

Cab fleet operators and other fleet owners of common carrier/livery vehicles who lease their vehicles to independent drivers and provide dispatch services in exchange for a percentage of the fare or some other financial arrangements are not encumbered by the MCS-90 obligation held by interstate truckers, and are more akin to the relationship of car rental agencies with long-term independent drivers.

Therefore, so long as there is solid evidence that no agency relationship exists between the fleet owner/lessor/dispatcher relationship and the separately insured independent operators, a strong argument can be made that:

(1) The fleet owner's insurance is excess under Section 11580.9(b); and

(2) Under the *Graves Amendment* the fleet operator has no vicarious fault for the wrongful acts of the separately insured at-fault independent operator.

Thus, although in this context there very may well still be an excess indemnity exposure presented to the fleet owner's liability carrier, the oftentimes more costly defense obligation would be held solely by the primary liability carrier of the separately insured independent operator.