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DISPATCHES FROM THE TRENCHES

Did a Florida Court just bury the Graves Amendment?

Finance lessors have historically been substantially more concerned about lessor liability than their straight-loan brethren. Claims of lender liability still exist in the context of pure loans, particularly if funders become too involved in the day-to-day operations of their borrowers' businesses. However, lessor liability is generally a scarier concept since the liability may not necessarily depend on the actions or inactions of the lessor.

Some lessor liability claims are derived from negligence (e.g. acting or failing to act reasonably when there is a duty to do so). For example, injured parties have argued that a lessor was liable for failing to inspect equipment and discover defects likely to cause injury; for failing to deliver operating manuals to the lessee; or for failing to warn a lessee of equipment defects of which the lessor knew or should have known. *See e.g. Indeck Power Equipment Co. v. Jefferson Smurfit Corp.*, 881 F. Sup. 338(NV. Ill 1995); *Black v Gorman-Rupp*, 655 So. 2d 717(La. Ct. App. 1995).

However, the most troublesome lessor liability claims do not require a showing of any negligence or wrong doing by the part of the finance lessor. These claims are born from products liabilities law. In particular, §402(a) of the Restatement Second of Torts provides that "one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to its property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or his property, (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change

in the condition in which it is sold.ö The Restatement goes on to further state that the foregoing rule öapplies although the seller has exercised all possible care in the preparation and sale of its product.ö Despite the fact that this rule speaks solely of sellers, it has been used on occasions to hold equipment renters and finance lessors liable. *See e.g. Miles v. Gen. Tire & Rubber Co.*, 10 Ohio App.3d 186, 189 (1983)(noting that courts in Alaska, Arizona, California, Delaware, Hawaii, Illinois, Indiana, Missouri, New Jersey, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Texas and Wisconsin have all held that the policy considerations which justify holding manufacturers and sellers strictly liable are also applicable in the context of commercial leasing and providing citations from courts in each of the aforementioned states). Although these cases cause prudent lessors to be mindful of the risk of lessor liability when leasing equipment that has the potential of injuring persons or property, they have been on the books for quite some time and are generally viewed simply the cost of doing business.

A few years ago, the issue of lessor liability raised lots of additional attention when state statutes imposing strict liability on commercial lessors resulted in the award of some large damages. Several states had statutes in their motor vehicle laws which held lessors of motor vehicles strictly liable for damage caused by their lessees, irrespective of whether or not there was a showing of negligence or wrong doing on the part of the lessor. Some of these laws were on the books in New York and Rhode Island. After a Twenty-Eight Million Dollar judgment against Chase Manhattan Auto Finance following an accident involving a car leased by it under a typical true lease, the company withdrew from the auto leasing business in some states. Many in our industry devoted significant time, effort and attention to protecting finance lessors from such suits. The ultimate result was a federal law called the Graves Amendment, codified at 49 U.S.C. §30106.

That first part of the Graves Amendment states that öan 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 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

(or an 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).ö

Many in the industry breathed a sign of relief when first reading this section. Unfortunately, the second part of the Graves Amendment was equally discomfoting, stating that: ö[n]othing 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.ö Some felt that there was a risk that this additional language would evolve into öthe exception which swallowed the ruleö.

As cases analyzing the Graves Amendment were litigated, finance lessors began to be comforted by various victories holding that the offensive state laws were overridden by the Graves Amendment. Two of these victories came in Florida where the applicable statute tested the full text of the Graves Amendment, including the financial responsibility section.

The Florida statutes generally held a lessor to be strictly liable for damages caused by the lessee while operating the leased vehicle but provided an exception when certain insurance was in place. Section 324.021(9)(b), Fla. Stat. (2007) states: ö[t]he lessor, under an agreement to lease a motor vehicle for 1 year or longer which requires the lessee to obtain insurance acceptable to the lessor which contains limits not less than \$100,000/\$300,000 bodily injury liability and \$50,000 property damage liability or not less than \$500,000 combined property damage liability and bodily injury liability, ***shall not be deemed the owner of said motor vehicle for the purpose of determining financial responsibility for the operation of said motor vehicle or for the acts of the operator in connection therewith***; further, this subparagraph shall be ***applicable so long as the insurance meeting these requirements is in effect***. The insurance meeting such requirements may be obtained by the lessor or lessee, provided, ***if such insurance***

is obtained by the lessor, the combined coverage for bodily injury liability and property damage liability shall contain limits of not less than \$1 million and may be provided by a lessor's blanket policy."

The two earlier Florida cases referenced above both held that Graves Amendment was intended to invalidate this applicable Florida statute. See *Kumarsingh v Pv Holding, Corp.*, So. 2d, 2008 Fla. App. Lexis 966 (8Fla. 3rd DCA Jan. 30, 2008); and *Vechinna v Enterprise Leasing, Co.*, 972 So. 2d. 925 (Fla. 3rd DCA 2007).

However, a new holding decided in July of 2008 shows that there is a long road ahead. In *Brookins v Ford Credit Titling Trust*, 2008 Fla. App. Lexis 10278 (Fla. 4th DCA July 9, 2008), the court analyzed the foregoing Florida strict liability statute to determine whether or not the Graves Amendment superseded it. In this case, the court noted that the federal power to pre-empt state laws is founded in the Constitution's supremacy clause but that the supremacy is not the "omnipotence of absolute monarchy" but is rather a necessary constituent in a federal system of shared powers between the state and federal governments. The court then noted that "the United States Supreme Court has long followed a principle that Congress did not intend to supersede the historic police powers exercised by the states in matters of public health and safety unless Congress makes such a purpose "clear and manifest" in plain language." *Id.* at *2. As a result, there is a presumption against pre-emption of state law unless Congress has made their intention "clear and manifest". The court further noted that even when Congress has clearly and manifestly states an intent to pre-empt state law, the scope and extent of that preemption must also be narrowly interpreted.

Moving to the Florida statutes in question, the court noted that the statutes were placed in the chapters of Florida statutes "pointedly entitled *Financial Responsibility*." See §324.021(9)(b), Fla. Stat. (2007). According to the court, the drafters "manifested their intent in the plainest of terms that the subject concerns the *financial responsibility* of those who by lease allow the operation of motor vehicles on the public highways of Florida, as well as the minimum requirements of such *financial responsibility* as reflected in their liability insurance satisfying

that responsibility.ö According the court ðone may not rationally doubt that this statute imposes liability on lessors-owners of leased vehicles for the privilege of operating their vehicles, and imposes consequences for failing to meet the financial responsibility requirements stated in the statute.ö

Accordingly, the court held that the Florida statute survived and was not preempted by the Graves Amendment. The court noted that the previous Florida courts, in their contrary holdings, failed to address this basic requirement of statutory interpretation with respect to the interplay of federal and state laws.

Obviously, lessors of dangerous equipment should always take precautions to make sure their lessees maintain proper liability insurance. Many lessors also obtain blanket, umbrella and contingent policies to cover them in the event there is a problem with the policy provided by one of their lessees. Those leasing vehicles in Florida should be particularly careful with this issue and should make sure the insurance requirements set forth above are satisfied. Lessors relying on blanket, umbrella or contingent policies may want to review the policy provisions carefully to determine whether or not the policies would protect the lessor for damages/claims that are not based on the lessor's negligence. A plain reading of the applicable Florida Statutes does not expressly require the policy to do so. However, the underlying motivations which prompted Florida to attempt to hold lessors strictly liable for actions of the lessee may make this an issue at a later date. Although clothed in ðfinancial responsibilityö language, these Florida statutes are eerily similar to the products liability laws referenced above with the main difference being that the Florida laws have the force of statutes rather than common law. If the lessor's insurance only covers it for negligence but the presence of that insurance absolves it from strict liability under the Florida statutes in situations where the lessee has no insurance, the result is that there is not any insurance money for the injured party. That is exactly how it would be if the lessor was a typical lender which holds the promissory note on the vehicle and the borrower who operates it is not insured. However, such lenders are not pulled into the quagmire of the Florida strict liability. . . . errr . . . I mean . . . financial responsibility . . . statutes.

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