



# GOLDBERG SEGALLA <sup>LLP</sup>

## RULES OF THE ROAD

Spring 2008

### Emergencies Require Rapid Response

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If we have learned anything from representing our clients over the years, it is that the trucking companies who stand the best chance of successfully defending accident injury litigation against them are those who acted with great dispatch upon learning that one of their drivers was involved in an accident resulting in serious injury to others. While it is tempting to avoid an expenditure on lawyers and investigators when it isn't certain that a lawsuit will result from an accident, if a serious injury is involved it is almost always penny-wise and pound-foolish to do nothing until faced with a suit. As good as most police agencies are at investigating an accident, they do not have the motivation to leave no stone unturned as does the trucking company in need of evidence or witnesses to defend the case against it. As we all know, plaintiffs' attorneys mobilize their investigators as soon as they are retained (and sometimes even before!). The risk of losing important evidence or contact with a witness compels rapid response to emergencies and accidents.

Like most firms which defend trucking companies directly or through their insurers, Goldberg Segalla LLP has a vigilant Emergency Response Team ("ERT") comprised of lawyers in each of our nine offices in four northeastern states. Our clients are given ERT business cards with 24/7 contact information for each lawyer so they can always be reached. Our lawyers have lined up investigators, photographers and accident reconstruction experts in each of our cities who know that if we call them with an emergency assignment for one

of our trucking clients, day or night, they are to get to the scene and get to work.

Why should your company utilize your lawyers' rapid response capability? For several reasons. First, if the effort is directed through attorneys, the results of the investigation can usually be cloaked in attorney-client privilege. This is helpful during litigation, in that a statement from a witness who is not helpful to your defense, for example, need not be given to the plaintiff's attorney. If the trucking company just sends its own investigator out, everything the investigator does – photos, witness identities, skid mark measurements – may have to be turned over to your adversary in litigation (who may have not obtained the same information on their own), on the basis that such accident investigation is in the usual course of business of a trucking company and not privileged from disclosure in a suit. Second, your company's lawyer should know of the best types of experts to retain to defend accident litigation, and getting them involved within hours of the accident gives them the best chance to develop evidence for your company's defense. Lastly, evidence and witness recollections fade or disappear over time. Waiting for a lawsuit before investigating it thoroughly may guarantee that the evidence you need is no longer available, or has been appropriated by your adversary.

We have overseen dozens of investigations within 24 hours of an accident. To take but one example, a motorcyclist

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ran a red light and the last thing he ever saw on this earth was the undercarriage of a big rig's trailer as it lawfully passed through the intersection on a green light. Every indication was that the accident was 100% the biker's fault. The trucking company could have rested on that comforting assumption, but they did not: they dispatched our ERT to the scene, where skid marks

that would soon fade away and pavement gouge marks cemented the proof that not only did the biker run the red, but he did so in excess of the speed limit, probably hoping to beat the light or the truck about to pass under it. If a suit is filed (there are still a few months left on the statute of limitations) the level of preparedness to defend the case is high. If there is no suit, the money is lost but not the investment in preparedness, when one can never

foresee if a suit will follow or not.

If your company does not have a law firm at its beck and call for emergency response, the contact should be developed and maintained. While you may be very happy with the lawyer who does the company's business law and transactional work, don't rely on them to direct your rapid response unless their firm also does accident litiga-

tion defense as well. If a firm recommendation is needed in a locale, the Goldberg Segalla ERT has working relationships with trucking lawyers throughout the U.S. and we can help you find a qualified firm for your rapid response in your locale.

## Interstate Commerce Act: Sue Your Shipping Broker Soon After There is a Dispute Over Payment

An appellate court in Georgia recently reversed a lower court decision and dismissed a dispute brought by a motor carrier against a shipment broker because the suit was commenced five (5) days after the running of the statute of limitations. (See *Exel Transportation Services, Inc. v. Sigma Vita, Inc.*, 288 Ga.App. 527, 654 S.E.2d 665 (November, 2007). The court held that the eighteen-month limitations period set forth in the Interstate Commerce Act (49 U.S.C. § 14705(a)) is applicable to actions by motor carriers seeking to recover for transportation charges.

In this case, Sigma provided transportation services for a shipment that originated in Shanghai, China and arrived in port in Savannah Georgia. The goods were then transported from Savannah to cities within Georgia, Florida and South Carolina. The total amount due

for Sigma's services was \$35,181.60. Counsel for Sigma argued that the Interstate Commerce Act did not apply because the bulk of the shipment was intrastate commerce confined to the State of Georgia. The court was not persuaded on this point because the Act only requires a reasonable anticipation of interstate shipment. The appellate court also found that the lower court erred when it applied 49 U.S.C. § 14706(a)(1) because this section applies only to the liability of a carrier for actual loss or injury to property, and may only be applied in actions brought against a carrier.

We are now advising clients that shipping goods across state lines (interstate commerce) to commence suit very soon after there is a clear dispute over payment of such shipment. Eighteen months is an extremely tight window of time in litigation.

For example, the usual controversy over non-payment of money may take months before it is clear that the party owing the money is taking a no-pay position. Thereafter, the trucking company may take months to negotiate with the non-paying party. It is rare for such disputes to reach our office until at least one year has passed from the date

services are rendered. This leaves less than six months to negotiate or commence suit. In light of the *Exel* decision, it is important to sue first and negotiate later.

Readers of our newsletter should keep in mind the short time limitations concerning litigation over interstate commerce.



## Into Federal Court Via Interstate Commerce, Even with a Well-Pleaded Complaint

Federal court has many advantages over most state court venues, not the least of which include an often faster track for the litigation, and the opportunity to conduct expert depositions in advance of a trial. Getting into federal court is not a given, however, understanding the rules will increase your likelihood of obtaining access to a federal court venue. This is particularly important to recall, as many times a “well-pleaded” complaint may seem to avoid federal jurisdiction.

There are two ways to obtain federal jurisdiction over a matter: establish that a question of federal law is involved (federal question jurisdiction), and/or recognizing that the parties to the litigation are from different states, and the amount in controversy exceeds \$75,000 (diversity jurisdiction). The recent case *Solelectron USA, Inc. v. Fedex Ground Package Systems, Inc.*, 520 F.Supp.2d 904 (W.D. Tenn. 2007), illustrates how both of these concepts work, even where the plaintiff tried to avoid implication of a federal statute, namely, the Carmack Amendment. Oftentimes a “well-pleaded” complaint can avoid federal question jurisdiction by avoiding pleading the federal statute—not where interstate trucking is involved, however.

In *Solelectron*, the fact situation was relatively simple: a computer company had contracted to ship its product to a repair facility and then return. FedEx was the carrier. Unfortunately for

all involved, a FedEx employee and an employee of the repair company (for purposes of this article, “Solelectron”) conspired to steal merchandise prior to its arrival at the repair shop. The insurance company for Solelectron paid the computer company for the loss, and then pursued FedEx for a full recovery of the payout. Solelectron initiated the lawsuit in state court; FedEx removed the action to the Western District of Tennessee based upon federal question jurisdiction (alleging a violation of the Carmack Amendment even though the statute was not pled by Plaintiff), as well as jurisdiction based upon diversity of citizenship. Solelectron then attempted to have the case remanded to state court, prompting the court into a full discussion on federal jurisdiction.

First up was an examination of the interplay between the well-pleaded complaint rule and the preemptive effect of the Carmack Amendment. Both parties agreed that the Carmack Amendment, if applicable, preempts state law and provides the sole and exclusive remedy to shippers for loss or damage in interstate transit. The plaintiff chose not to plead it. “The well-pleaded complaint rule generally provides that the plaintiff is the master of his complaint, and the fact that the wrong asserted could be addressed under either state or federal law does not ordinarily diminish the plaintiff’s right to choose a state law cause of action.” *Solelectron* at 907, quoting *Loftis v. United Parcel Serv., Inc.*, 342 F.3d 509, 515 (6<sup>th</sup> Cir. 2003)

(quoting *Alexander v. Elec. Data Sys. Corp.*, 13 F.3d 940, 943 (6<sup>th</sup> Cir. 1994). In this trucking situation, however, the judge determined that simply because the plaintiff pled intrastate trucking (because of the theft, the goods did not leave the state), did not make it so. The goods were intended for interstate transit, and the fact that they never made it out of the state due to theft did not change the original character of the shipment. Recognition of the interstate character of the shipment triggered the Carmack Amendment, and permitted the removal to federal court on the basis of federal question jurisdiction.

Alternatively, the court also found that diversity of citizenship between plaintiff and defendant supported federal court jurisdiction. Under this

theory, however, state substantive law would be applied to the state claims, but federal procedures would be implemented, thereby preserving the procedural advantages of a federal court venue.

The *Solelectron* case reminds the industry to look beyond the face of the well-pleaded state court complaint. Understanding the factual situation surrounding a loss can many times open the doors to federal court.



## The Graves Amendment: A Widely Accepted Use of Congressional Power

In a small number of states, and under varying statutory schemes, vehicle owners faced tort liability for the negligent acts of a permissive user. As a result, leasing companies faced financial exposure every time a lessee was involved in an accident, simply because the lessor was the titled owner of the vehicle. This all changed in 2005 when President Bush signed a significant transportation bill titled the Safe, Accountable, Flexible, Efficient, Transportation Equity Act: A Legacy For Users. Included within this legislation was the "Graves Amendment." This Amendment eliminated vicarious liability for the owners of vehicles or trucks if two conditions were satisfied. First, the owner was "in the business of renting or leasing" vehicles and there was no "negligence or wrongdoing" by the owner. The relevant portion of the Amendment states,

(a) In General- 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 subdivisions 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 wrong doing on the part of the owner

Under this Amendment, Congress rewrote state law to preclude a cause of action arising purely out of vicarious liability. In the three years since the law took effect, virtually every court that has been asked to consider the constitutionality of the Graves Amendment has held that the law is a valid exercise of Congress' power under the Commerce Clause (See *Milsap v. U-Haul Truck Rental*, 2006 WL 3797731). Often times these decisions simply conclude the Amendment is constitutional and do not engage in any significant analysis.

### The Graves Amendment Faces Little Resistance

In contrast with most decisions, a Florida Federal District Court in *Garcia v. Vanguard* undertook a thorough analysis of the Amendment. In *Garcia v. Vanguard Car Rental USA*, 510 F.Supp.2d 821 (M.D. Fla), the District Court looked to the Supreme Court's decision in *US v. Lopez*, a relatively recent and well known decision discussing the scope of Congress' authority under the Commerce Clause. In *Lopez*, the Supreme Court identified three conditions under which Congress can use its power under the Commerce Clause. First, Congress may regulate the use of the channels of interstate commerce. Second, "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or

things in interstate commerce, even though the threat may come only from intrastate activities." Lastly, "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e. those activities that substantially affect interstate commerce."

While discussing these categories, the court in *Garcia*, concluded that the Graves Amendment fell within each of the three categories discussed in *Lopez*. The court held that the statute regulated tort causes of action against lessors whose leased vehicles pass through interstate commerce and the Amendment also regulates the "instrumentalities" of interstate commerce. In addressing the final category the court stated,

"It is clear to the court that Congress' attempt to regulate the motor vehicle industry by uniformly eliminating the costs of no fault vicarious liability claims, even where such costs relate to solely intrastate travel and accidents, substantially affects interstate commerce. In fact, the car

rental industry, together with airlines, railroads, and over the road bus and trucking enterprises, constitute the most visible components of modern interstate commerce."

While the majority of decisions affirm the validity of the Graves Amendment, with less discussion than provided in *Garcia*, there have been courts that have reached the opposite conclusion (See *Vanguard Car Rental USA v. Huchon*, 2007 WL 2875388 (S.D.Fla. 2007).

There are two notable decisions from another District Court in Florida that did not agree with the analysis provided in *Garcia*. In both *Vanguard v. Huchon* and *Vanguard v. Drouin*, Judge Moore concluded that the Graves Amendment exceeded Congress' authority. He held that the statute regulated tort liability and not the channels or instrumentalities of interstate commerce. Further, Judge Moore noted that there was little debate on the floor of the House of Representa-

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tives and no official Congressional findings were made. Believing vicarious liability had an attenuated affect on interstate commerce, Judge Moore declined to adopt the rationale of *Garcia*.

The *Huchon* and *Drouin* decisions are in stark contrast with virtually every other judicial ruling on this issue. The *Garcia* opinion has been appealed to the 11<sup>th</sup> Circuit (See *Myron v. Rodriguez*, 2008 WL 516753 (M.D. Fla. 2008)). The Circuit Court has heard oral argument and is expected to issue a decision in the coming months. To date, the 11<sup>th</sup> Circuit is the highest court to consider the Graves Amendment.

#### **Efforts to Get Around Graves**

Plaintiffs in both Florida and Connecticut have attempted to get around the Graves Amendment by relying on state statutes requiring owners maintain minimum levels of insurance coverage. In Connecticut, all owners are required to maintain minimum levels of coverage for personal injury arising out of a traffic accident. In *Dorsey v. Beverly*, the plaintiff argued that the lessor was liable for personal injuries, as the owner, up to the statutory minimum. The court disagreed and held that endorsing the plaintiff's rationale would undermine the purpose of the Graves Amendment.

In Florida, a lessor of a vehicle under a lease less than one year is deemed the owner of the vehicle for the purposes of liability up to \$100,000 per person and

\$300,000 per incident. The plaintiff in *Garcia* argued that the Florida statute was a "financial responsibility" law which was explicitly exempted from pre-emption under the Graves Amendment. The court disagreed noting that the Florida statute concerns liability and not coverage and that the Florida statute has been interpreted as simply a cap on damages.

Since the Graves Amendment does not apply to a lessor guilty of negligence or criminal wrongdoing, the statute leaves an opening for plaintiff's attorneys to plead negligence on the part of the lessor in order to keep a lessor in a tort action. This was successful in the case *Whiston v. Curry*, where the trial court held there was a question of fact over whether the lessor was negligent by failing to inquire if a lessee maintained proper insurance coverage.

A different Connecticut court reached the opposite conclusion in *Escaleria v. Powell*, holding that there was no connection between a lessor failing to make sure the lessee maintained insurance and the direct cause of the accident, the actions of the lessee. Similarly, a New York court dismissed a claim against a lessor despite the plaintiff's allegations of improper maintenance and failure to investigate the lessee. That court noted that the plaintiff failed to cite any legal authority supporting the proposition that the lessor was required to investigate the driving record of the lessee.

To date, it does not appear that courts will require lessors to investigate, in any manner, a potential lessee.

Absent evidence that a lessor knew of a defect in the truck at issue it will be difficult for a plaintiff to plead a cause of action against a lessor sounding in negligence. Consequently, lessors are still likely to win an immediate motion for summary judgment seeking dismissal of a suit naming the lessor as a defendant.

#### **The Future of the Graves Amendment**

As stated, the *Garcia* decision has been appealed to the 11<sup>th</sup> Circuit and a decision is expected in the coming months. The New York Court of Appeals is set to hear an appeal concerning whether a plaintiff may add a lessor as a defendant based on the date the complaint was filed (See *Rawlings v. National Car Rental System*, 849 N.Y.S.2d 454 (2nd Dept. 2008)). While this appeal is expected to concern the "relation back" doctrine, it will be the first time New York's highest court will hear an appeal implicating the Graves Amendment. It is uncertain if, and when, the issue of the constitutionality of the Graves Amendment will reach the United States Supreme Court.

The Supreme Court's decision will likely turn on whether Congress' regulation of state tort liability is distinguishable from the regulations at issue in *US v. Lopez* and *US v. Morrison*, two relatively recent cases where the Supreme Court held Congress exceeded its authority under the Commerce Clause.

In *Morrison* the Supreme Court invalidated a federal law authorizing a civil action under the Violence Against Women Act. The court stated, "We accordingly reject the argument that Congress may regulate

noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."

In *Lopez*, the Supreme Court held a statute criminalizing gun possession on school grounds violated the Commerce Clause and stated, "To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power the sort retained by the States."

Today's Supreme Court is different than the Court that decided *Lopez* and *Morrison*. The majority in both *Lopez* and *Morrison* were composed of Justices Kennedy, Scalia, Thomas, Rehnquist and O'Connor. Justices Rehnquist and O'Connor have since been replaced by Justices Roberts and Alito. It is uncertain exactly how the presence of Justices Roberts and Alito would affect the Court's decision and whether they would view the regulation of state tort liability as exceeding Congress' authority under the Commerce Clause. At a minimum, however the reprieve from vicarious liability for lessors will continue for the foreseeable future. Companies and their counsel are likely to win a motion to dismiss or strike a complaint with little costs or defense fees. Whether this continues past the decision of the 11<sup>th</sup> Circuit, and possibly the Supreme Court remains to be seen.

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